IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 032 OF 2024

IN THE MATTER OF determining and defining the terms of employment of the Teachers in Fiji under the Open Merit Recruitment and Selection Policy, 2018 **AND IN THE MATTER OF** sections 20(1) & 127(8) of the 2013 Constitution thereof

FIJI TEACHERS UNION

Plaintiff

PERMANENT SECRETARY MINISTRY OF EDUCATION, HERITAGE & ARTS

First Defendant

ATTORNEY GENERAL OF FIJI

Second Defendant

Counsel: Mr D Nair for the Plaintiff

Mr R Green, Solicitor General, and Mr V Chauhan for First and Second Defendant

Hearing: 14 March 2024

Judgment: 21 March 2024

JUDGMENT

(On a Summons Seeking Interim Injunctive Relief)

[1] On 29 January 2024, the Permanent Secretary for Education circulated a Memorandum (hereinafter referred to as the 'Memorandum') to all staff in the Ministry of Education (hereinafter referred to as the 'Ministry') advising that the Ministry was commencing a process of '*regularisation'* to fill vacant positions. Where staff were currently filling a vacant position in an acting capacity, they would be provided with an opportunity to be regularised, ie confirmed, in the position for which they were acting. There were a number of conditions that the staff member was required to satisfy, namely:

i. The person had to have been in the acting position for a substantively vacant position for six months or more continuously in 2023.

ii. The person had to meet the qualifying criteria which included having the relevant qualifications, at least two years satisfactory annual performance assessments, experience relevant to the role that the officer would be regularized in, and valid FTRA Registration.

[2] According to the Memorandum, the intention behind the regularisation process was to '*retain and motivate the civil service'*. The Permanent Secretary noted therein that this process had been arrived at in consultation with the Permanent Secretary for Public Service Commission. The Permanent Secretary for Education expressly invoked s 127 of the Constitution to authorize the regularization process. Finally, the Permanent Secretary stated that the regularisation process would be completed by 29 February 2024.

[3] On 1 February 2024, the General Secretaries of the FTU and FTA, on behalf of the Fiji Teachers Confederation, sent a letter to the Permanent Secretary for Education expressing concern with the regularisation process on the basis that there had been no consultation with them. They believed that the regularisation process was contrary to the principles of Equal Employment Opportunity and the decision to embark on regularization was in excess of the Permanent Secretary's powers under s 127 of the Constitution.

[4] The Permanent Secretary responded on 7 February 2024 disagreeing with the criticisms. The Permanent Secretary described the regularisation process as a '*kind of one off amnesty'*, with a fixed start date and a fixed end date. The Permanent Secretary noted that on the completion of the regularisation process, '*substantively vacant positions that are not filled and all vacancies will continue to be advertised and recruitment will follow the normal recruitment process'*. The Permanent Secretary also took issue with the process being described as her decision. The Permanent Secretary stated that the process was, in fact, a '*Policy decision of the PSC and is being implemented throughout the Civil Service'*.

[5] It appears that the regularisation process concluded at the end of February. The Ministry has since taken a different approach to filling its still vacant positions. On 6 March, the Ministry circulated an Internal Closed Advertisement seeking applications by 11 March 2024 for fifty-two (52) listed vacancies.

Originating Summons

[6] On 9 February 2024, two days after the Permanent Secretary responded to the Fiji Teachers Confederation, the Plaintiff filed an Originating Summons and supporting affidavit for Mr Muniappa Goundar, General Secretary of the Fiji Teachers Union, seeking declarations that the Memorandum of 29 January 2024 and the regularisation process were unlawful.[1] The Fiji Teachers Union (hereinafter referred to as 'FTU') seek six orders. Five of the six orders pertain to the Memorandum of 29 January 2024. The remaining order, Order 2, is broadly worded and reads:

> *A Declaration that the Part 2 regulation 5 of the Civil Service Regulations, 1999 is binding and requires all appointments and promotions to be made on the basis of merit after an open, competitive selection process, and in accordance with section 127(8) of the Constitution.*

[7] The Court will not entertain making such a broad declaration in a vacuum. I note that the FTU more properly formulates its declaration (in respect to the application of the 1999 Regulations and the Constitution to the present facts), at Order 4, which reads:

> *Alternatively, a Declaration that the Memorandum from the Permanent Secretary Education Heritage and Arts purporting to regularize the acting appointments of selective teachers is ultra vires the Civil Service Regulations, 1999 and section 20(1) and 127(8) of the 2013 Constitution.*

[8] On 29 February 2024, the FTU filed an interlocutory summons and supporting affidavit seeking an urgent interim injunction restraining the First Defendant from regularizing acting staff until the determination of the substantive action. The Plaintiff's summons was called before me on 7 March 2024 at which time counsel for the defendants stated that the acting appointments had already been regularized – which is consistent with the content of the Memorandum that the process would be completed by the end of February. On this advice, the FTU withdrew its interlocutory summons.

Summons seeking injunctive order

[1] The Originating Summons has been set down for hearing on 18 April.

[9] A second interlocutory summons, being the present summons, was filed by the FTU on 8 March 2024 along with a further affidavit for Mr Goundar of the same date. The FTU has sought the following urgent injunctive order:

> ***AN ORDER*** *that the First Defendant to desist from processing the positions that were advertised on 6 March 2024 as internal closed advertisement until the determination of the substantive action filed herein that has been listed for hearing on 18 April 2024.*

[10] Mr Goundar's initial affidavit dated 7 February 2024, filed in support of the Originating Summons, is confined to the events surrounding the regularization. His affidavit of 8 March 2024, filed in support of the present summons, speaks to the internal closed advertisement of 6 March 2024. He also attaches a copy of the advertisement.

[11] In response to the interlocutory summons, the defendants have filed two affidavits for Mr Timoci Bure, Deputy Secretary for Education, as well as an affidavit for Ms Loveleen Chetty, Acting Director Policy at the Ministry of Civil Service. Mr Bure explains that the Civil Service is implementing different approaches to fill the significant number of vacant positions. He attaches a Circular dated 18 January 2024, prepared by the Permanent Secretary for PSC and Public Enterprises wherein the Permanent Secretary outlines the various measures being implemented which include regularization. Mr Bure also states that the FTU and FTA participated in the regularization process by putting names forward to be regularized. Mr Bure states that 1,587 acting positions have been regularized. Ms Chetty summarises the different measures being taken by the civil service to fill its vacancies. It appears that regularization was simply the first stage. Where a position has not been filled by regularization the following step wise process will then be employed:

- First, each Ministry will seek to fill the vacant position internally.[2]
- Second, vacancies will be advertised within the wider civil service.
- Third, if the position still remains vacant, the position will be advertised outside of the civil service.

[2] This appears to be the measure taken by the Ministry in its Internal Closed Advertisement of 6 March 2024.

[12] There is disagreement between the parties as to whom the 6 March advertisement is intended and been circulated. The Plaintiff understands that the positions advertised are restricted to acting positions, and the advertisement was only circulated to the acting staff members. The defendants, however, say the advertised positions are available, and have been circulated, to all staff in the Ministry. This is not the time to resolve factual disputes. That said, there is no basis to support the Plaintiffs understanding. The wording of the advertisement does not in any manner suggest that only those in acting positions are eligible to make an application for the vacant position advertised. There is no reference to or requirement that applicants must be in an acting position/capacity. Any person within the Ministry may apply. Mr Bure produces an internal email sent on 6 March which shows that the advertisement was circulated to Ministry officers with a request that they in turn circulate the advertisement to their respective staff.[3]

Decision

[13] The Plaintiff seeks an interlocutory injunction under Order 29 Rule 1 of the High Court Rules 1988. The provision reads:

> *(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in the party's writ, originating summons, counterclaim or third party notice, as the case may be.*
>
> *(2) Where the applicant is the plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but except as aforesaid such application must be made by notice of motion or summons.*
>
> *(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the*

[3] Annexure C of Mr Bure's affidavit dated 13 March 2024.

issue of the writ or summons and such other terms, if any, as the Court thinks fit.

[14] The law is settled on where the Court may make an order for an interim injunction. In *Korovulavula & Anor v Fiji Development Bank* [1997] FJHC 197, Pathik J stated:

> *The principles to be followed in considering the granting of injunctive relief are set out in the leading case of American Cyanamid Co v Ethicon Ltd (1975) A.C. 396. The House of Lords there decided that in all cases, the Court must determine the matter on a balance of convenience, there being no rule that an applicant must establish a prima facie case. The extent of the court's duty in considering an interlocutory injunction is to be satisfied that the claim is "not frivolous or vexatious", in other words, "that there is a serious question to be tried".*
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> *In Cyanamid (supra) at page 406 Lord Diplock stated the object of the interlocutory injunction thus:*
>
> ***"....** to protect the plaintiff against injury by violation of his right <u>for</u> which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies".*
> *(emphasis mine)*
>
> *A similar view was expressed by McCarthy P in Northern Drivers Union v Kuwau Island Ferries (1974) 2 NZLR 61 when he said:*
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> *"The purpose of an interim injunction is to preserve the status quo until the dispute has been disposed of on a full hearing. That being the position, it is not necessary that the Court should have to find a case which would entitle*

the applicant to relief in all events: it is quite sufficient if it finds one which shows that there is a substantial question to be investigated and that matters ought to be preserved in status quo until the essential dispute can be finally resolved ... "
(ibid, 620)

"It is always a matter of discretion, and ... the Court will take into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted ... and that which the plaintiff, on the other hand, might sustain if the injunction was refused ..." (ibid, 621).

...

As to "balance of convenience" the court should first consider whether if the Plaintiffs succeed at the trial, they would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction.

...

In HUBBARD v VOSPER (1972) 2 WLR 359, LORD DENNING at p.396 gave some guidance on the principles of granting an injunction which I think is pertinent to bear in mind in this case when he said:

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and, then, decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At other times, it is best not to impose a restraint upon the defendant but leave him free to go ahead. For instance in Fraser v Evans [1969] 1 QB 349, although the plaintiff owned the copyright, we did not grant an injunction because the defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."

[15] These principles have been applied up to the present time. In *Alizes Ltd v Commissioner of Police [2013] FJHC 596*, Tuilevuka J noted:

11. Interim injunctions are a powerful discretionary remedy. But they are not lightly granted. They are granted ex parte only if there is urgency. In other words, if to proceed normally (i.e. inter partes by Notice of Motion or Summons) would be a delay entailing irreparable or serious mischief, (see Order 29 Rule 1(2) as amended in 1991 in LN 61/91).

12. The applicant must show a strong enough case to justify the Court not hearing the other side's case. Usually, to show "urgency", the applicant must show that, unless the court intervenes with a restraining order, he has a legal right in the subject-matter of the case which is under an immediate threat of being violated. Apart from that, the applicant must convince the court that the balance of convenience favours the granting of the injunction ex-parte.

[16] Balapatabendi J succinctly identified the test as follows in *Vanualevu Muslim League v Hotel North Pole & Ors* [2013] NZHC 151, at 17.4:

> *What could be deduced from Lord Diplock's rulings in American Cyanamide Case are in fact tests to be adopted in dealing with an application for interim injunction. The tests could be summarized as follows:-*
>
> *1. Is there a serious question to be tried?*
> *2. Is damages an adequate remedy?*
> *3. Where does the balance of convenience lie?*

[17] In order for the FTU to be entitled to the interim relief sought it must satisfy each of the three tests. Even if it does so, the Court must still be satisfied that the orders sought are necessary to preserve the status quo. The order must pertain to matters squarely within the scope of the substantive claim.

Is there a serious question to be tried?

[18] The Plaintiff contends that the Memorandum regularising acting appointments is in breach of the Constitution as well as contrary to certain other legislative provisions and

agreements. The features of the regularisation process that affronts the FTU is that the regularization process allegedly does not appoint officers on merit and is anti-competitive. At a base level, the FTU takes exception to the lack of consultation with it or with the Fiji Teachers Association before the Permanent Secretary decided to implement the process.

[19] The defendants argue that the Plaintiff has brought this proceeding against the wrong party. They say it should have been brought against the Permanent Secretary for PSC who was, in fact, responsible for the regularization process.

[20] Mr Green acknowledged that the Permanent Secretary for Education is empowered to employ staff in her Ministry, not the Permanent Secretary for PSC. That is, of course, expressly prescribed at s 127(7) and (8) of the Constitution. The Circular from the Permanent Secretary for PSC dated 18 January 2024 is no more than a policy. The ultimate authority on whether to implement the recruitment policy lies with the Permanent Secretary of each Ministry. I am satisfied that the Plaintiff has brought this claim against the correct party.

[21] I conclude that there is a serious question to be tried.

Are damages an adequate remedy?

[22] This claim is not about compensation. As far as the FTU is concerned it is about ensuring a fair, transparent and competitive process of appointment of teachers in the Ministry of Education. Damages will not be a suitable or adequate remedy.

Where does the balance of convenience lie?

[23] The defendants contend that an injunction will cause significant prejudice and disruption to the functioning and administration of the Ministry. There are 15,000 staff and many of the vacant positions are in important administrative and financial roles. I am not persuaded by this argument. Many substantive vacant positions are currently filled by acting staff. That will not change if the injunction is granted.

[24] To my mind, the more important question, in terms of the balance of convenience, is how, if at all, will granting the injunction impact on the substantive issue in this proceeding.

How is the status quo (insofar as the substantive issue is concerned) preserved by making the order?

[25] The Plaintiff argues that the substantive claim will be rendered '*nugatory*'[4] and a majority of its members will be '*severely prejudiced*'[5] if an order restraining the processing of the positions advertised on 6 March is not made. Further, the Permanent Secretary '*will be free to proceed and process the vacant positions without opening the process to other employees who are better qualified and more meritorious*'.[6]

[26] The Plaintiff's substantive claim concerns the legality of the regularisation process of 29 January and not the legality of the advertising process of 6 March. The Plaintiff is conflating the two processes. They are not the same. The regularization process ended on 29 February 2024. Applicants who sought regularization, and satisfied the requirements, have been regularized.[7] The advertising process of 6 March, being a separate measure to fill vacancies in the civil service, commenced after regularization had ended.

[27] Accordingly, in my view the order sought in the present summons will not impact on the substantive issue. Certainly, the first summons filed by the FTU on 29 February seeking a restraint on the regularization process, was an order squarely within the scope of the originating summons and such relief, if granted, would have been relevant to protecting the status quo ahead of the determination of the substantive issue. However, by the time the first summons had been filed, the regularisation process was ending.

[28] I conclude that the balance of convenience lies with refusing the injunctive order. Restraining the First Defendant from processing the positions advertised on 6 March will almost certainly inconvenience the First Defendant, causing administrative difficulties as well a delay to the processing of the applications received in response to the Internal Closed Advertisement. On the other hand, I do not see how the Plaintiff will be prejudiced or disadvantaged (with respect to the substantive issue) if the injunction is refused. It is worth pointing out that if the FTU succeeds on its substantive claim and obtains a declaration that the regularization process is unlawful this will, no doubt, have the impact that the FTU desires.

[4] Para 1.17 of Plaintiff's written submissions.
[5] Para 1.18.
[6] Para 1.23.
[7] See Mr Bure's affidavit of 13 March 2024, at para 21.

[29] Finally, I have not addressed Mr Green's main argument against the Plaintiff's application for injunctive relief, namely that the Court is prohibited from making such an order by s 15 of the State Proceedings Act 1951. In light of my conclusion above, I do need to determine the effect, if any, of s 15 in this case.

Orders

[30] Accordingly, I make the following orders:

i. The Plaintiff's interlocutory summons is dismissed.

ii. The costs of the Plaintiff's application to be costs in the cause.

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D. K. L. Tuiqereqere

JUDGE

Solicitors:

Nilesh Sharma Lawyers for the Plaintiff

Attorney General's Chambers for First & Second Defendants