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

Decision (Corrected)

Title of Matter:	**Air Terminal Services (Fiji) Limited**	**(Applicant)**
	v	
	Federated Airline Staff Association	**(Respondent)**
Section:	**Sections 212(2) and 216(6) *Employment Relations Act* 2017**	
Subject:	**Application to withdraw matter before Tribunal without consent**	
Matter Number:	**ERT Miscellaneous Action No 01 of 2018** **ERT Dispute No 27 of 2017**	
Appearances:	**Messrs N Tofinga and E Batiweti, Fiji Commerce & Employers Federation and Mr Richard Donaldson, Human Resource Manager for the Air Terminal Services (Fiji) Limited** **Mr K Tunidau, Kevueli Tunidau Lawyers, Mr M Anthony, Legal Representative; and Mr V Naulumatua, for the Federated Airline Staff Association (FASA)**	
Date of Hearing:	**20 January 2018**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**20 January 2018**	

KEYWORDS: *Employment Relations Act* 2007; Application by Employer to withdraw matter without consent; Suspension of Workers Without Pay; Disciplinary Action Provided for in Statute or Contract; Effect of Unlawful or Lawful Strike; Enforcement of Contractual Provisions; Joining of Proceedings with Common Issues in Dispute.

CASES CONSIDERED:
Australian Workers Union v Stegbar Australia Pty Ltd [2001] FCA 367
Browne v Commissioner for Railways (1935) 36 SR (NSW) 21
*Gregory v Philip Morris Limited [*1988] FCA 100; 24 IR 397 (14 April 1988)
Hanley v v Pease & Partners Ltd [1915] 1KB 698
Marshall v English Electric Co Ltd [1945] 1 All ER 653
Miles v Wakefield Metropolitan District Council [1987] UKHL (12 March 1987)
Re The 21st Century Sign Company Pty Ltd [1994] 1 QdR 93.

Background

1. The Applicant seeks to withdraw its Miscellaneous Application before the Tribunal without the written consent of the Respondent Association, in accordance with Section 216(6) of the *Employment Relations Act* 2007. The Miscellaneous Application that was commenced by way of Writ of Summons,[1] asked that the Tribunal make various declarations and orders pertaining to the conduct of the Association, its Executive and members, relating to what is alleged was unlawful strike action taken by approximately 256 employees of the employer between 16 to 20 December 2017.[2]

2. On 16 January 2018, during a preliminary identification of the issues by the Tribunal, the Employer's Representative Mr Tofinga, told the Tribunal that 225 employees of the company remained suspended from work without pay, on the basis of a decision made by the Acting Chief Executive Officer.

3. By Directions issue to the parties on the 17 January, legal submissions were required to be filed by close of business on 24 January 2018, in relation to the following:-

    (i) Does the alleged conduct of any or all of the employees constitute unlawful strike action for the purposes of Section 177 of the *Employment Relations Act*; and

    (ii) Can the Employer lawfully suspend its employees without pay, other than in a manner consistent with Article 26A to the *Agreement Between Air Terminal Services (Fiji) Limited and Federated Airline Staff Association* ("the Master Agreement") entered into between the parties on 22 January 1998.

4. On 18 January 2018, a Further Direction Order was issued to the parties, reinforcing the requirement that no communications should be issued that would in any way act to impede the progress toward achieving a positive and mutually satisfactory outcome in relation to the present dispute.

Request to Have Matter Withdrawn By Leave of the Tribunal

5. On 18 January 2018, the Registry of this Tribunal received correspondence from the authorized representative of the Applicant Employer, flagging the intention of the Employer to make an application to withdraw Miscellaneous Application No 1 of 2018, on today's date. That request is now considered within the context of Section 216(6) of the Act and of course the desire of this Tribunal to join both matters in proceedings.

6. The primary reason provided by the Employer for the application to withdraw this matter, is made on the basis that it is submitted that the Directions Order issued on 17 January 2018, serves to undermine the declaration made by the Minister for Employment, Productivity & Industrial Relations on 16 December 2017, in accordance with Section 180(1) of the *Employment Relations Act* 2007, in which he had "hereby declared the strike (on) 16 December 2017 to be

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[1] As altered at the first call up of this matter by the Tribunal, in accordance with Order 6 Rule 4 of the *Magistrates Court Rules* 1945 and after the withdrawal of any objection by the Association, in relation to form and time for service.

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unlawful".[3] Mr Tunidau for the Association, argued that the parties should be made to comply with the Directions as issued by the Tribunal and ensure that the issues contained within those directions were allowed to be determined by the Tribunal.

7. During the submissions made by the Applicant Employer, the Tribunal indicated that it intended to join the present application, with Dispute No 27 of 2017, on the basis that one aspect of that dispute, dealt with the matter of standing down an employee facing disciplinary action, without pay. In this regard it is a matter of record that the Employer advised the Tribunal on 11 December 2017 in what was scheduled as a report back in that matter, that in discussions held with the Association on 16 October 2017, that this matter had been 'closed off'.[4] That is, that the Company and the Association would work together in developing a more detailed Disciplinary Inquiry process. Those efforts appear to have been thwarted by other events and the Tribunal indicated that it was most desirable to ensure that the matters were joined to allow for a common analysis and management of the issues.

Relevant Considerations

8. There is no statutory formula or preconditions set out within Section 216 of the Act, that directs the Tribunal as to what should be the conditions in place, so as to warrant the grant of leave to withdraw.[5] The granting of the leave is a discretion that must be exercised reasonably.[6] As Lord Green MR said in *Wednesbury Corporation:*

> *"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general discretion of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider if he does not obey these rules, he may truly be said, and often is said, to be acting "unreasonably"."*
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> *"I think Mr Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind."*
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> *"The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere."*

9. In considering as to what would be reasonable, the Tribunal has had regard to the following facts and factors:-

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[3] See Annexure RD19 to the Affidavit of Richard Donaldson, filed on 12 January 2018.

[4] It should nonetheless be noted that there was no appearance by the Association for this report back hearing and no reason was provided for such absence.

[5] See for example, *Re The 21st Century Sign Company Pty Ltd* [1994] 1 QdR 93.

[6] See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

(I) That the declaration issued by the Minister dealt with the conduct of only a group of approximately 70 employees on 16 December 2017;
(II) That the Employer admitted during proceedings on 16 January 2018, that it could not say with certainty, whether all of the 190 additional employees that had been stood down by the Employer, had in fact participated in unlawful strike activity;
(III) That the Application had been commenced by the Employer;
(IV) That in previous submissions provided to the Employer on 11 December 2017, in ERT Dispute No 27 of 2017, the Employer had indicated that this issue, as to whether employees could be stood down without pay in the case where a Disciplinary Inquiry had been commenced, had been "closed off'.
(V) That it is in the public interest, to resolve that issue in dispute, as quickly as possible.

10. Having regard to these facts and factors, the Tribunal is of the belief that it would be premature to allow for the withdrawal of the Application at this stage. The leave of the Tribunal is refused for the purposes of Section 216(6) of the Act. The Tribunal further Orders that the Application be now joined with ERT Dispute 27/2017.

Belief that the Employer Has Not Observed or Complied with the Provisions of an Employment Contract

11. Based on the above, the Tribunal now wishes to turn its mind to concerns that it has, that the Employer has not observed or complied with the provisions of an employment contact; in this case specifically Article 26A of the Master Agreement. The case law is quite clear in relation to this matter. There are only three circumstances in which an employee can be suspended without pay.[7] They are:-

    (a) Where it is provided for by way of contract (See *Warburton v Taff Vale Railway*)[8]
    (b) Where it is included by a term implied by custom or usage (See *Marshall v English Electric Co*)[9];
    (c) Or where the right is expressly provided for within statute (See *Browne v Commissioner for Railways*)[10]

12. Addressing these issues in turn, as confirmed by Mr Tofinga on 16 January, there is nowhere within the standard employment contract entered between ATS and its employees that provides for any such contractual right. As to whether or not a term could be implied by custom or usage, there is also no support for such an argument. In *Marshall v English Electric Co,* the right of suspension without pay was deemed to be implied into the contract of an Engineer engaged in essential work under emergency legislation in war time England, because of the fact that it "had for years been exercised by the respondents".[11] In the present case, there is simply no evidence before the Tribunal, where the custom and practice of the employer was to suspend workers without pay.

13. Finally, it needs to be determined, whether there is any statutory instrument in place that would enable the employer to suspend its employees without pay. In this regard, the *Agreement Between Air Terminal Services (Fiji) Limited and Federated Airline Staff Association* ("the Master

7 See *Australian Worker's Union v Stegbar Australia Pty Ltd* [2001] FCA 367
8 (1902) 18 TLR 420
9 [1945] 1 All ER 653
10 (1935) 36 (SR) NSW 21
11 See MacKinnon LJ at 657.

Agreement") entered into between the parties on 22 January 1998 and remaining in force by virtue of Section 166(3) of the Act, assumes statutory characteristics somewhat akin to sub-ordinate law. By virtue of Section 166(8) of the Act, the Agreement is binding and enforceable.

What Does the Master Agreement Provide?

14.For the sake of convenience, Article 26 of the Master Agreement is reproduced as follows:

ARTICLE 26 DISCIPLINARY PROCEDURE

A. When it is proposed to interview an employee in connection with an alleged misconduct or irregularity which may lead to disciplinary action against the employee, he shall be informed in writing by the Chief Executive or his representative of:

i) the purpose of the interview;

ii) the charge(s) against him;

iii) the fact that disciplinary action may result and

iv) his right to, if he so wishes, be accompanied by an official of the Association.

An employee may be stood down from duty with or without pay or partial pay by the Company pending the outcome of a disciplinary inquiry in cases where the incident or misconduct involving the employee is of a serious nature, in order to safeguard the employee's own interest and the continued smooth operation of the Company's business. Should the inquiry find that the stand down was not justified the employee shall be paid for any salary lost as result of the suspension.

B. The interview and investigation in connection with an alleged irregularity or misconduct shall be carried out by a Disciplinary Committee which shall consist of an equal number of representatives (not exceeding two) nominated respectively by the Company and the Association, with a Chairman who shall be mutually acceptable to both the parties. In light of the investigation carried out by the Disciplinary Committee, the Committee shall determine whether or not disciplinary action is warranted and if so, the nature of such action. A decision reached by the majority of the Committee shall be the decision of the Committee, but if the members of the Committee are equally divided in opinion the Chairman shall make a decision which shall be the decision of the Committee.

C. The Chairman of the Disciplinary Committee within 7 (seven) days of the hearing shall inform the employee in writing of the decision of the Committee and the proposed disciplinary action, if any.

D. After disciplinary action has been imposed or not imposed, as the case may be, the employee or the Company, as the case may be, shall have the right to appeal against the decision of the Disciplinary Committee on the grounds that the decision of the Disciplinary Committee is harsh, unreasonable or unjust, or that such decision is lenient, unreasonable or unjust having regard to all the circumstances of the case. The Employee or the Company shall advise the Chief Executive and the Association Secretary within seven (7) days of the decision of the Disciplinary Committee of his or its desire to appeal. That the Disciplinary Committee of his or its desire to appeal. The appeal shall be submitted in writing stating the grounds thereof.

E. An appeal under this Article shall be heard as soon as possible by a Committee of Review consisting of one representative nominated respectively by the Company and the Association and a Chairman who shall be mutually acceptable to both the parties. Those persons who have

participated in the Disciplinary Committee referred to in Paragraph B above shall not be involved in the Committee of Review. A decision reached by the majority of the Committee of review shall be the decision of the Committee but if the members of the committee are equally divided in opinion the Chairman shall make a decision which shall be the decision of the Committee.

F. "Disciplinary Action" shall mean, subject to compliance with the aforesaid provisions of this Article, temporary or permanent reduction of an employee's rate of pay or classification, suspension without pay for up to 20 working days or dismissal. A disciplinary action may comprise of any combination of the above penalties.

15. As can be seen at Article 26 A, an employee may be stood down (suspended) from duty with or without pay or partial pay by the Company pending the outcome of a disciplinary inquiry. That inquiry is to be undertaken by a Disciplinary Committee, consisting of an equal representation of company and Association representatives, conducted under the auspice of a jointly agreeable Chairperson. It is the Disciplinary Committee's function to make a decision as to the worker's culpability and to make a recommendation as to the appropriate disciplinary sanction to be imposed. This in effect amounts to the statutory prescription and is the only basis upon which an employee may be suspended without pay.

16. Whilst there has been obiter raised in *Gregory v Philip Morris Limited*[12] in which it is suggested that by agreement and as a possible alternative to summary dismissal, that an option may be to seek the consent of an employee to be suspended without pay pending an investigation, as an alternative to effecting summary dismissal, there is no evidence that any consensual suspension had been undertaken in the present case. And even if it had, such circumstances would give rise to an interrogation of the manner by which such consent was secured on a case by case basis.

17. By embarking upon the course of action that it did, the Employer failed to follow the requirements of the Master Agreement**.** As this Tribunal stated in *Dutt v Air Terminal Services (Fiji) Ltd* [13]

> *The current Disciplinary Committee procedure as contained within the Collective Agreement, requires some clarifying protocols as to the way in which committee members should conduct themselves. The role of a member on a committee such as this, is an important one. Those employees who are required to submit to the disciplinary process, would have an expectation that their hearing before the committee will be conducted in a confidential and professional manner by its members……*
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> *It needs to be said, that in 2017 there are very few organisations that still have disciplinary committees of this type in operation. In many cases, these committees are a relic of times gone by and have been superseded by other practices that are probably just as effective in ensuring fair treatment and outcome. That being said, for bi-partite disciplinary committees to work effectively, requires the support of both parties. If not, the committee processes will only contribute to a prolongation of a disciplinary inquiry, that could otherwise take place in a far more efficient way*

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12 (1988) 80 ALR 455 at 473

13 [2017] FJET 20; ERT Grievance 86.2017 (14 November 2017)

18. The Employer should have gone about forming a Disciplinary Committee and to consider the unique circumstances for each and every case in which misconduct was alleged. Whilst the Master Agreement does not provide a timeline as to how long should transpire before a Disciplinary Committee is formed, clearly in the case where a worker has been stood down without pay, there would be practical and more importantly ethical reasons to ensure that such a process was not prolonged.

19. Outside of that process however, the Employer did not have the power to suspend the employees without pay. As Lush J stated in the case of *Hanley v Pease & Partners Limited*[14] where a worker had absented himself from his work for one day without leave from his employer:

> *The contract has become a voidable contract. The master can determine it if he pleases. Assuming that there has been a breach on the part of the servant entitling the master to dismiss him, he may if he pleases terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding the misconduct or breach of duty of the servant, then the contract is for all purposes a continuing contract subject to the master's rights in that case to claim damages against the servant for his breach of contract. But in the present case after declining to dismiss the workman- after electing to treat the contract as a continuing one- the employers took upon themselves to suspend him for one day; in other words to deprive the workman of his wages for one day, thereby assessing their own damages for the servant's misconduct at the sum which would be represented by one day's wages. They have no possible right to do that. Having elected to treat the contract as continuing it was continuing. They might have had a right to claim damages against the servant, but they could not justify their act in suspending the workman for the one day and refusing to let him work and earn wages.*

20. Either the Employer wishes to have the matter dealt with by the Disciplinary Committee or it does not, but it cannot compel the employees to do anything other than that. If it does not wish the workers to submit to that process, it must otherwise allow them to return to work. There are simply no other options available to it. There is no right to suspend workers without pay in any other circumstance.

Decision

21. In light of the above, the Tribunal believes it is obligated to exercise its powers in accordance with Section 212 of the Act and enforce the Employer's compliance with the terms of the Master Agreement. As the Tribunal has indicated, it sees no benefit in withdrawing any matter before it, although for reasons that will become obvious and in part to possibly hear at some later time more comprehensive submissions from the parties on this point, the Tribunal will suspend the need for the parties to comply with the Directions issued on 17 January 2018.

22. In the interim, and exercising the Tribunal's powers in accordance with Section 212(2) of the Act, the Tribunal shall of its own motion issue orders against the Employer and Association, directing that the employees be returned to work immediately and further ordering that the Association

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[14] [1915] 1KB 698

and its members comply with the terms of Article 25B of the Master Agreement in order to secure and preserve amity and good relations between the Company, the Association and employees and to resolve any difference of opinion or dispute between the parties.

23. In issuing orders for compliance of the terms of the Master Agreement, the Tribunal wants to make clear, that in no way does it countenance the conduct of the employees or their Association, that may have given rise to the issues that took place in the workplace on 16 December. As extensive evidence would be required in order to get a complete picture as to what took place between 17 to 20 December 2017, there is no point in attempting at this point in time, to state with any precision, what should or should not have taken place. More generally though, what should take place at all times, is that employees and their trade union associations must follow the terms of their registered collective agreement and more importantly the legal requirements for participating in industrial conduct, as set out within the relevant provisions of the *Employment Relations Act* 2007. If there are grievances at work, these must be pursued in accordance with the law. Workers and their trade union associations cannot pick and choose as to when they seek the protection of the law, if they themselves are seen not to be complying with such provisions and running industrial campaigns outside of the law.

24. Finally, both parties and the employees in particular, need to adopt a very measured and respectful manner in the way they should treat each other moving forward. The issuing of these Orders should not be seen as a win for either party, but more a win for the value of the Fijian employment law and the need to ensure that it is embraced all the time, by all of its stakeholders. Clearly this dispute to date has cost a significant amount of money to the company and its reputation. New ways for moving forward and engaging in constructive dialogue and negotiation will be required to ensure that the business can embrace and meet the challenges and expectations of its clients and the broader community. The only way that this can happen is through a partnered approach.

25. To that end, it is probably important for all industrial parties to be reminded of the purpose of this current employment law, in the words set out within the Second Reading Speech of the *Employment Relations Bill* 2006, where the Honourable K Datt, the then Minister for Labour and Industrial Relations stated:

> ***It is crucial that we…. not only do away with the confrontational nature of our relationship, but build employment relationships between our workers and our employers that are based on mutual trust, respect, dignity and fair deal……..***
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> ***the principle of good faith underpins the Bill… The simple requirement of the concept is that the parties to employment relationships (unions, employers and workers) deal with each other in good faith, and that those dealings are based on mutual trust, sincerity, honesty, humility, confidence, fair dealing and a genuine desire to settle their differences. This includes, but is not limited to, not directly or indirectly misleading or deceiving each other.***[15]

[15] Second Reading Speech, *Employment Relations Bill*, Parliamentary Hansard 22 June 2006, p570 and p579.

Decision

26. In summary, the Tribunal will now issue the following orders, a copy of which is now made available to the parties:

(i) That the cases in Miscellaneous Application No 01 of 2018 and ERT Dispute No 27 of 2017 be joined.

(ii) That the Applicant Employer must allow all employees who it has stood down or suspended from duties without pay, on or from 16 December 2017 until to date, to return to work in accordance with the terms of their employment contract.

(iii) That the Applicant Employer must give effect to this Order, by issuing to all such employees, new work rosters, security access ID cards and any other pre-start work requirements within 48 hours hereof.

(iv) That the Applicant Employer must thereafter and on a case by case basis, ensure that the pay and entitlements of each employee are reviewed and where necessary reinstituted, in accordance with the law.

(v) That the Respondent Association and its members comply with the terms of Article 25B of the Master Agreement, in order to secure and preserve amity and good relations between the Company, the Association and employees and to resolve any difference of opinion or dispute between the parties.

(vi) That the Directions issued by the Tribunal in Miscellaneous Application No 01 of 2018 be suspended until further notice.

EMPLOYMENT RELATION TRIBUNAL OFFICIAL

Mr Andrew J See
Resident Magistrate