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

Corrected Decision

Title of Matter:	**National Union of Workers** **v**	**(Applicant)**
	Fiji Sugar Corporation	**(Respondent)**
Section:	**Section 211(1)(i) Employment Relations Promulgation**	
Subject:	**Referral of dispute: Adjudication of a question connected with the construction of a provision of the Act**	
Matter Number:	**ERT Dispute No 34 of 2016**	
Appearances:	**Mr F Anthony, for the Applicant** **Ms M Lord, for the Respondent**	
Dates of Hearing:	**7 April 2017**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**20 March 2019**	

Background

[1] On 9 February 2018, this Tribunal issued a decision in this matter, that was incorrect on the basis of information that had been relied upon for the purposes of interpreting the provisions of the Act. The decision has prejudiced the rights of a worker who was pursuing a complaint against her employer for summary dismissal. Within Paragraph 3 of the decision, the Tribunal stated:

> *It is noted that that by an earlier Order issued by the Chief Tribunal on 11 July 2016, that it was determined that the Respondent Employer was an "Essential Services Industries employer" for the purpose of Part 19 of the Employment Relations Act 2007. If that is the case, then the Employer contends that a dispute pertaining to the dismissal of an employee, can only be dealt with in accordance with Section 188(4) of the Act.*

[2] The Tribunal further went on to state,

> *….the Respondent Employer is of the view that a dispute initiated by the Union within the context of an essential services industry employer, would ordinarily take the form of a 'trade*

dispute' and would therefore be one that should otherwise be dealt with by the Arbitration Court. It is submitted within the Submission of the Employer, that in cases where a 'dispute of right' such as a dismissal grievance exists, that this should therefore be processed by the Union on behalf of the employee, within 21 days.

The Applicant Union submits that the dispute was lodged with the Ministry of Labour on 3 October 2016. This would mean that the dispute was lodged 47 days following the dismissal decision……..

The parties accept that Fiji Sugar Corporation is an employer who employs persons within an essential service and industry 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…….

The Tribunal does not have any power to consider the interpretation, application or operation of an employment contract in the case of a National Essential Service and Industry Employer, other than within the confines of Part 13 of the Act, where it is dealing with an employment grievance. For a valid employment grievance to be made in the case of an Essential Service and Industry Employer, requires the grievance to be lodged or filed within 21 days. The application by the Union on behalf of its member, was done some 26 days out of time. There is simply no capacity for the Tribunal to deal with an employment grievance of this type, when it is made out of time. The Tribunal has no jurisdiction to deal with the matter. The referred employment dispute cannot be entertained and must be dismissed.

[3] The Tribunal came to this view, reliant on the submissions of the parties, that would appear to have been incorrectly formed. There was no declaration or Order made, that would give the Employer in this case, the status of an essential service and industry employer.

The Definition of Essential Service and Industry

[4] The definition of essential service and industry and essential services and industries is located at Section 188 of Part 19 of the *Employment Relations Act* 2007, that came into force on 11 September 2015. The provision reads:

> the *"essential service and industry" or "essential services and industries" means a service listed in Schedule 7 and includes those essential national industries declared and designated corporations or designated companies designated under the Decree, and for the avoidance of doubt, shall also include—*
>
> *(a) the Government;*
> *(b) a statutory authority;*
> *(c) a local authority, including a city council, town council or rural authority;*
> *(d) Government commercial company, as prescribed under the Public Enterprise Act 1996;*
> *(e) a duly authorised agent or manager of an employer; and*
> *(f) a person who owns, or is carrying on, or for the time being responsible for the management or control of a profession, business,*
> *trade or work in which a worker is engaged;*

[5] Having regard to the recent decision in *ERT Grievance 21 of 2018,* the Tribunal has recognised that the dispute in relation to Ms Mere Jiki, has suffered the same fate in analysis. So as to be perfectly clear and to use the same words the Tribunal has relied upon in that matter, the

Tribunal is not aware of any declaration or designation pertaining to the FSC, nor of any prescription that has been made under the *Public Enterprise Act* 1996. There is no other part of the definition of these terms that would appear to have any application to the Employer. The result of all of this, is likely to mean that the employment dispute filed by the Union on behalf of Ms Jiki was dismissed in error. The reason for that error was reliant on the submissions of the Employer, that in effect stated that:

> *The Chief Tribunal ordered in the matter ERTMA No 31 of 2015… that the Fiji Sugar Corporation is an Essential Services Industries Employer and as such is covered under the newly amended provisions of the Part 19 of the Employment Relations Promulgation*

[6] As it transpires, the Employer has not been declared an essential service and industry, nor has it been determined that it is caught by the definition of "essential service and industry" or "essential services and industries," as those expressions are defined within the Section 188 of the *Employment Relations Act* 2007. The file notes held by this Tribunal in relation to *ERTMA No 31 of 2015,* record the Chief Tribunal advising that no such decision had been made as to the status of the Employer, but instead the matter had been referred to the Employment Court on 18 August 2016 and the Employment Relations Tribunal advised to:

(i) Either call for submissions from the parties and refer to the Employment Court for consideration; or

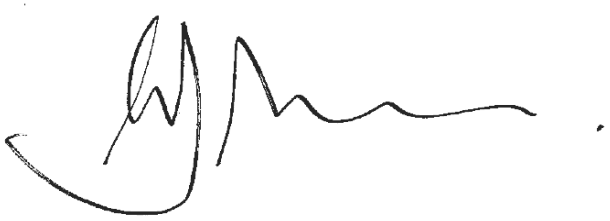
(ii) Remit the file to the Employment Court for directions on the submissions on the issue and that the Court will give a decision upon hearing the parties.

[7] In the absence of any party providing any further evidence of the advancement of that matter in Case *ERTMA No 31 of 2015*, then the view should remain that the Fiji Sugar Corporation is not at the present time, a Part 19 employer for the purposes of the Act. The consequence of this, is that the ERT Dispute No 34 of 2016 was incorrectly dismissed. The Tribunal will order the Registry to return the file and the matter will be listed for mention in Lautoka, in the April 2019 sittings.

Decision

It is the decision of this Tribunal that:-

(i) The Employment Dispute No 34 of 2016 remains on foot and will be set down for mention on 29 April 2019 at 9.00am in Lautoka.



Mr Andrew J See
Resident Magistrate