

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA NO. 4 OF 2012

BETWEEN: FIJI NATIONAL PROVIDENT FUND
APPELLANT

AND: ABINESHWAR VINOD
RESPONDENT

Appearances: Mr. D Sharma; Mr. Karunathilleke and Ms. Kumar for the Appellant.

Mr. P. Rae for the Respondent.

Date and Place of Judgment: Wednesday 19 February 2014 at Suva.

Coram: The Hon. Justice Anjala Wati.

JUDGMENT

Catchwords:

FNPF nominated as an essential national industry- continuation of proceedings under the ERP- when should an amended Decree deem to come in force.

Legislation:

The Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011)-("ENI"): ss. 28; 30.

Essential National Industries and Designated Corporation (Amended) Regulations 2013.

The Interpretation Act Cap. 7: s. 11.

The Cause

- [1]. On 17 April 2013 I had granted in this matter leave to appeal the decision of the Employment Relations Tribunal ("*ERT*") and further ordered that compliance of the orders of the ERT be deferred until the determination of the appeal.
- [2]. The substantive appeal was filed and listed for hearing when a preliminary issue under s. 28 (2) of the ENI was raised. The issue was raised by the appellant.

The Case Background

- [3]. On 29 June 2009 the worker reported an employment grievance claiming prejudice over the employer's action to enforce his transfer. The case was allocated an action number "*ERT Grievance No. 98 of 2009*".
- [4]. The hearing of the grievance began in May 2010. At the hearing on 21 July 2010, the ERT directed that the worker was to remain in his position at Lautoka pending determination of the grievance. The employer complied with the order but the employee was no longer, as he previously was, holding the position of the Team Leader Member Benefits.
- [5]. On 3 May 2011, the grievor was again charged by the employer with falsification and alteration of FNPF record where it was alleged that the employee had falsely altered the address of the witness in the education assistance application form of member no. 1525800, Isoa Wasenavanua. The hearing was conducted on 5 May 2011. On 31 August 2011 the employee was terminated.
- [6]. The employee filed a motion on 17 October 2011 and sought the following orders:-
 - "1. *That the respondent's action in terminating the applicant's employment constitutes discrimination in employment contrary to section 77 (1) (a) and (c) of the Employment Relations Promulgation 2007, is in breach of his employment contract, unjustified and unfair.*

2. *That the respondent be ordered to comply with the Employment Tribunal's directions of 21 July 2010, the applicant's employment contract and section 24 of the Employment Relations Promulgation 2007 and provide him with work in his position as Team Leader Member Benefits at its Lautoka Branch.*
3. *That the respondent be ordered to cease and desist from requiring the applicant to re-apply for his position pending the final determination of the within Motion and Grievance No. 98 of 2009.*
4. *That the respondent be restrained from terminating the applicant's employment pending the determination of the within Motion and Grievance No. 98 of 2009.*
5. *That the respondent be ordered to provide the Tribunal and the applicant with particulars of its Reform Program requiring the applicant to re-apply for his position".*

[7]. On 19 December 2011, the ERT made the following orders on the motion:-

- "1. The worker, Abineshwar Vinod, is hereby reinstated to his position as Team Leader Member Benefits from 31 August 2011 at the Employer's Lautoka Branch pending the final determination of Grievance No. 98 of 2009 and the Motion herein.*
2. *That the employer, Fiji National Provident Fund is restrained from terminating the worker's employment pending the determination of Grievance No. 98 of 2009 and the Motion herein.*
3. *That the ruling on preliminary issue in Grievance No. 98 of 2009 is that the employer carries the burden of proof pursuant to section 77 (3) of the Employment Relations Promulgation 2007 in respect of the Grievance .*
4. *..."*

The Submissions

- [8]. Mr. D. Sharma submitted that FNPF is designated as an Essential National Industry and as such under s.28 (2) and 30(2) of the ENI, the proceedings cannot continue in the ERC and ought to be terminated under S.30 (3) of the ENI.
- [9]. Mr. Sharma also tried to argue in this matter the validity of another decision of another RM in *Fiji Bank and Finance Sector Employees Union and Fiji National Provident Fund - ERT Dispute No. 4 of 2012*.
- [10]. I had indicated to the parties that that matter should not creep in as it should become subject of appeal in another separate case where I will have the benefit of perusing the records of the lower Court.
- [11]. Mr. Rae submitted that the ENI came in force on 9 September 2011. Then 11 corporations were designated as essential national industries. Subsequently 2 other corporations were added on 5 March 2013. FNPF was one of it. So ENI applies to FNPF since 5 March 2013. It was deliberate on the part of the legislature not to add all corporations when the ENI was enacted. In this case the grievance commenced in 2009 before the ENI came in force. Subsequent acts of dismissal of the employee should have been a separate issue. At least the 2009 grievance is not caught by ENI.

The Law and Analysis

- [12]. It is clear that the acts complained of by the employee all occurred before the ENI came in force.
- [13]. It is indisputable that FNPF is now designated as an essential national industrial under *Essential National Industries and Designated Corporation (Amended) Regulations 2013*.
- [14]. The question is whether the decision of the FNPF against the employee, be it any decision, can be challenged in ERC under the ERP.
- [15]. For this I have to look at whether the ENI applies to matters commenced but not finalised before the ENI came in force.

[16]. Mr. Rae says that the ENI applies to this dispute but only to matters arising after 5 March 2013. Mr. Sharma argues that it applies to all existing disputes not finalised in Court.

[17]. I need to carefully look at ss.28 (2) and 30 of the ENI. It reads:-

28). (2) *Except as otherwise provided in this Decree, the provisions of the Employment Relations Promulgation 2007 shall not apply to any essential national industry, designated corporation or any person employed in any designated corporation or any essential national industry.*

30).(1) *No Court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any other way entertain any proceeding, claim, challenge or dispute by any person or body which seeks or purports to challenge or question-*

a) *the validity, legality or propriety of this Decree;*

b) *any decision of any Minister, the Registrar or any State official or body, made under this Decree; or*

c) *any decision of any designated corporation made under this Decree.*

(2) *Any proceeding, claim, challenge or dispute of any nature whatsoever in any court, tribunal, commission or before any other person or body exercising a judicial function, against any designated corporation that had been instituted under or involved the Employment Relations Promulgation 2007 before the commencement date of this Decree but not been determined at that date or is pending on appeal, shall wholly terminate immediately upon the commencement of this Decree, and orders whether preliminary or substantive made therein shall be wholly vacated and a certificate to that effect shall be issued by the Chief Registrar or the registrar of the Employment Relations Tribunal.*

- [18]. The words used in s.30(2) to the effect *“instituted under or involved the Employment Relations Promulgation 2007 before the commencement date of this Decree but had not been determined at that date or is pending on appeal, shall wholly terminate immediately upon commencement of this Decree, and all orders whether preliminary or substantive made therein shall be wholly vacated and a certificate to that effect shall be issued by the Chief Registrar or the registrar of the Employment Relations Tribunal”* make it very clear that the ENI applies to all matters not finalised be it a matter commenced before the ENI came in force or after it.
- [19]. S. 30(2) of the ENI thus applies retrospectively. There is no question which is debatable in light of s.30 (2). Mr. Rae says that since FNPF was added as an essential national industry, the ENI applies to FNPF since 5 March 2013. I do not agree with Mr. Rae’s submission.
- [20]. S.11 of the *Interpretation Act* is very clear that *“where any written law is amended by any subsequent written law, the original law together with all amendments thereto shall be read and constructed together from the date of commencement of the amendments or retrospectively, as the case maybe...”*
- [21]. The interpretation of s. 11 of the Interpretation Act is that FNPF albeit added as an essential national industry on 5 March 2013 must be read as an industry which was designated on the commencement date of the ENI. It then follows that s.30 (2) of the ENI will apply to FNPF too, and that it will apply to FNPF from the commencement date of the ENI and not from 5 March 2013.
- [22]. This appeal together with all the matters pending in the ERT has to be terminated.

Final Analysis

- [23]. I am sending this file to the office of the Chief Registrar under s.30 (3) of the ENI for termination of the proceedings.
- [24]. The Chief Registrar must call for all the matters pertaining to these parties pending in the ERT for termination too.

[25]. A copy of this decision must be sent to the Chief Tribunal of the ERT.

[26]. Each party to bear their own costs.

Anjala Wati

Judge

19.02.2014

To:

1. *Mr. D. Sharma for the Appellant.*
2. *Mr. P. Rae for the Respondent.*
3. *File: ERCA No. 4 of 2012.*