

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER:

ERCC 1 of 2019

ERT Grievance Number: 146 of 2018

BETWEEN:

PRANEEL SANJAY DAYAL

GRIEVOR

AND:

MINISTRY OF EDUCATION, HERITAGE AND ARTS

EMPLOYER

Appearances:

Ms. Ali for the Grievor.

Mr. D. Nair for the Employer.

Date/Place of Judgment:

Thursday 25 April 2019 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

A. Catchwords:

Employment Law – questions of Law referred by the ERT – whether the ERT has jurisdiction to hear an employment grievance instituted by an employee of an essential service and industry – whether it is mandatory that there shall be a disciplinary action instituted against the employee and the Public Service Disciplinary Tribunal must hear the cause before any dismissal is carried out.

B. Legislation

- 1. The Constitution of Fiji (“CF”): ss. 120 and 127.*
 - 2. Employment Relations Act 2007 (“ERA”): ss. 33; 185; 188; and 211.*
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Cause

1. On 1 February 2019, the Employment Relations Tribunal ("**ERT**") referred the grievance between the parties to the Employment Relations Court ("**ERC**") under s. 217 of the ERA for determination of questions of law.
2. The questions of law have been presented as follows:

"The Grievor, Praneel Sanjay Dayal was employed as a teacher at the Ministry of Education, Heritage and Arts based at Tokaimalo District School until 25 June 2018 when he was terminated for inflicting corporal punishment on one of the school students.

The Grievor reported an employment grievance against the Ministry of Education, Heritage and Arts (Employer) relating to his termination and in the cause of the proceeding, the following questions of law emanated:

1. *Whether the Employment Relations Tribunal has jurisdiction to determine an employment grievance relating to dismissal executed by the Permanent Secretary for Education, Heritage and Arts in accordance with section 127(7) of the Constitution of the Republic of Fiji; and*
 2. *Whether it is mandatory to refer the disciplinary action instituted by the Permanent Secretary to the Public Service Disciplinary Tribunal under section 120(9) of the Constitution of the Republic of Fiji".*
3. Both counsel had in accordance with their agreement that this matter be heard by way of written submissions, filed helpful submissions for determination of the questions of law.

Determination

4. I will deal with each question of law separately. The first question is whether the ERT has jurisdiction to determine the employment grievance brought by the employee against the employer.
5. Very simply, the answer is in the affirmative in that the ERT does have jurisdiction to hear an employment grievance brought by this employee. Before I go to the relevant law to support

my findings, I must at the outset indicate that the question posed before ERC must not be restricted to s. 127(7) of the CF.

6. S. 127(7) of the CF states that *“the permanent secretary of each Ministry shall have the authority to appoint, remove and institute disciplinary action against all staff of the ministry, with the agreement of the Minister responsible for the ministry”*.
7. The above section of the CF prescribes the powers of the permanent secretary. It does not set out the powers of the ERT which it can invoke when the permanent secretary exercises one of its powers under s. 127(7) of the CF.
8. The question of law can only be addressed by reference to the ERA which establishes the ERT and the ERC. In this case the employee was dismissed by the employer. His cause therefore is defined as an employment grievance under s. 185 of the ERA. By virtue of s.188(4) of the ERA, the ERT derives the jurisdiction to hear the grievance of this employee as long as the grievance is brought within 21 days from the date when the grievance first arose.
9. S. 188(4) of the ERA reads as follows:

“Any employment grievance between a worker and an employer in essential services and industries ... shall be dealt with in accordance with parts 13 and 20, provided that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose, and –

(a) where such an employment grievance is lodged or filed by a worker in an essential service and industry, then that shall constitute an absolute bar to any claim, challenge or proceeding in any other court, tribunal or commission; and

(b) where a worker in an essential service or industry makes or lodges any claim, challenge or proceeding in any other court, tribunal or commission, then no employment grievance on the same matter can be lodged by that worker under this Act”.

10. It is not disputed by any party that the Ministry of Education, Heritage and Arts is included in the definition of essential service and industry under s. 185 of the ERA. s. 185 of the ERA states that the government and the statutory authority is included in the definition. The Ministry in this case is controlled and managed by the government and as such it is covered under Part 19 of the ERA which deals with matters relating to essential services and industries.
11. The ERT's jurisdiction is prescribed in section 211 of the ERA. S. 211 of the ERA falls under part 20 of the Act. One of the jurisdictions as prescribed is to adjudicate on employment grievances.
12. The ERT's view that the grievor can only bring the cause by way of a judicial review is not correct is law, restrictive, preclusive and not supported by the provisions of the ERA. Both the counsel are also of the same view that the ERT does have jurisdiction to hear the employment grievances concerning an essential service and industry. The finding would not be the same if the matter before the ERT was a trade dispute.
13. The next question of law is whether it is mandatory to refer the disciplinary action instituted by the Permanent Secretary to the Public Service Disciplinary Tribunal ("*PSDT*") under section 120(9) of the CF.
14. The answer is in the negative. The Ministry of Education, Heritage and Arts has exercised its powers under s. 33 of the ERA to summarily dismiss an employee for breaching the law of not inflicting corporal punishment on a child. In cases where the Ministry decides to carry out summary dismissal, reference of the matter to the PSDT is not mandatory. The question of law framed for the ERC makes reference to s. 120(9) of the CF.
15. s. 120 of the CF establishes a PSDT. One of the functions of the PSDT is listed in s. 120(9) of the CF. It states that:

"In addition to such other functions as may be conferred by written law, the Tribunal shall have the function of hearing and determining disciplinary action instituted by-

(a) *The Public Service Commission – against any permanent secretary; or*

(b) *a permanent secretary, the Solicitor-General, the Director of Public Prosecutions or the Secretary - General to the Parliament – against any person employed in their respective ministries or offices”.*

16. The effect of the above section is to hear a disciplinary action if and only if it is instituted by one of the authorized personnel named in the provision. It does not in any event make it mandatory that there shall be a disciplinary action in all cases especially in a one that warrants summary dismissal in view of the authority(s).

17. It is at this stage that s. 127(7) of the CF becomes relevant. It outlines the powers of the permanent secretary to appoint, remove and institute disciplinary action against a staff of a ministry. The power is not confined to only instituting disciplinary actions. It grants the permanent secretary the powers to remove a staff as well.

Final Orders

18. In the final analysis, I find that the ERT has jurisdiction to hear this matter and that the employer was not bound to refer the matter to the PSDT before dismissing the employee in this case. I now direct that this matter be heard by the ERT forthwith.

19. There shall be no order as to costs against any party.




Anjala Wati
Judge
25. 04.2019

To:

1. *Office of the Attorney General for the Grievor.*
2. *Mr. Nair for the Employer.*
3. *File: Suva ERCC 1 of 2019.*