IN THE EMPLOYMENT RELATIONS TRIBUNAL

AT SUVA

Miscellaneous Case No. 08 of 2024

BETWEEN: **EVERGREEN INTERNATIONAL FIJI, LLC T/A WORMALD FIRE & SECURITY AND GUARDFORCE FIJI**

APPELLANT

AND: **PERMANENT SECRETARY FOR EMPLOYMENT, PRODUCTIVITY & INDUSTRIAL RELATIONS**

RESPONDENT

AND: **NATIONAL UNION OF WORKERS**

INTERESTED PARTY

Appearances
Mr. Apted. J for the Appellant
Ms. Ali. S for the Respondent

Date of Hearing: 26 November, 2024
Date of Decision: 24 January, 2025

DETERMINATION OF THE EMPLOYMENT RELATIONS TRIBUNAL

Introduction

1. The Appellants Evergreen International Fiji, LLC ("**Evergreen**") have appealed a decision by the Permanent Secretary made on 13 June 2024 to reject Evergreen's 16 May 2024 report of an employment dispute ("**Evergreen's Dispute Report**") with the Interested Party, the National Union of Workers ("**NUW**").

2. In this Appeal, Evergreen seeks orders that –

   (i) The Decision be set aside;

(ii) The Respondent must accept the Appellant's Report of an Employment Dispute under section 170(1) of the Employment Relations Act 2007 (the Act) and refer the Employment Dispute to Mediation Services under section 170(4) of the Act;

(iii) The Respondent pay the Appellant's costs of the appeal on a full indemnity basis;

(iv) Such alternative and/or further orders as the Court deems just.

3. Evergreen's grounds of appeal are –

(a) The Respondent erred in law in reaching the Decision in that the only grounds on which he was empowered to reject the Appellant's Report of an Employment Dispute are the grounds contained in section 170(1) of the Act, and none of those grounds applied in this case;

(b) The Respondent erred in law and in fact in reaching the Decision in that the reasons relied upon by the Respondent in reaching the Decision namely –

(i) That he considered the employment dispute reported to be over the Interested Party's alleged failure to comply with good faith bargaining; and

(ii) Good faith bargaining had been initiated under section 149 of the Act

Were incorrect because –

A. The Appellant's Report of an Employment Dispute was not over an alleged failure to conduct good faith negotiations;

B. Further no good faith negotiations had taken place under section 149 of the Act between the Appellant and the Interested Party after the date of Appellant's Report of an Employment Dispute;

C. The Appellant and the Interested Party had attended "informal mediation" conducted by an officer of the Respondent's Ministry but the Appellant had made clear that it wished the Appellant's Report of an employment Dispute to be formally accepted and referred to Mediation Services as provided for in section 170 of the Act;

(c) The Respondent failed to exercise his jurisdiction and/or exceeded his jurisdiction in accordance with section 170 of the Act in failing to accept the Appellant's Report of an Employment Dispute and failing to refer the Appellant's Report of an Employment Dispute to Mediation Services.

Evidence

4. The relevant evidence is found in the -

(a) Affidavit from Malka Seakar Khan, Manager Human Resources, deposed and filed on 3 July 2024.

(b) Affidavit in reply from Jone Maritino Nemani, Permanent Secretary, deposed on 8 August 2024, and filed on 9 August 2024.

(c) Affidavit in reply of Malka Seakar Khan, deposed and filed on 26 August 2024.

The Facts

5. Evergreen, trading as "Guardforce" and "Wormald," provides a range of security services to various entities and individuals in Fiji. The company found itself in negotiation process with the National Union of Workers (NUW), which represents its members. The journey began on 3 November 2023, when Evergreen received a letter from NUW containing its first draft collective agreement. This initiated a series of face-to-face negotiations held on 3 November 2023, 8 December 2023, 1 March 2024, and 10 April 2024. Unfortunately, the negotiations reached a deadlock by the final meeting.

6. On 22 April 2024, NUW issued a Notice of Secret Ballot for strike action, set to be conducted on 17 May 2024. In an effort to avert the strike, Evergreen submitted a Dispute Report to the Permanent Secretary on 16 May 2024. The secret ballot took place as planned, and NUW received a mandate to proceed with strike action. In response, Evergreen was invited to a "good faith meeting" with a mediator from the Ministry, which took place on 21 May 2024. Subsequent mediation sessions were held on 22 May 2024 and 27 May 2024, during which Evergreen attempted to renegotiate pricing with its key customers.

7. Between 29 May 2024 and 6 June 2024, a series of emails were exchanged among Evergreen, NUW, and representatives of the Permanent Secretary. The Permanent Secretary ultimately rejected Evergreen's Dispute Report on 14 June 2024, citing ongoing good faith negotiations. Undeterred, Evergreen received another invitation to a mediation meeting on 1 July 2024, scheduled for 5 July 2024, with the Minister for Employment, Productivity, and Industrial Relations. On 3 July 2024, Evergreen filed a notice of motion to appeal the Permanent Secretary's decision. By 15 July 2024, Evergreen and NUW had signed both a mediated agreement and a collective agreement.

Issue

8. The issue before me is the interpretation and application of section 170(1), (2), and (10) of the Act, along with regulation 13(2) of the Employment Relations (Administration) Regulations 2008 ("**Regulations**"). By examining both the plain meaning and purposive interpretations, the tribunal seeks to determine whether the Permanent Secretary's decision aligns with legislative intent and statutory requirements.

Appellant's position

9. Section 170(1) of the Act states that the Permanent Secretary must accept all reported disputes unless one of the exceptions in paragraphs (a) to (c) applies. Since none of these exceptions apply, the Permanent Secretary must accept the dispute based on the plain meaning and purposive rule.

10. The Ministry conducted "informal mediation" and not "good faith negotiations". Good faith negotiations had already broken down when NUW obtained the strike mandate.

11. Section 170(10) is not applicable in this case. Furthermore, if rejecting Evergreen's Dispute Report is deemed an acceptance under section 170(10), then the Dispute should have been referred to formal mediation as required by the Act.

12. The Regulations is not entirely consonant with the amended section 170 and should be read subject to the amendment, as discussed in **Manufacturing Commerce and Allied Employees & Staff Union v Goodman Fielder International Fiji Limited** ERCA No 18 of 2018 (6 October 2021) (*"MCA case"*).

Respondent's position

13. The deeming provision of section 170(10) has been satisfied, so the Dispute was accepted. The Ministry chose to conduct informal mediation instead of the formal process.

14. Section 170 and regulation 13(2) of the Regulations should be read together to properly understand the Act's intention for disputes referred to the Permanent Secretary. These provisions allow the Permanent Secretary to reject a dispute, as long as reasons are provided, and those reasons are not confined to the exceptions in (a) to (c) of section 170 of the Act.

15. The Appellant did not object to the good faith meetings and did not question whether these were mediations or negotiations, accepting them as part of the formal third-party dispute resolution process. They only raised objections after the rejection of the Dispute Report. Despite the Permanent Secretary's decision, both parties continued discussions, resulting in the Mediation Agreement and the Collective Agreement. The Appellant cannot withdraw from the agreement just because they later found the terms to be commercially unfavorable.

The Legislation

16. Section 170 (1) states –

Decisions by the Permanent Secretary

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.

17. Section 170 (2) states –

(2) The Permanent Secretary must:

(a) inform the parties that he or she accepts or rejects the dispute; and

(b) give reasons for rejecting a dispute.

18. Section 170 (10) states -

If an employment dispute reported to the Permanent Secretary is not accepted or is rejected by the Permanent Secretary within 30 days of it being reported, then the employment dispute shall be deemed to have been accepted.

19. Regulation 13 of the Regulation states:

(1) Within 30 days after receiving the report of the dispute under regulation 12, the Permanent Secretary shall inform the parties or their representatives in writing that he or she accepts or rejects the dispute, and give reasons for rejecting the dispute.

(2) In exercising his or her powers under this regulation, the Permanent Secretary must be satisfied that the parties to the dispute have taken all reasonable means to exhaust the procedures for settlement of disputes under section 168 of the Act, and have engaged in good faith in attempting to resolve the dispute.

(3) The Permanent Secretary may reject the dispute and refer the dispute back to the parties if he or she is satisfied that the parties have not exhausted the procedure for settlement of disputes, and have not engaged in good faith negotiations in attempting to resolve the dispute.

(4) If a report of a dispute is accepted by the Permanent Secretary, it becomes an employment dispute, and he or she shall refer the employment dispute either to the Employment Relations Tribunal or the Mediation Services in accordance with section 170(4) of the Act, with notification to the parties.

Analysis

20. The plain meaning of section 170 of the Act mandates acceptance of all reported disputes unless one of the exceptions in paragraphs (a) to (c) applies.

21. Act No 4 of 2015 amended section 170 and introduced the exceptions in paragraphs (a) to (c). Before this amendment, the Permanent Secretary was guided by regulation 13.

22. Regulation 13 sets out -

    (a) The specific timeframe within which the Permanent Secretary must respond to a dispute (30 days);
    (b) The requirement for the parties involved to have exhausted internal settlement procedures under section 168 of the Act and engaged in good faith negotiations;
    (c) The obligation for the Permanent Secretary to provide written reasons if a dispute is rejected;
    (d) The procedure for referring accepted disputes to the Employment Relations Tribunal or Mediation Services.

23. The Respondent contend that section 170 and regulation 13(2) should be interpreted together, submitting that the Permanent Secretary has the discretion to reject disputes for reasons beyond the exceptions listed in section 170 (a) to (c). They claim that as long as reasons are provided, the Permanent Secretary's decision is valid.

24. I disagree with this interpretation, particularly considering the decision in the *MCA Case.* The *MCA case* cited by both parties is particularly relevant as it discusses the powers and limitations of the Permanent Secretary in handling disputes, especially following legislative amendments and how the Permanent Secretary's role has evolved. For instance, paragraph 17 explains that prior to the amendment, the Permanent Secretary had more discretion to accept or reject disputes, however, this power has been significantly reduced. Both the Respondent and Appellant relies on paragraph 15 which states that the Permanent Secretary cannot reject an employment dispute but for the exceptions in 170 (a) to (c). The *MCA case* supports the plain meaning rule by strictly interpreting the statutory language, reinforcing the limits on the Permanent Secretary's discretion.

25. The amendments to section 170 were intended to restrict the discretionary power of the Permanent Secretary. Therefore, any interpretation that broadens this discretion contradicts the legislative intent. The literal wording of section 170(a) to (c) should be adhered to, as it clearly specifies the exceptions for rejecting disputes.

26. Regulation 13 requires the Permanent Secretary to verify that parties have exhausted internal settlement disputes and engaged in good faith negotiations. This requirement to

exhaust internal dispute mechanisms is one of the exceptions as per the amendment. The *Form ER5* reflects this requirement by including a declaration that confirms all internal procedures have been exhausted, thereby streamlining the process for the Permanent Secretary.

27. Ensuring that the process of exhausting internal dispute mechanisms is done in good faith is crucial for maintaining trust and fairness in the resolution process. The verification by the Permanent Secretary acts as a safeguard, ensuring genuine efforts are made before accepting a dispute. In this capacity, the Permanent Secretary serves as a gatekeeper, preventing disputes from escalating prematurely. This approach does not take away the right of parties to turn to the Employment Relations Tribunal if they feel this requirement is not being met.

28. What is good faith negotiation? The Court of Appeal in **Stantec New Zealand Ltd v Fiji Roads Authority** [2020] FJCA 23; ABU 24 of 2019 (28 February 2020) references another case, ***Wellington City Council v Body Corporate*** 51702 (Wellington) [2002] NZCA 191; [2002] 3 NZLR 486 (CA), where it was held that negotiating in good faith doesn't mean reaching an agreement. Instead, it means honestly trying to reach an agreement. Justice Tipping clarified this, stating:

> *".... an obligation to negotiate in good faith is not the same as an obligation to negotiate reasonably ..... An obligation to negotiate in good faith essentially means that the parties must honestly try to reach agreement. They remain able to pursue their own interests within what is subjectively honest, rather than what is objectively reasonable."*

29. The Court of Appeal acknowledged that parties have the right to express all their concerns during discussions. One party leaving midway doesn't necessarily indicate a lack of good faith. The fact that negotiations lasted for one and a half days suggested that both sides were genuinely trying to resolve the dispute, showing good faith on both sides.

30. The evidence shows that parties had already exhausted internal dispute mechanisms and good faith negotiations when Evergreen's Dispute Report was lodged. Parties had multiple negotiations before reaching a deadlock on 10 April 2024. Following this deadlock, the NUW obtained a mandate to take strike action, and Evergreen lodged their Dispute seeking formal mediation through Mediation Services. I note that this same verification process is mandated under section 33(1) and (5) of the Act by the Permanent Secretary, as the Registrar of Trade Unions, before accepting a notice of secret ballot for a strike. Therefore, the progression to formal mediation was a necessary next step to resolve the Dispute.

31. The Respondents referred to regulation 13 in their submissions, assuming this was the basis for the rejection, although this was not stated in the Decision.

32. The first paragraph of the Decision states "*I note that the dispute relates to the Union's failure to comply with good faith bargaining process for collective agreement, hence the report of this dispute*". This is incorrect, as the Dispute is about the terms and conditions of the Collective Agreement which the Employer state they could not meet financially.

33. The second paragraph states *"I have noted the recent development in relation to the dispute and the good faith negotiations between the parties initiated as per the provisions of section 149 of the Employment Relations Act 2007"*. The third paragraph states *"Given the above and pursuant to section 170(2) (b) of the Employment Relations Act 2007, I hereby reject the report of the dispute since the parties are already meeting on the issues under dispute."* Apart from the fact that outright rejection of the dispute might not be appropriate solely based on ongoing meetings especially when the rejection means that the strike can proceed, the fact that parties are in ongoing good faith negotiations or in informal mediation is not a valid reason for rejection. If the rejection is being made under regulation 13(3), it should explicitly state that the parties have not fully pursued or engaged in good faith negotiations. Even so, this would be a significant challenge, as the evidence shows that parties had already exhausted internal dispute mechanisms and good faith negotiations when Evergreen's Dispute Report was lodged.

34. It is not disputed that the Ministry initiated and conducted "informal mediation" after receiving Evergreen's Dispute Report. Informal mediation which involves a neutral mediator helping both sides find a solution, may be different from good faith negotiations where parties talk directly without a mediator, as per process in section 149 of the Act. Ideally, the onus is on the parties involved in the dispute to actively engage and attempt resolution as per the established procedures. While informal mediation can be a valuable tool for resolving disputes, it should not replace the formal procedures required by the Act, which ensures transparency and fairness. Given that the Dispute was already lodged for formal mediation and the necessary internal and good faith negotiations were exhausted, referring the dispute to formal mediation from the start would have been the more appropriate response.

35. Section 170(10) of the Act states that "*If an employment dispute reported to the Permanent Secretary is not accepted or is rejected by the Permanent Secretary within 30 days of it being reported, then the employment dispute shall be deemed to have been accepted.*" This provision applies only when the Permanent Secretary has **not** made a decision within 30 days after receiving the report. Then, the dispute is automatically accepted to prevent delays. If the decision is made within 30 days, such as in this case, then section 170(2) would apply. This interpretation ensures both provisions work together in harmony, avoiding any conflict. Therefore, the Respondent cannot argue that the dispute was deemed accepted under section 170(10) because the Decision was made within the stipulated 30 day period, making section 170(10) irrelevant in this context.

36. The Appellant seeks an order to cancel the registered Collective Agreement with NUW on the grounds that Evergreen was forced to sign it out of fear of a strike and would not have signed it if their Dispute Report had been accepted. I am not inclined to grant orders for the following reasons:

(a) I am of the view that this Tribunal lacks jurisdiction to grant the order sought as it falls under the Employment Relations Court per section 220(1)(i) and (2) of the Act;

(b) The Appellant was pursuing resolution through both informal mediation and formal channels simultaneously, keeping multiple options open. The registered Collective Agreement is a result of the informal mediation process. The success of this appeal would mean the same dispute would undergo a formal mediation process to potentially arrive at a different resolution. While the outcomes of these two processes might differ or contradict each other, this is a matter for the Appellant to manage;

(c) NUW did not participate in this appeal proceeding thus, the Tribunal did not have the benefit of hearing from the other party to the Collective Agreement.

Determination

37. The Permanent Secretary did not comply with section 170 of the Act by failing to accept Evergreen's Dispute Report and refer it to Mediation Services. The evidence shows that internal dispute mechanisms and good faith negotiations were exhausted, making formal mediation necessary.

38. The appeal is upheld. The Permanent Secretary's decision is set aside, and Evergreen's Dispute Report should be referred to Mediation Services for formal mediation.

Orders

39. The Respondent must accept Evergreen's Dispute Report under section 170(1) of the Act and refer the Employment Dispute to Mediation Services under section 170(4) of the Act.

40. Costs summarily assessed at $1, 000. to be paid within 28 days.

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Ms. Mary Motofaga
Resident Magistrate

24 January 2025