

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**CASE NUMBER:** ERCC 09 of 2013

**BETWEEN:** FIJI PUBLIC SERVICE ASSOCIATION  
APPLICANT

**AND:** FIJI HARDWOOD CORPORATION  
RESPONDENT

Appearances: Mr. D. Nair for the Applicant.  
Ms. S. Khan for the Respondent.

Date/Place of Judgment: Monday 12 June 2023 at Suva.

Coram: Hon. Madam Justice A. Wati.

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## **RULING**

**A. Catchwords:**

*Employment Law – action brought under the ERA against a designated corporation when it was precluded under Decree No. 35 of 2011 – respondent was included as a designated corporation after filing of the action but since claim was not determined before it was designated, the claim is caught by Decree No. 35 of 2011 – s. 173 (3) of the Constitution does not allow for any amendments after the Constitution to revive the right to file or hear the claim that is terminated or ought to be terminated under Decree No. 35 of 2011.*

**B. Legislation:**

1. Constitution of Fiji: s. 173 (3).
2. Employment Relations Act 2009 (“ERA”): s. 188 (4).
3. Essential National Industries (Employment) Decree 2011 (Decree Number 35 of 2011): ss. 28 and 30.
4. Essential National Industries & Designated Corporations (Amendment) (No. 2) Regulations 2013.

1. The applicant brings this action on behalf of its members who had been given redundancy notices on 21 June 2013. The applicant seeks an order that the employer complies with s. 107(1) (a) and (b) of the ERA and that it negotiates in good faith with the applicant on a reasonable redundancy package of its members in accordance with s.108 (3) of the ERA. A further order is sought for a stay of the redundancy of its members until the determination of the application.
  
2. Before the substantive matter was listed for hearing, the respondent raised a preliminary objection under s. 28 (2) of the **Essential National Industries (Employment) Decree 2011 (Decree Number 35 of 2011)** which states that “*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*”.
  
3. The respondent argues that since it is a designated corporation, the claim for compliance with s. 107 of the ERA cannot be maintained as the Act does not apply to it.
  
4. The plaintiff argues that s. 28 (2) does not apply to the respondent as it was only included as a designated corporation by **Essential National Industries & Designated Corporations (Amendment) (No. 2) Regulations 2013** which came in force on 18 December 2013, after the commencement of the cause on 1 July 2013.
  
5. The plaintiff argues that the Essential National Industries & Designated Corporations (Amendment) (No. 2) Regulations 2013 cannot apply retrospectively and any designated corporation under this Regulation cannot be included as a designated corporation from the time the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011) came in force (*9 September 2011 by Legal Notice Number 82 of 2011*).
  
6. S. 30 of the Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011) reads:

*“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) ...*

*(b) ...*

*(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 had not been determined at the date or is pending on appeal, shall wholly terminate immediately upon the 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.*

*(3) Where any proceeding, claim, challenge, application or dispute of any form whatsoever, is brought before any court, tribunal, commission, or any other adjudicating body, in respect of any of the subject matters in subsection (2), then the presiding judicial officer, without hearing or in any way determining the proceeding or the application, shall immediately transfer the proceeding or the application to the Chief Registrar or the registrar of the Employment Relations Tribunal for termination of the proceeding or the application and the issuance of a Certificate under subsection (2).*

*(4) A certificate under subsection (2) is, for the purposes of any proceedings in a court, tribunal, commission or any other person or body exercising a judicial function, conclusive of the matters stated in the certificate.*

*(5) A decision of the Chief Registrar or the Registrar of the Employment Relations Tribunal to issue a certificate under subsection (2) is not subject to challenge in any court, tribunal, commission or any other adjudicating body”.*

7. The claim was filed before the respondent was included as a designated corporation. However, the claim was not determined until the respondent was included as a designated corporation. What the amendment did was to include more industries as

designated corporations to be excluded from proceedings under the ERA. It is meaningless to amend and include more industries under the substantive law if the directions in the substantive law was not apply to the new industries. It would not serve the purpose to include more industries then. I find that s. 30 (1) and (3) very clearly captures all claims that are pending and therefore applies to the respondent as well.

8. The law was subsequently amended in 2015 to allow employment grievances against designated corporations to be filed against it within 21 days from the day the grievance first arose: **s. 188(4) of the ERA.**
9. The question that now needs to be answered is whether the applicant's claim can be brought under s. 188(4) of the ERA. The answer lies in s. 173 (3) of the Constitution of Fiji which states that the laws in place before the Constitution may be amended by the Parliament after the commencement of the Constitution but that no amendment shall have any retrospective effect and that no amendment shall grant any compensation, damages, relief, remedy or reparation to any person affected by these laws.
10. I therefore find that the amendment in 2015 allowing employment grievances to be filed against designated corporations within 21 days from the date the grievance first arose does not apply to this cause.
11. All that now remains is for me to terminate the proceedings. I thus order that this action be terminated forthwith.



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**Hon. Madam Justice Anjala Wati**

**Judge**

**12.06.2023**

**To:**

1. **FPSA.**
2. **Young & Associates for the Respondent.**
3. **File: Suva ERCC 09 of 2013.**