

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 01 of 2017

BETWEEN: **MINISTRY OF EDUCATION, HERITAGE & ARTS**
APPELLANT

AND: **KAILASH NADAN PILLAY**
RESPONDENT

Appearances: Mr. A. Prakash for the Appellant.

Mr. D. Nair for the Respondent.

Date/Place of Judgment: Friday 26 January 2024 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. Catchwords:

Employment Law – Appeal – whether the Tribunal was correct in arriving at a finding that the transfer of the worker was not in accordance with the law and thus an unfair employment practice under the Constitution – could the Tribunal have made a decision where the worker ought to be transferred and did it usurp its powers when it implemented its own decision on where the worker ought to be transferred.

B. Legislation:

1. *Constitution of Fiji: ss. 20; and 127(8).*
 2. *Public Service Regulations 1999: Reg. 13.*
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Cause and Background

1. I have waited long for the parties to advise me whether they require a judgment in this appeal or that it was not necessary as the parties have moved on and the issue before me is now moot.

No response has been provided by the parties and I am bound to deliver a judgment on the appeal before me as the matter is pending and I cannot complete the file without delivering a judgment. It is not in the interest of case management that the matter be allowed to languish in the system.

2. This is an appeal against the decision of the Tribunal of 9 January 2017 wherein the Tribunal had ordered that the respondent Mr. Pillay be posted on his existing terms and conditions to a school in the Western Division preferably near Nadi from the current posting at Nabua Sanatan Campus.
3. Mr. Pillay had brought a grievance in the Employment Tribunal against the Ministry's decision of 29 February 2016 to transfer him from Dr. Saukat Ali Sahib Campus to Nabua Sanatan Campus with effect from 22 February 2016.
4. The letter was received by Mr. Pillay on 1 March 2016. He then wrote to the Ministry on 2 March 2016 appealing against the transfer. The contents of his letter are as follows:-

"Re: Appeal Against Transfer To Nabua Campus"

This correspondence serves to appeal against my transfer to Nabua Campus. With due respect, I am appealing against my transfer and therefore request for consideration on humanitarian grounds.

Sir I have had a meeting with my principal who corresponded with Director Technical and I have also discussed with Director HR. Now I seek your assistance given the reasons below:

- (a) My wife is pregnant and will deliver early June. She is working in Nadi and it will be difficult for her to leave her job and secure a job in Suva given her condition.*
- (b) Shifting to Suva will affect me financially as my wife will be without employment and as such I will be facing difficulties in supporting my mother who is living in Labasa.*
- (c) I made an investment in Nadi and my papers for the construction of my residential home in Nadi has come through and I am planning to build my house next month. So moving to Suva will inconvenience the process of seeing my investment starting off.*

(d) I had been transferred to four schools within the 10th year of being in the teaching profession which includes Valebasoga Secondary School, Suva Muslim College, Nukuloa College, Ratu Navula College and Technical College of Fiji, Nadi.

I humbly request to stay in Nadi Campus or join Lautoka Campus or Sigatoka Campus.

Thank you.

Signed

Mr. Kailash Pillay

[TPF 80258]"

5. In absence of any favourable response from the Ministry, Mr. Pillay filed a grievance challenging the decision of the Ministry. He asserted that the transfer breached Regulation 13 of the Public Service Regulations 1999 and Section 77(1) (b) and (c) of the Employment Relations Act 2007. He sought to have his transfer to Nabua Campus rescinded and that he be considered for a posting in Lautoka or Sigatoka Campus if there was any urgency and justification in his transfer from Nadi Campus.
6. Before the Ministry's transfer letter, Mr. Pillay had made two written requests for transfer. The first one was on 29 June 2015 in which he had made an application to be transferred to the Test Section. The second one was on 30 September 2015 where he requested to be sent to either Pandit Vishnu Deo School or Drasa Secondary.
7. At the time of making the applications for transfer, Mr. Pillay was Head of Department Vocational in Technical College of Fiji in Nadi. His reasons for transfer were listed as follows:-

*"(1) I prefer the secondary school working conditions; and
(2) I am not able to spend enough time with my family".*
8. It is clear from Mr. Pillay's application for transfer that he either wanted to stay in Nadi or in Lautoka. He did not seek a transfer to the Central/Eastern Division.

Tribunal's Findings

9. The Ministry did not take part in the hearing at the Tribunal. The matter was heard undefended.
10. The Tribunal found that the worker Mr. Pillay had raised some pertinent issues in his first letter dated 29th June 2015 where he had requested for a transfer back to the Test Section and if the Ministry had dealt with the issues raised then, the parties would not be in a conflict situation.
11. The Tribunal said that there was no reply to the first letter for transfer and that was a mistake on the part of the Ministry as good faith requires the parties to be responsive and communicative. It stated that it will hold that the common law implied obligations of trust and confidence applies to all the employers.
12. The Tribunal found that it was clear and simple that the worker wanted to be transferred to either Lautoka or Sigatoka as he wanted to spend more time with his family and when the Ministry could not do that, it should have given him the reasons.
13. The Tribunal took the position that the powers allocated to the Permanent Secretary under the Constitution did not give him an unfettered discretion to transfer the worker wherever it wanted. There were standards to be met and benchmarks to be aligned with, like in this case Regulation 13 of the Public Service Regulations 1999, the good faith concept in the Employment Relations Act 2007 and s.20 of the Constitution.
14. The Tribunal stated that from the evidence and the written submission of the parties, it found that Mr. Pillay was disadvantaged by the discriminatory action of the employer as it had subjected the worker to detriment. He was caused to be separated from his family when other workers could work and not be separated from their family which was not difficult for the worker to establish.

The Appeal

15. The employer appeals the decision of the Tribunal on the grounds that the Tribunal erred in law and in fact in:

1. *Ordering that the worker be posted on his existing terms and conditions to a school in the Western Division preferably near Nadi from the current posting at Nabua Sanatan Campus in Suva without considering the following salient facts of the matter:*
 - (a) *That the authority to determine all matters pertaining to the employment of all staff in a ministry is vested in the permanent secretary of that ministry pursuant to section 127(8) of the Constitution of Fiji; and*
 - (b) *That by granting the relief sought by the worker, the Tribunal had unduly exercised the authority vested only in the permanent secretary.*
2. *Failing to consider that the worker had not specified the alleged act of discrimination caused to him by the employer.*
3. *Determining that the employer's actions were discriminatory.*
4. *Failing to consider that the worker had himself applied to the employer twice for a transfer.*
5. *Failing to consider that the worker had a contractual agreement with the employer in which he had agreed to be available to be posted anywhere in Fiji and had agreed that the decision on his posting will be final.*
6. *Determining that the employer was subject to Regulation 13 of the Public Service Regulations 1999.*
7. *Determining that the employer was in breach of section 77(1) (c) of the Employment Relations Act 2007.*

Law and Analysis

16. The employer is largely relying on the Permanent Secretary's powers in s. 127(8) of the Constitution of Fiji and Clause 11 of the employment contract to assert that the employee cannot challenge the transfer.
17. I do not find that the employer's reliance on s.127 (8) of the Constitution of Fiji and the contract can assist its case unless it is shown that the decision that it had implemented was a fair employment practice under s.20 of the Constitution.

18. The s.127(8) of the Constitution of Fiji states:-

“The permanent secretary of each ministry, with the agreement of the Minister responsible for the ministry, has the authority to determine all matters pertaining to the employment of all staff in the ministry, including-

- (a) The terms and conditions of employment;*
- (b) The qualification requirements for appointment and the process to be followed for appointment, which must be an open, transparent and competitive selection process based on merit;*
- (c) The salaries, benefits and allowances payable, in accordance with its budget as approved by Parliament; and*
- (d) The total establishment or the total number of staff that are required to be appointed, in accordance with the budget as approved by Parliament”*

19. Clause 11 of the contract of employment states:-

“The Officer agrees to be available to be transferred or posted to other Ministries/Departments without any loss to benefits as per this contract anywhere in Fiji, and to be assigned such other responsibilities or duties as may be assigned by the Government during this Contract on Promotion. The decision of Government is final.”

20. I have regard to both the Constitution and the contract. I will start off with the contract first. Clause 11 is confined to transfers upon promotion. That clause does not apply to workers who are not promoted. The employer cannot rely on the clause unless it had promoted the worker and made a decision to send him to a different station.

21. I turn to the Constitution. The Constitution empowers the permanent secretary to make a decision on the terms and conditions of the worker's employment which includes a decision to transfer the worker. The power of the permanent secretary to determine the transfer is not subject of this grievance. No one refutes that that power exists. What can be and is questioned

is whether the permanent secretary has acted properly, fairly, humanely and not arbitrarily in making a decision to transfer the employee.

22. All the provisions of the Constitution has to be read together. The employer only wishes to assert that the permanent secretary had powers to carry out the transfer. Why does it choose to ignore s. 20 of the Constitution? In carrying out the transfer the employer must ensure that the worker had a right to fair employment practice.
23. Is it fair to transfer an employee to a place where he did not request to be transferred and in the process disrupt his ability to be close to his family in times of dire need? This employee's circumstances required consideration. He had a pregnant wife who was due to give birth and the employer just did not have regard to his plea. The wife could not accompany the husband to Suva as she too was working and pregnant. It would not be easy for her to find new work during her pregnancy. She would be giving birth and requiring the husband to be with the child and her. The new born will also require the love, bonding and affection of his father.
24. Even if the employer did not know about the wife's pregnancy, it was made aware of it when the worker appealed the decision to transfer. Why was the decision not considered? The employee has a right to be heard if he is to be transferred to another place of employment.
25. I reiterate that no one is questioning the permanent secretary's power under s. 127(8) of the Constitution but was that discretion to transfer exercised properly is a question that can be considered by the Tribunal and the Court.
26. Regulation 13 of the Public Service Regulations 1999 specifically governs how an employee can be transferred without his agreement. It reads:-

"[13] The Commission may transfer an employee without the employee's agreement only if the Commission has-

- (a) given the employee 28 days written notice of the transfer;*
- (b) given the employee an opportunity to state his or her views about the transfer; and*

(c) *considered any views stated by the employee.*”

27. The employer asserts that this provision of the law does not apply to the employer. The Regulation sets out a fair and transparent process when transfers are carried out. For the transfer to be proper, fair and not arbitrary, the process outlined ought to have been followed whether or not the employer thinks that this Regulation applies to it.
28. It is only through this process that s. 20 of the Constitution could have been adhered to and the employer considered to have acted fairly. There was no fairness in the process. The employee was not given 28 days written notice of the transfer or an opportunity to state his or her views about the transfer and his views when expressed by him was not considered by the employer. Further, his transfer was backdated. How can that work practically?
29. I do not find that the employer can assert that it has powers to carry out an act. It may have such powers but in employment law, good faith and fairness is the principle that is the guiding principle. This employer did not practice fairness. It therefore cannot justify its decision to transfer the employee to the Central Division.
30. I do not find that the Tribunal erred in holding that the transfer was unlawful in the way it was carried out and consequently rescinding it. However, I find that the Tribunal could not have made a decision that the employee be transferred to a particular place or station. That prerogative is always vested in the permanent secretary. The Tribunal could set aside the decision to transfer.

Final Orders

31. I allow the appeal in part to the extent that the Tribunal does not have powers to implement its decision on where the worker should be transferred. I however uphold the decision of the Tribunal that the transfer of the employee was unfair and that the same be set aside.
32. It is the prerogative of the permanent secretary to determine whether the transfer of the worker is necessary and whether it is fair to transfer him to a place that the employer has in mind. It

may now not be necessary that any further action be taken as I understand that the issue before me is only academic.

33. I do not consider it proper to award costs against any party as both have consumed time in not informing me whether this matter ought to be disposed of without a judgment.



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Hon. Madam Justice Anjala Wati

Judge

26.01.2024

To:

1. *Attorney General's Chambers, Suva for the Appellant.*
2. *Fiji Teachers Union for the Respondent.*
3. *File: Suva ERCA 01 of 2017.*

