IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL

Decision

Title of Matter:	**Stanley Robert Leuluniu Ooms**	**(Grievor)**
	v	
	Chief Mediator	**(First Respondent)**
	Fiji Airways Limited	**(Second Respondent)**
Section:	**Section 211(1)(a) Employment Relations Promulgation**	
Subject:	**Determination of Threshold Issue**	
Matter Number:	**ERT Misc Application 23 of 2017**	
Appearances:	**Ms A Swamy, Patel & Sharma Lawyers, for the Grievor** **Ms M Faktaufon, Attorney General's Chambers for the First Respondent** **Mr N Prasad, Mitchell Keil & Associates, for the Second Respondent**	
Date of Hearing:	**4 September 2017**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**30 November 2017**	

KEYWORDS: Employment Relations Act 2007; Part 13 Employment Grievances; Part 19 Essential Services and Industries; Inclusion of Internal Appeal Systems in Employment Contract; Requirement to Lodge Grievance in 21 days.

Background

1. The Applicant is a former airline pilot who up and until his dismissal from employment on 2 August 2016, had been engaged by the Second Respondent.

2. Following that dismissal and purportedly in accordance with the terms of Clause 22 of the *Collective Bargaining Agreement Between Air Pacific Limited and Fiji Airline Pilots Association* ("**the Collective Agreement**"), effective 2 January 2012, the Applicant appealed against that decision to the Company's Managing Director and Chief Executive Officer.[1] The outcome of that appeal was communicated to the Applicant on 10 February 2017, after which time the Applicant sought to exercise his right to have his grievance referred to the Mediation Service in accordance

[1] See Paragraph 22 of the *Submissions For and On Behalf of the Applicant* filed on 11 July 2017.

with Section 111 of the *Employment Relations Act* 2007 *and* Regulation 3 of Part 2 of the *Employment Relations (Administration) Regulations* 2008.

3. On 7 March 2017, the Mediation Service wrote to the Applicant and advised that it was unable to accept the grievance as referred, on the basis that it was received outside of the statutory time requirement of 21 days, as prescribed by Section 188(4) of the *Employment Relations Act* 2007.

4. It is against that decision, that the Applicant now seeks Orders from the Tribunal in the following terms:

   (a) That the Mediation Unit be directed to convene mediation over the grievance of the Applicant relating to his dismissal that was effective from 2nd August 2016;
   (b) That in the alternative the Tribunal adjudicates upon the employment grievance of the Applicant relating to his dismissal;

The Effect of Part 19, Essential Services and Industries

5. Section 188(4) of the *Employment Relations Act* 2007 was inserted into the legislation by way of statutory amendment on 11 September 2015.[2] That amendment introduced special arrangements for dealing with disputes of interest and grievances in the case of designated essential services and industries. The amendment also repealed the *Essential National Industries (Employment) Decree* 2011.

6. There appears no dispute between the parties that Fiji Airways, is an employer who employs persons within an essential service and industry[3] and on that basis, must submit to the Arbitration Court, rather than the Employment Relations Tribunal or Employment Relations Court, in relation to trade disputes as defined for the purposes of the Act.

7. In the case of essential service and industry employers, the jurisdiction of the Employment Relations Tribunal, the Employment Relations Court and the Arbitration Court, insofar as each of these entities are able to deal with matters over trade disputes and employment grievances, is set out within Section 188 of the Act as follows:

> *188.—(1) All trade disputes in essential services and industries shall be dealt with by the Arbitration Court in accordance with this Part.*
> *(2) The Employment Tribunal and the Employment Court established under Part 20 shall not have any jurisdiction with respect to trade disputes in essential services and industries.*
> *(3) For the avoidance of doubt, Part 20 shall not apply to essential services and industries, except as provided under subsection (4).*
> *(4) Any employment grievance between a worker and an employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with Parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose, and—*

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2 See *Employment Relations (Amendment) Act* 2015

3 Air Pacific later to be renamed Fiji Airways, was a designated corporation for the purposes of Schedule 1 of the *Essential National Industries Designated Corporations Regulations* 2011. [Note preamble to definition of "essential service and industry or essential services and industries" at Section 185 of the Act].

(a) where such an employment grievance is lodged or filed by a worker in an essential service and industry, then that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission; and
(b) where a worker in an essential service and industry makes or lodges any claim, challenge or proceeding in any other court, tribunal or commission, then no employment grievance on the same matter can be lodged by that worker under this Promulgation.

8. The critical provision is sub-section 4 that provides the circumstances for when an employment grievance (including a dismissal grievance) can be dealt with by the Employment Relations Tribunal. To restate:

> *4) Any employment grievance between a worker and an employer in essential services and industries that is not a trade dispute shall be dealt with in accordance with Parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose*

9. The language is clear. Any grievance not a trade dispute shall be dealt with relevantly, in accordance with Part 13. The proviso being, that if that is to take place, then the grievance must be lodged within 21 days from when it first arose.

When Did the Employment Grievance Arise?

10. The central issue for the parties is when the grievance arose and does it fall within the statutory window as provided for in accordance with Section 188 of the Act. In this regard, one must consider how Part 13 of the Act, that deals with the processing of grievances applies in these circumstances. Keep in mind here, that Section 188(4) provides no doubt that Part 13 applies to designated corporations such as the Employer, except for the fact that any grievance arising between an employee and employer needs to be lodged within 21 days. Let us consider the implications of all of this.

11. Section 109 of the Act, sets out the object of the legislation, insofar as it provides for grievance procedures for workers to pursue, either personally or through the assistance of a union representative. Section 110 states that an employment contract must contain procedures for settling a grievance, that must firstly need to be referred for mediation services in accordance with Division 1 of Part 20 of the Act. Most importantly, Section 110(4), states:

> *Where an employment contract includes an internal appeal system it must not provide for appeal to the Tribunal or Employment Court, and the internal appeal system must first be exhausted before any grievance is referred for Mediation Services.*

12. There is nowhere within Section 188(4) of the Act, that indicates that Section 110(4) does not apply to workers and employers of designated corporations.

13. All that is clear, is that the combined effect of Sections 110(4) and 111 of the Act, along with Regulation 3 of the *Employment Relations (Administration) Regulations* 2008, anticipates that the Grievor should have exhausted all internal grievance procedures as applicable, prior to referring the grievance to Mediation Services in accordance with Section 110 (3) of the Act.

14. Let us consider the implications of those provisions in the case of dismissal and non-dismissal grievances.

Non-Dismissal Grievances

15. Ordinarily, that is, in the case of persons to whom Part 19 of the Act does not apply, there are two requirements. Firstly that in order for a worker to refer the matter to the Mediation Service, she or he must have exhausted all internal grievance procedures as applicable to the employment contract. [4] Secondly and in accordance with Section 111(2) of the Act, the grievance that forms the basis of that referral, must have been submitted to the Employer six months from the date in which the action alleged occurred, unless either the Employer consents to the extension of the timeline or where otherwise extended by the Tribunal in accordance with Section 111(3) of the Act.

16. In all of these cases, once a grievance has been submitted to the Employer, it must be dealt with in the first instance, in accordance with the agreed internal procedures or those that are otherwise set out within Schedule 4 to the Act.

What Ordinarily Happens in the Case of Dismissal Decisions

17. In the case of dismissal grievances, whether or not a person is covered by Part 19 or not, first and foremost the procedures to apply are ones that can be determined by consent of the parties.[5] In the event that the parties have not developed any, then the alternative to that is, the adoption of the *'Standard Clauses on Procedures for Settlement of Employment Grievances'* as provided for within Schedule 4 of the Act. Importantly within Clause 2 of those procedures, is the recognition that in the case of a dismissal, that "the aggrieved party may refer the employment grievance directly to the Mediation Service in the prescribed manner" rather than having to refer the matter to the Employer.

18. The case of the Applicant is predicated upon the fact that Schedule 4 of the Act did not apply and that the worker and the employer, were required to submit to agreed internal procedures for dealing with the dismissal grievance, consistent with the terms of Clause 22 of the Collective Agreement and Section 1.4 of the *Company Human Resource Policies and Procedures* (CHRPP)[6].

What the Collective Agreement Provided

19. The submissions of the Applicant make reference to Clause 22.0 of the Collective Agreement as being the vehicle through which an initial grievance arising out of the dismissal decision was made out. It is recognised by the Tribunal that the Note to Clause 22.0, instructs the parties that this procedure is to be utilised where a grievance results from the use of a disciplinary procedure.[7] The representation made by the Pilots Association to the Employer on 24 August

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4 See Note at Schedule 1 to the Regulations, where the declaration requirement within the Form ER1 is set out.

5 See Section 110(2) (a) of the Act.

6 Otherwise referred to as the Fiji Airways Human Resources Policies and Procedures.

7 While the Tribunal is not encouraged by the language of that procedure, insofar as it appears to arise more out of disciplinary issues brought about at the local level, for the reasons that will become apparent and for the purposes of this analysis, nothing of consequence turns on that observation.

2016,[8] is presumably a grievance made on behalf of the Applicant worker, resulting from a disciplinary procedure.

20. Perhaps more relevantly, the Tribunal's attention was also drawn to Section 1.4 of the *Fiji Airways Human Resources Policies and Procedures*[9] that sets out the policy, practice and procedure in the event that an employee wishes to appeal against a dismissal decision. The Grievance Procedure and the policy, practice and procedure in some respects appear incompatible with each other, insofar as the Grievance Procedure does not seem to be particularly tailored for the case of termination of employment. But even with that said, it nonetheless is not disputed that in reliance of one or both of those arrangements, representations were made to the Chief Executive Officer following the dismissal decision. It is also quite clear that a further review ensued, with the ultimate result being, that the dismissal decision stood.

21. It was only upon the conclusion of the process, that the Applicant then decided to refer the grievance to the Mediation Service.

Effect of Section 118(4) on Attempt by Applicant to Refer Grievance to Mediation Service after 21 Days?

22. Again we need to return to the language of Section 118(4) of the Act. Specifically, it states that:

> *"any such employment grievance must be lodged or filed within 21 days"*

23. Note here, the use of the words 'lodged' or 'filed'. The legislator was not making reference to a "worker who wishes to submit an employment grievance,"[10] but one who was wanting to lodge or file one. The distinction between these two expressions is abundantly clear by the effect of Section 118(4)(a) of the Act, that states:

> *where such an employment grievance is lodged or filed by a worker in an essential service and industry, then that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission;*

24. The only sensible construction from these words is that the bar to a claim will come about when a grievance is lodged or filed with the Mediation Service. In this regard, the lodgement or filing of the Grievance is akin to commencing proceedings. This takes place in the first instance by way of compulsory mediation and if unsuccessful, by way of adjudication or determination by the Employment Tribunal. Any other construction would not make sense. Lodging or filing a grievance with an Employer in response to a dismissal decision, would hardly give rise to a bar to any further proceedings. And what would be the result thereafter if the Employer did not overturn its decision? There would be no further remedy whatsoever. The lodgement or filing of the grievance can only mean with the Mediation Service and on that basis, there is a requirement in the case of a designated corporation, that it take place within 21 days from when the grievance took place.

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8 Note capacity of Association to do this in accordance with Section 109 of the Act.

9 See Exhibit B to the Affidavit of Stanley Robert Leuluniu Ooms dated 25 July 2017.

10 See Section 111(2) of the Act.

Implications of Section 188(4) of the Act to Non Dismissal and Dismissal Grievances

25. For employees and employers captured by the Part 19 regulatory arrangements governing essential services and industries, the most obvious issue to attend to, is in considering whether or not existing internal grievance procedures remain compatible with the now 21 day time limit imposed by virtue of Section 188(4) of the Act. That is, in the case of non-dismissal grievances, what is required is that where an internal grievance procedure provides for a worker to submit an employment grievance to an Employer, it must ensure that the timeline for resolution, recognises that the right of filing or lodging the grievance with the Mediation Service, is restricted to 21 days from the time in which the employment grievance first arose. That is, if it can't be resolved internally, then this must be determined before the 21 day limitation, in order that a worker may pursue the grievance externally with the Mediation Service. Any procedure that does not recognise that fact, will have the effect of compromising the right of a worker to pursue a grievance by lodging or filing it with the Mediation Service.

26. In the present case, there would have been nothing wrong whatsoever, if the terms of the Collective Agreement or company policy would have dealt with the internal dismissal appeal within a period less than 21 days, in order that if the appeal was unsuccessful, then the Applicant would still have had the right to file or lodge his grievance with the Mediation Service. Unfortunately though, this was not the case. The time frame from when the Applicant's representative[11] submitted the grievance to the Employer[12] until such time as when he sought to lodge or file the grievance,[13] was in fact 174 days. More relevantly though, the time from when the employment grievance first arose would have been the date of the dismissal decision on 2 August 2016. If that was the case, then the 21 day period would have concluded on close of business 23 August 2016. The Applicant's representative had not even submitted its grievance to the Employer within that 21 day period. The actual number of days between the dismissal and the time in which a grievance was lodged or filed was in fact 196 days.

Conclusions

27. Unfortunately, the Applicant has fallen victim to a situation where it would appear that neither the Employer nor the Pilots Association had sought to consider the implications of the Collective Agreement or company policy within the context of the new Chapter 19 regime.[14] Of course there was nothing inherently wrong with the Applicant pursuing its grievance in the manner that it did, only that by doing so after the 21 day period, he compromised any further right of review, in the event that his submission to the Employer was ultimately unsuccessful.

28. Unlike the generic arrangements that apply in the case of employees working outside of essential services and industries, where the Tribunal may extend the time period for submitting a grievance to an Employer outside of the six month window, no such similar power or function is provided for in relation to Section 188(4) of the Act. The legislation is quite clear and the policy imperative seems clear enough also. Essential services and industries need industrial relations processes that are timely and efficient. The very purpose of establishing a window of 21 days is to ensure that grievances can be dealt with in that same way.

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11 Note that the representative was perfectly entitled to submit the grievance on the Applicant's behalf by virtue of Section 109 of the Act.

12 24 August 2016

13 14 February 2017.

14 In this regard, each party remains at fault for their apparent lack of understanding and should bear their own costs of proceedings for that reason.

29. The Applicant has filed or lodged a grievance some 175 days outside of the statutory requirement. The Orders sought by the Applicant cannot be achieved. The Tribunal is without jurisdiction. The motion is therefore dismissed.

Decision

It is the decision of this Tribunal that:-

(i) The Motion filed on 26 April 2017 is dismissed.

(ii) Each party should bear their own costs.

EMPLOYMENT RELATION TRIBUNAL OFFICIAL

Mr Andrew J See
Resident Magistrate