

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 23 of 2019

**BETWEEN:** NATIONAL UNION OF WORKERS

**APPELLANT**

**AND:** THE PERMANENT SECRETARY FOR THE MINISTRY  
OF EMPLOYMENT, PRODUCTIVITY AND INDUSTRIAL  
RELATIONS

**RESPONDENT**

Appearances:

*Mr. F. Anthony for the Appellant.*

*Mr. S. Kant and Mr. V. Ram for the Respondent.*

Date/Place of Judgment:

*Wednesday 01 June 2022 at Suva.*

Coram:

*Hon. Madam Justice Anjala Wati.*

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**JUDGMENT**

**A. Catchwords:**

*Employment Law – Did the Permanent Secretary’s act of rejecting the dispute on the basis that the employer had a right to stand down the workers under the Memorandum of Agreement amount to adjudicating the dispute which is not within the powers of the PS – Did the Tribunal decide the issue of the PS’s powers to adjudicate the dispute when confronted with it on appeal?*

**B. Legislation:**

1. *Employment Relations Act 2007 (“ERA”): ss. 170; 239.*

**Cause**

1. The Union appeals against the decision of the Employment Relations Tribunal ("**Tribunal**") of 9 August 2019 when it dismissed its appeal against the decision of the Permanent Secretary for the Ministry of Employment, Productivity and Industrial Relations ("**PS**"). The appeal was against the decision of the PS to reject the report of the dispute by the Union.
2. The background to the proceedings is very essential. On 13 September 2016, the Union reported a dispute to the PS. The terms of the dispute was:  
  
*"The Employer stood down workers at Rarawai Mill between 9<sup>th</sup> and 22 August 2016 in breach of Clause 4 of the Memorandum of Agreement ("**MOA**") dated 2<sup>nd</sup> November, 2007 between the parties. The Union seeks that all workers so affected be paid for the period they had been denied work".*
3. On 19 September 2016, the office of the PS wrote to the General Secretary of the Union and acknowledged the receipt of the report of the dispute. By the same letter, it was indicated that the report was being analysed and that an outcome would be relayed once the analysis is complete.
4. On 13 October 2016, the PS wrote to the General Secretary of the Union and advised that she has rejected the report of the dispute on the basis that the employer had not breached Clause 4 of the MOA. It is important that I outline the material parts of the letter.

*"...2. I note that the dispute is over the allegation that the employer stood down workers at Rarawai Mill between 9 to 22 August 2016 hence a breach of clause 4 of the MoA. Hence the report of this dispute.*

3. *Given this dispute as reported by the National Union of Workers, I find that in this case Fiji Sugar Corporation is in line with the MoA signed with the National Union of Workers dated 2 November 2007 and the amended “standing down without notice” clause 4 (a) (i) & (ii) which states:*

a) *The Corporation may stand down without pay an employee who cannot be usefully employed because of:*

(i) *Strike or breakdown of machinery provided such strike or breakdown continues for more than seven (7) working days; or*

(ii) *Any stoppage of work by any cause for which the Corporation could not reasonably be held responsible, including Cane Supply.*

4. *The Mill stopped crushing due to poor cane supply and conditions in the field and poor harvesting, which the Corporation had no control and could not reasonably be held responsible.*

5. *Please be advised that Fiji Sugar Corporation is in compliance with the MoA clause 4 therefore, under section 170(1) of the Employment Relations Promulgation 2007 (as amended), I reject the report of this dispute for the above mentioned reason...”*

5. Aggrieved at the decision, the General Secretary of the Union wrote to the PS on 25 October 2016, expressing concern that the PS had assumed the role of the Arbitrator and decided that the FSC is in compliance with the MoA. The General Secretary asserted in the letter that it was not for the PS to decide which party is wrong or right as that role was vested in the Arbitrator of the dispute to make

a finding on after hearing the parties. The General Secretary went onto state in the letter that the fact was that there was difference of opinion in relation to the stand down and in light of the unresolved difference, a dispute existed and it was simply for the PS to understand that a dispute exists and not to arbitrate the matter. The General Secretary required a reconsideration of the decision by the PS.

6. On 27 October 2016, the PS responded and advised the General Secretary that the decision remains.
7. On 7 November 2016, the Union filed an appeal to the Employment Relations Tribunal under s. 239 of the ERA. The appeal was brought under the following grounds:
  1. *The Permanent Secretary was wrong in declaring that the FSC was in compliance with the MoA.*
  2. *That the Permanent Secretary had no powers to adjudicate on substantive issues of the Dispute.*
  3. *That the Permanent Secretary accept the dispute pursuant to section 239 of the ERA.*

### ***Findings of the Tribunal***

8. In determining the appeal the Tribunal only casted its mind to the issue of whether the PS had the powers to reject a dispute. The Tribunal found that pursuant to s. 170 of the ERA, the PS had the powers to accept or reject the dispute within 30 days from the date of receiving the report of dispute.

9. The Tribunal went further to find that when a PS rejects the dispute, written reasons rejecting the dispute must be given to the affected party.
10. The Tribunal found that the letter that the PS wrote to the General Secretary of the Union on 13 October 2016 was in compliance with the requirements in section 170 of the ERA and therefore the appeal was not sustainable.

### ***Grounds of Appeal before the Court***

11. Dissatisfied with the findings of the Tribunal, the Union appealed the decision of the Tribunal on the grounds that Tribunal erred in law and in fact:
  1. *In determining that the PS was in compliance with s. 170(1) of the ERA.*
  2. *When it failed to consider Part 11 of the Employment Relations (Amendment) Act 4 of 2015 which makes it clear that the PS must accept all disputes referred to him or her and that the PS is not empowered to adjudicate on matters in dispute.*

### ***Law and Analysis***

12. I must start off by saying that the issue before the Tribunal was not only to consider whether the PS had powers to accept or reject a dispute and what the PS should when it rejects a dispute but also to determine whether the PS had powers to **determine** or **decide** on a dispute arising out of a MoA. Of course this would dependent on the finding whether what the PS did amounted to adjudicating the dispute.

13. The Tribunal conveniently did not determine the full appeal before it and failed to determine whether the actions of the PS amounted to adjudicating the dispute and whether she was empowered to make a finding on whether the employer had a genuine basis to stand down the workers pursuant to Clause 4 of the MoA. I find that the Tribunal had not discharged its duties on the appeal fully and effectively.

14. I will now turn my mind to the powers of the PS in accepting and rejecting a dispute enshrined in s. 170 of the ERA. The relevant parts of s. 170 reads as follows:

*“170 (1) The Permanent Secretary, must, within 30 days, accept all employment disputes reported to him or her, provided that –*

- (a) the employment dispute is not vexatious or frivolous;*
- (b) all existing internal procedures have been exhausted in resolving the employment dispute; and*
- (c) the employment dispute is reported within 3 months from the date in which the employment dispute arose, except where the delay to report was caused by mistake or other good cause.*

*(2) The Permanent Secretary must:*

- (a) inform the parties that he or she accepts or rejects the dispute; and*
- (b) give reasons for rejecting the dispute;*

*(3) If a dispute is accepted by the Permanent Secretary, the dispute becomes an employment dispute for the purpose of this Act.*

*(4) The permanent Secretary must –*

*(a) refer the employment dispute to the Tribunal if the dispute relates to interpretation, application or operation of an employment contract;*

*(b) In any other case, refer the employment dispute to Mediation Services.*

*(5) ...”*

15. S. 170 (1) mandates that the PS must accept all the disputes within 30 days provided, amongst other matters not relevant to this case, that it is not frivolous or vexatious. The counsel for the Respondent said that since there was no merit in the case, it was frivolous and vexatious based on which the dispute was rejected.

16. Firstly, the letter by the PS that rejected the dispute did not mention or state that it was being rejected because the dispute was frivolous and vexatious. Even if I accept for a moment the contention of the counsel that that is what the letter meant, then it is clear that the PS had gone onto making a finding on whether there was any merits in the dispute and accepting the version of the employer. That is not the function of the PS.

17. If a dispute is lodged and prima facie there appears to be a difference between the parties, the matter must be referred for determination. The PS cannot go onto making a finding as to whether the allegations in the dispute are correct or not. That is the function that is left to the Tribunal.



18. It was legally incorrect and ultra vires for the PS to determine that the conditions in clause 4 of MoA was met for the employer to stand down the workers. The PS stated in its letter rejecting the dispute that the Mill stopped crushing due to poor cane supply and conditions in the field and poor harvesting which the Corporation had no control of. I am baffled.
19. How can the PS arrive at that conclusion without hearing the parties? What the PS accepted as correct may be the position of the employer, however, the workers are not accepting those grounds and that is why they have challenged the decision to stand down. The workers needed to be heard to determine whether there was in fact poor cane supply due to conditions in the field and poor harvesting. What evidence was before the PS to arrive at that conclusion? The finding was made even without hearing the workers. There was breach of the fundamental principle of natural justice.
20. The PS cannot use his or her personal knowledge to reject a dispute. It maybe that the PS heard from somewhere about the issue or was convinced by the employer about the situation but that does not mean that that information is sufficient to arrive at a conclusion. Using that information to reject the dispute is a biased act.
21. I find that the PS erred in determining the merits of the claim which function is vested in the Tribunal. The Tribunal erred in not determining the appeal before it fully and making a finding on whether the PS had the powers to adjudicate the dispute before it and reject it on the basis that it had no merits.

### ***Final Orders***

22. In the final analysis, I allow the appeal.



23. The PS was wrong in rejecting the dispute. It ought to have referred the dispute to the Tribunal under s. 170 (4) (a) of the ERA as it concerned the application of the employment contract being the MOA signed by the Union and the Employer.

24. I now refer the dispute to the Tribunal for adjudication at its earliest. The Senior Court Officer of the High Court Civil Division must inform the Registrar of the Tribunal to allocate a date for the dispute and inform the parties of the returnable date.

25. There shall be costs against the Respondent in the sum of \$3500 to be paid within 21 days.



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**Hon. Madam Justice Anjala Wati**

**Judge**

**01 .06. 2022**



**To:**

- 1. Mr. F. Anthony for the Appellant.**
- 2. Attorney – General’s Chambers for the Respondent.**
- 3. File: ERCA 23 of 2019.**