**IN THE EMPLOYMENT RELATIONS COURT AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** **ERCA NO. 17 of 2011**

**BETWEEN:** **THE UNIVERSITY OF THE SOUTH PACIFIC**

**APPELLANT**

**AND:** **USP PERMANENT HOURLY PAID STAFF AND INTERMEDIATE AND JUNIOR STAFF UNION**

**RESPONDENT**

**Appearances**: Mr. N. Barnes for the Appellant.

Mr. N. Tofinga for the Respondent.

**Date/Place of Judgment:** Wednesday 17 April 2013 at Suva.

**Coram:** The Hon. Justice Anjala Wati.

# JUDGMENT

### *The Cause*

1. The appellant appeals against the orders of the Employment Relations Tribunal ***("ERT")*** of 10 February 2011 and seeks that the said orders be wholly set aside.

2. On 10 February 2011 the ERT had ordered that:

   1. *"The special application informally done by the applicant union is hereby validated.*

2. *The respondent employer shall not retire and/or terminate the employment of any worker who are union members on the grounds that their contract has expired, unless so ordered by this court.*

3. *The respondent employer is specifically ordered to immediately reinstate the four union members who were sent home for the reasons described in the above paragraph without any loss of pay/or benefits and the respondent is further ordered to cease and desist from making any other similar decisions to the unions members.*

4. *The undertaking given by the employer, previously, to retain the status quo shall now be deemed to have been so ordered by the Tribunal.*

5. *The parties are ordered to appear before the Chief Tribunal on 21 February 2011 at 9.00 am for further directions".*

3. The orders were made in absence of the employer. There was no application before the ERT for such orders. The substantive application before the ERT was a motion. The Union's claim was that the employer had failed to negotiate properly over the Union's 2008 Log of Claims. The specific orders that were sought via the motion were:

1. *"The employer to comply with the deed of settlement in relation to the disputed 2008 log of claim.*

2. *The employer to comply with s. 149 of the ERP 2007.*

3. *The employer be restrained from implementing any of its functions provided for in the union's log of claims without an agreement with the union.*

4. *The employer ceases and desists from processing the unions' members in the staff review earmarked to commence on or about 25 October 2010.*

5. *The employer ceases and desists from treating those workers who have joined the union after 3 November 2006 differently from those members who have been in the union on or before 3 November 2006".*

4. The matter was first called in the ERT on 15 October 2010. The employer was granted 7 days to file its response and the case was adjourned to 25 October 2010 on which date the matter was adjourned to 28 October 2010. On 28 October 2010 the respondent was given time to amend its motion and the matter was adjourned to 17 November 2010 on which date further 14 days was granted to the worker to file an accompanying affidavit and the matter adjourned to 29 November 2010. On 29 November 2010 the matter was adjourned to 07 December 2010 without any orders being made. On 07 December 2010 the ERT ordered that the affidavit be signed by the President of the Union and adjourned the matter to 20 January 2011. On 20 January 2010 an order was made for both parties to be at liberty to file affidavits, the matter then adjourned to 21 February, 2011. The matter was called before 21 February 2011 and the date of advancement was 07 February 2011. I cannot explain from the records the reasons behind this. On 07 February 2011, I cannot explain from the records what orders were made on this day. The next day the matter was called in ERT was 10 February when the orders appealed were made. There was no appearance for the employer. I will not state what happened on subsequent Tribunal dates as it is not important for the appeal.

***The Grounds of Appeal***

5. The employer has advanced 7 grounds of appeal in the following form:

   1. *"The Learned Tribunal erred in law in allowing the application by the respondent without first providing the applicant an opportunity to be heard as the circumstances did not justify an urgent ex-parte application.*

   2. *The Learned Tribunal erred in law in allowing the application by the respondent to be made orally without supporting affidavit evidence when the circumstances did not justify such urgency.*

   3. *The Learned Tribunal erred in law, by failing to consider that the expiry of a fixed term contract is not retirement of the employee or termination of the contract, when ordering that:*

      *"USP shall not retire and terminate the employment of any worker who is a Union member on the terms that their contract has expired".*

4. *The Learned Tribunal erred in fact, by failing to take into account that USP had not retired or terminated any employee but had merely allowed fixed term contracts to expire when ordering:*

   *" That the respondent employer is specifically ordered to immediately reinstate the four union members who were sent home for the reasons described in the above paragraph without any loss of pay and/or benefits and the respondent is further ordered to cease and desist from making any other similar decisions to the unions members".*

5. *The Learned Tribunal erred in fact and law, by failing to identify with sufficient particularity the said four union members. The order was therefore not precise enough to allow the appellant to know exactly what "similar decisions to the Union members" entailed. Also, according to USP's records, only 3 workers had been "sent home" when it was ordered:*

   *" That the respondent employer is specifically ordered to immediately reinstate the four union members who were sent home for the reasons described in the above paragraph without any loss of pay and/or benefits and the respondent is further ordered to cease and to desist from making any other similar decisions to the unions members".*

6. *The Learned Tribunal erred in fact and law when he ordered:*

   *"That the undertaking given by the employer, previously, to retain the status quo shall now be deemed to have been so ordered by the Tribunal".*

   *Because:*

   (a) *There was no evidence provided for any breach of the undertaking;*
   (b) *The appellant had not breached the undertaking and was, and is still, complying with the undertaking;*
   (c) *The undertaking provided by the appellant was not "to retain" the status quo; and*
   (d) *The order was imprecise, vague and impossible for proper performance.*

7. *The Learned Tribunal erred in law and in practice in allowing the application by the respondent without setting a short return date for review of the order".*

***The Appellant's Submissions***

6. Mr. Barnes argued that his first and second ground of appeal is in respect of order 1 which reads that *"the special application informally done by the applicant union is hereby validated."*

7. Mr. Barnes argued that the reference to *"the special application is validated"* is presumably a reference to s. 234 of the ERP. The application was made ex-parte and till date no formal application or affidavit has been filed. The employer neither knows what was said, or has had any opportunity to respond. Mr. Barnes argued that s. 234 can only have effect if the application and orders made were within the jurisdiction of the ERT in the first place. The process adopted in this particular case according to Mr. Barnes was so defective that any attempted retrospective validation was doomed to fail. Mr. Barnes further argued that there was no urgency to allow an application to be made orally. The employer was denied the natural justice process to respond to any allegation put against it.

8. Mr. Barnes further argued that it appears that the ERT made compliance orders but apparently no provision of the ERP or the contract was stated to have been breached for such orders to be issued.

9. In respect of grounds 3 and 4, Mr. Barnes argued that the employer does not retire or terminate any worker on the ground that the contract has expired. The contract simply runs out and the legal relationship created by the contract ceases to exist. The employer takes or plays no part when the contract expires. It is pursuant to the contract that the employee has to go home.

10. Effectively what the Tribunal ordered was to renew or keep the contract on foot when it expired. No reasons were provided by the ERT as to why the employer was denied the benefit of what the parties had agreed to in the contract. The order amounts to a mandatory injunction that has a real cost consequence. The ERT has no jurisdiction to grant injunctions.

11. If the formal application was made, at least parties would have known what actual question of law was to be determined. The injunction was granted without any undertaking and if it was, the Union would now have been faced with the real prospect of making good its own undertaking.

12. In respect of grounds 5 and 6, Mr. Barnes argued that the order was imprecise of being followed. The names of the members who were to be retained were not even identified. How does the employer know which employee had been referred to in the order. Mr. Barnes also argued that Mr. Jon Apted had only given an undertaking that the employer will not actually convene a PHP Staff Review. That was the limit of the undertaking provided. It was never to maintain the status quo. Status quo is not defined and the employer is not clear as to what it can do and what it cannot. The order again is too vague.

13. Mr. Barnes said that the employer has suffered a lot of damages as a result of the orders and it should be allowed to produce evidence as to the level of damages and that should be awarded against the respondent by the ERT or the ERC.

***Respondent's Submissions***

14. Mr. Tofinga argued that he need not have filed a formal application as the originating motion was already before the Tribunal. The employer had sent 3 of his union members' home and at the time he made the application in the Tribunal he did not even know the names of the union members. Mr. Apted had given an undertaking that the members would not be sent home, that is what was meant by maintaining the status quo and when the union members were sent home, there was so much urgency in the matter.

15. Mr. Tofinga stated that on 7 February 2011 he had advised the Tribunal about the fact that the union members were sent home and if the employer wanted it could have filed affidavits in response. Mr. Tofinga says that all these problems arose because the employer did not honour its part of the bargain under the Deed of Settlement.

*Analysis*

16. I will deal with the first two grounds of appeal together. The two grounds are basically complaining against the making of the oral application and the ERT granting the same. When the parties appeared in the Tribunal on 7 February, the next call date was not set. On 10 February, the ERT only entertained the Union when there was no application before the Court. On what basis does the ERT call the matter back in Court? There was no mandate for the ERT to convene sitting without the employer because at all times the employer had been appearing in the ERT. If the respondent wanted an application to be made, it should have filed a formal application and if it could not but was interested in seeking audience before the ERT, it was only proper that the employer be advised to appear in the ERT as well. The respondent's actions indicate how it wanted to obtain an order without the due process of natural justice on the right of each party to be heard being followed.

17. I do not agree with Mr. Tofinga that by filing a substantive motion for a claim of an entirely different nature he could find a leg for his oral application for such orders of 10 February.

18. The ERT should not have entertained any oral ex-parte application which was going to affect the substantive rights of the parties and the orders in fact affected the rights of the parties in that the employer is not allowed to enjoy the benefits under the contract. The employees who are supposed to leave employment because their contract had expired are forcefully kept at the employment and the employer is suffering financially.

19. The making and entertaining of the oral application has no basis and the orders granted thereon were also flawed in that it should not have been granted in absence of the employer. This is not the only reason why the orders should be set aside. This is only the procedural defect but the orders ought not to have been granted on merits either. This takes me to grounds 3 and 4 of the appeal.

20. The ERT ordered that the employer does not retire and/or terminate the employment of any worker who are union members on the grounds that their contract had expired. I cannot put it better than Mr. Barnes has done that the employer takes no part or there is no action on

the part of the employer when a contract comes to an end. The contract ends on its own as agreed to by the parties and the employer does not take any part in this. To ask the employer to continue to keep the employees at employment after expiration of the contract is going past the agreement in the contract and is without any legal basis. On merits this order ought to be set aside.

21. The ERT goes on to state that the 4 union members must be reinstated by the employer. The order as contended by Barnes is so ambiguous. In fact only 3 employees' contract had expired and they could no longer be employed. The employer does not know which employees' to keep at the employment. An order of this nature is so prejudicial to the employer that without an undertaking as to damages, such order should not have been allowed. The fact of the matter is that the employer has no means to recover any monies from these employees because their contract had expired and there was no obligation on the employer to keep them at work.

22. I now consider grounds 5 and 6 of the appeal which relates to the order of the ERT that the undertaking given by the employer to maintain the status quo is reduced into an order. The first question is what was meant by status quo? That is not clear from any reading of the records. The second aspect is that Mr. Apted is noted to have told the ERT that the employer will not convene a PHP Staff Review. That is clear from the Tribunal's minutes of 28 October 2010. Mr. Apted never agreed for any status quo to be maintained and for the ERT to order that status quo be maintained without clarifying what was meant and on the basis that the order was reduced from the undertaking is inchoate and misconceived. It ought to be set aside.

23. The final ground of appeal is that after making of the order the ERT should have very quickly called the matter back in the Tribunal for the employer's rights to be vindicated. The ERT granted the orders and gave a returnable date after 11 days. When orders are granted ex-parte, a short returnable date must be given so that the other party who had been denied the process of natural justice is given an opportunity to have access to justice immediately. Normally a matter is granted a returnable date within 7 days but this also depends on the availability of the Court. Sometimes the matter is granted a returnable date within 14 days.

In any case long returnable dates are prejudicial to the party against whom the order has been obtained ex-parte. I do not find that granting a returnable date in 11 days to be too late in the day.

24. Mr. Barnes request that he be allowed to file an affidavit outlining financial damages suffered by the employer cannot be entertained at the appellate stage. The proper procedure would be to file an action against the respondent for damages arising from the improper oral application which gave rise to orders of mandatory injunction and if not mandatory injunction, orders akin or analogous to mandatory injunction.

25. The appellant definitely is entitled to the costs of the appeal bearing in mind the nature of the matter.

***Final Orders***

26. For the reasons enunciated above, I allow the appeal on grounds 1 to 6 and I set aside the orders of the ERT of 10 February 2011.

27. There shall be costs in favour of the appellant. I will determine the quantum upon hearing the parties.

**Anjala Wati**
**Judge**
**17.04.2013**

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***To:***

1. ***Mr. Barnes, for the appellant.***
2. ***Mr. Tofinga, for the respondent.***
3. ***File: ERCA 17 0f 2011.***