IN THE HIGH COURT OF FIJI
IN THE EMPLOYMENT RELATIONS COURT
AT LAUTOKA

CASE ACTION NO. ERCC 06 OF 2021

BETWEEN: **ALVIN RAJU** and **NAZMEEN RAJU** of Sabeto College, Teacher Secondary.

PLAINTIFFS

A N D: **THE PERMANENT SECRETARY FOR EDUCATION**

FIRST DEFENDANT

A N D: **MINISTRY FOR EDUCATION HERITAGE AND ARTS**

SECOND DEFENDANT

Appearances: Mr. Nair D. and Mr. Rueben J. for the Plaintiffs
Mr. Kant S. for the Defendants

Date of Hearing: 30 May 2023

Date of Ruling: 25 March 2025

R U L I N G

INTRODUCTION

1. The plaintiffs, Mr. Alvin Raju (**"Alvin"**) and Ms. Nazmeen Raju (**"Nazmeen"**), are husband and wife. They are both school teachers. They are also civil servants employed under an employment contract with the Ministry of Education, Heritage and Arts (**"Ministry"**). At all material times, Alvin and Nazmeen were both teaching at Sabeto College. They were both holding acting positions. Alvin was acting in the position of HOD Maths/Physics. Nazmeen was acting in the position of HOD Social Science.

2. On 03 October 2019, Nazmeen wrote a letter of complaint to the Permanent Secretary for Education. She alleged that the Acting Principal, Ms. Shelly Chand (**"Chand"**) had been treating her unfairly. Alvin also wrote a letter of complaint against Chand. His letter followed a week later

on 09 October 2019. On 03 December 2019, Alvin again emailed the Ministry. In that email, Alvin alleged that Chand had been discriminating against him.

INVESTIGATION PANEL

3. In response to the letters, the Ministry appointed a panel to investigate the allegations. The panel interviewed various persons at the school in August 2020, including Alvin and Nazmeen. In its report to the Permanent Secretary for Education, the panel found that Alvin's and Nazmeen's allegations were unsubstantiated. The panel actually found that they had personalized certain professional issues. The panel also observed that Alvin and Nazmeen had been insubordinate and disrespectful in attitude towards Chand. The panel then recommended that Alvin and Nazmeen be transferred out of Sabeto College.

ACTION TAKEN BY THE PERMANENT SECRETARY

4. Acting on the panel's report, the Permanent Secretary issued a warning letter each to Alvin and Nazmeen. Their letters were both dated **27 September 2021**. I reproduce below the letter which Nazmeen received. It is the exact replica of the one which Alvin received:

> Our Reference: TPF 83105
>
> Mrs. Nazmeen Raju
> C/- Sabeto College
> Nadi Airport
>
> Dear Mrs. Raju
>
> **SUBJECT: WARNING, TRANSFER AND REVOCATION OF ACTING**
>
> This is to advise you of the outcome of the disciplinary proceeding against you for continuously disrespecting the directives from the Head of School and Administrators causing differences amongst teachers at Sabeto College.
>
> We expect our staff to be professional and be excellent role models at all times. As the Head of Department been in a leadership position you should know better and set a good example to others.
>
> As the Head of Department, you should have established and sustained effective, constructive and respectful relationships within the school community.
>
> However, I have considered the investigation report and their findings for insubordination and been disrespectful against the Head of School. **I also taken into account the**

> **<u>explanation that you have provided. The panel's recommendations has been accepted and you will be transferred to a school on your substantive position</u>**.
>
> Moving forward, more explicit expectations will be anticipated from you. These will include that you strictly abide by the Civil Service Code of Conduct, MEHA policies and related legislations and demonstrate responsible behavior and conduct.
>
> This serve as a **Warning**. Your compliance with these expectations will be reviewed regularly. We expect to see significant improvement in your attitude and conduct towards work. Please be advised that should your attitude and conduct not improve, disciplinary action may further be taken.
>
> Sincerely
> Sgd. Dr. Anjeela Jokhan
> **Permanent Secretary**

5. The Permanent Secretary did transfer Alvin and Nazmeen out of Sabeto Secondary School to a school in Lautoka. Their acting appointments were both revoked and they were reverted to their respective substantive positions.

<u>CHALLENGING THE PERMANENT SECRETARY'S DECISION</u>

6. On 20 October 2021, Alvin and Nazmeen filed an Originating Summons seeking the following relief:

    1. <u>a declaration</u> that the decision of the within named Defendant made on or about the 27th September 2021 wherein the disciplinary penalties, warning, transfer and revocation of acting appointment was imposed against the plaintiffs:

        (a) in breach of their employment contracts.
        ~~(b) was unjustified, unfair and unlawful.~~
        ~~(c) contravened section 77 (1) (c) of the Employment Act, 2007.~~
        (d) contravened the principles of natural justice, procedural fairness, double jeopardy and fair labour practices.

    2. an Order that the said <u>three penalties be rescinded forthwith without any loss of benefit and entitlement</u>.
    3. damages.
    4. costs.
    5. any other Order which the Court may deem just in the circumstances.

7. At the hearing, the plaintiffs' counsel advised the court that they are abandoning relief 1 (b) and 1 (c) above (hence, the strikethrough). The Originating Summons then sets out the following grounds:

    (i) that the purported disciplinary proceeding instituted against the plaintiffs was in breach of **<u>clause 16</u>** of the Employment Contract and Regulation 22 of the Civil Service Regulations, 1999, and as amended under the Civil Service (General) (Amendment) Regulations 2017.

(ii) that the first and second defendants failed to comply with the procedures contained in the Civil Service Disciplinary Guidelines, 2010, pertaining to the conduct of disciplinary investigations.

(iii) that the second defendant failed to lay disciplinary charges against the plaintiffs and refer the matter to the PSDT that has the powers under Regulation 22 (1) and as amended under section 7 (i) of the Civil Service (General) (Amendment) Regulations 2017 to determine any disciplinary penalty.

(iv) that the decision by the first defendant is ultra vires on the ground that no such disciplinary proceeding was initiated against the plaintiff when the plaintiffs only appeared as a complainant in a disciplinary proceeding over the Principal of Sabeto College Ms. Sherly Chand.

(v) that the plaintiffs were denied the principles of natural justice and further the three penalties is manifestly harsh, disproportionate and cannot be rationally justified.

(vi) that the first and the second defendants action and conduct via letter 27th September 2021 be stayed and or reversed on the ground of actual malice by the first defendant in failing to see that the investigation committee follows disciplinary procedure.

8. The Originating Summons is supported by an Affidavit of Alvin sworn on 20 October 2021.

MINISTRY'S POSITION

9. The Ministry opposes the Originating Summons *vide* an affidavit of Ms. Kacaraini Buaserau (**"Kacaraini"**) sworn on 04 April 2022 and a supplementary affidavit sworn on 25 May 2023. Kacaraini is the Senior Human Resource Officer of the Performance and Discipline Unit of the Human Resources Department in the Ministry. The plaintiffs replied to the above vide an affidavit of Alvin sworn on 05 May 2022.

PRELIMINARY POINTS

10. At the hearing, Mr. Kant submitted that the first question to be considered is whether or not this court, sitting as the Employment Relations Court (**"ERC"**), has jurisdiction to consider Alvin's and Nazmeen's application.

11. If this Court has jurisdiction, the next question to consider is whether the Permanent Secretary's decisions were lawful, justified and fair?

12. Mr. Kant argues that this Court does not have jurisdiction. He highlights that section 220(1) of the Employment Relations Act 2007 sets out at subparagraphs (a) to (n) an exhaustive list of situations where the ERC has jurisdiction.

13. Section 220(1)(h) provides that the ERC has jurisdiction:

> *"..to hear and determine a question connected with an employment contract which arises in the course of proceedings properly brought before it"*

14. In contrast, section 211(1) (a) of the Employment Relations Act confers jurisdiction on the Employment Relations Tribunal (**"ERT"**) to **"adjudicate on employment grievances".** Relying on the above provisions, Mr. Kant submits that an employment grievance can only be instituted before the ERT and not in the ERC. Similarly, a **"question connected with an employment contract"** cannot be instituted in the ERT (as per Mansoor J in **Pushp Chand Dass v Sugar Cane Growers Council** ERCC No. 20 of 2017 (3 April 2023); **Salim Buksh v Bred Bank (Fiji) Ltd** **ERCC** No. 2 of 2019 (27 August 2021).

15. Mr. Kant then submits that Alvin's and Nazmeen's action is founded on an employment grievance. He bases this argument on the following factors:

    (i) their grievance is about the revocation of their acting appointments.

    (ii) however, their respective contracts do not entitle them to any acting appointment.

    (iii) rather, they are contracted to their substantive teaching positions. Their respective acting appointment was given to them at the discretion of the Permanent Secretary.

    (iv) accordingly, their acting appointment is revocable at the discretion of the Permanent Secretary. At the revocation of their respective acting appointments, they were merely reverted to their substantive positions. Since their acting appointment is not a contractual entitlement, any grievance they have about its revocation cannot be *"connected with their employment contract"*. Accordingly, their grievance as such is simply an *"employment grievance"*.

    (v) if, supposing, Alvin and Nazmeen had lost their substantive positions for which they were then that would have entailed a question *"connected with their employment contract"*.

    (vi) if it were to be accepted that their respective acting appointment is a condition of their contract (as they appear to argue), then their grievance about the revocation of the acting appointment falls squarely within the definition of "*employment grievance"* under section 4 (b) of the ERA.

    (vii) section 4 (b) defines the term rather broadly to include a grievance about one or more conditions of employment.

    (viii) further to the above, if, as Alvin and Nazmeen appear to allege, they were being unfairly discriminated against by Chand, then their grievance about the alleged discrimination also falls squarely within the definition of "employment grievance" under section 4(c).

    (ix) section 4 (c) defines grievance to mean *inter alia* a grievance to include a claim that the worker has been discriminated within the terms of Part 9 of the Act.

(x) the breach of natural justice alleged by Alvin and Nazmeen would appear to ring hollow when one considers that they have merely been reverted to their respective substantive positions. In any event, the Permanent Secretary did take into account the **"explanations you have provided"** before making the decision (see letter of 27 September 2021 above).

DISCUSSION

ERC Has No Jurisdiction to Adjudicate on Employment Grievances

16. The Fiji Court of Appeal in **ANZ Banking Group Pte Ltd v Sharma** [2024] FJCA 29; ABU030.2022 (29 February 2024) has ruled that the ERC has no jurisdiction to adjudicate on an employment grievance. The Court said as follows at paragraphs 42 to 48:

> 42. Ms. Solimailagi, counsel for Mr. Sharma, submitted that "founded" in section 220 (1) (h), meant "based on a particular principle or concept – serves as a basis for". As a former worker of ANZ it would not be unreasonable to assume there was a contract of service and, as such, Mr. Sharma's action came within s 220(1) (h) and the ERC's jurisdiction.
>
> 43. Mr. Apted drew the distinction between an *"action"* and an *"employment grievance"*. He submitted the clearest indication that "employment grievances" are different from "actions" and lie exclusively within the jurisdiction of the ERT is to be found in a comparison of ss 211 and 220. Section 211(1) (a) gives the Tribunal jurisdiction to "adjudicate on employment grievances." By contrast s 220 does not refer to employment grievances at all.
>
> 44. The question is whether an employment grievance may be brought under s 220(1) (h) which gives the ERC jurisdiction to "hear and determine an action founded on an employment contract."
>
> 45. The answer is "no". The ERC has no jurisdiction to entertain an employment grievance claim as such (unless transferred from the Tribunal or on appeal). The ERC does have jurisdiction to hear claims founded on contract where, as a matter of pleading and evidence, the contract will necessarily be central. Crucially, Mr. Sharma's statement of claim before the ERC made no mention of a contract.

17. As to how to distinguish between an employment grievance and an action founded on contract, the Fiji Court of Appeal, referred to *Odger's Principles of Pleadings and Practice*, suggesting that the distinguishing feature would lie in how the claim is pleaded:

> 46. *Odger's Principles of Pleading and Practice* states:
>
> > Where the action is brought on a contract, the contract must first be alleged, and then its breach. It should clearly appear whether the contract on which the plaintiff relies is express or implied, in the latter case the facts should be briefly stated from which the plaintiff contends a contract is to be implied. If the contract be by deed, it should be so stated; if it be not by deed, then a consideration should be shown, which must not be a past consideration.

> Wherever the contract sued on is contained in a written instrument, the pleader should shortly state what he conceives to be its legal effect; he should not set out the document itself verbatim unless the precise words of the document, or some of them, are material.
> …
> The breach of contract, of which the plaintiff complains, must be alleged in the terms of the contract, or in words co-extensive with the effect or meaning of it.

47. In **Salim Buksh v Bred Bank Fiji Ltd** Mansoor J heard and determined similar issues to those before Wati J. Having concluded that the plaintiff was not entitled to file an employment grievance in the ERC, His Honour turned to s 220(1)(h):

> The phrase, "action founded on an employment contract", can, therefore, be taken to include reference to a cause for dismissal based on breach of contract similar to the common law wrongful dismissal action. Where an action is founded on an employment contract the Court would have jurisdiction to determine a claim for damages for dismissal from employment. Such an action would attract the usual principles attendant on a damages claim including the principles of mitigation. An action founded on an employment contract can be heard and determined by the Court.
>
> Importantly, in proceedings founded on an employment contract, subject to section 220(2) of the Act 18, the Court has jurisdiction to make any order that the Tribunal may make under any written law or the law relating to contracts.

48. I respectfully endorse His Honour's analysis and conclusions.

At paragraph 64 (ii), the Court concluded as follows:

(ii) Can any worker in Fiji (whether or not employed in an Essential Service and Industry) bring a claim of unjustified dismissal or unfair dismissal directly to the Employment Relations Court (which has unlimited jurisdiction) or must those claims only be made in an employment grievance that can only be reported to Mediation Services and the Employment Relations Tribunal (which has jurisdiction not exceeding $40,000).

Answer: *The ERC has no jurisdiction to hear employment grievances but if a claim for unjustified or unfair dismissal is "founded on a contract of employment", and properly pleaded as such, the ERC has jurisdiction under s 220(1) (h) to hear and determine such a claim.*

Is this an "employment grievance" or an "action founded on contract"?

18. The plaintiffs' Originating Summons allege that the defendants were obliged to follow the Civil Service Disciplinary Guidelines, 2010 pertaining to the conduct of disciplinary investigations against them. Following due investigation, the defendants ought to, then, lay proper disciplinary charges against the plaintiffs under Regulation 22 of the Civil Service Regulations, 1999 as amended by the Civil Service (General) (Amendment) Regulations 2017. The defendants should

then institute proper disciplinary proceedings by referring the charges to the Public Service Disciplinary Tribunal. It is the PSDT which must then hear and determine the matter and then impose an appropriate disciplinary sanction, if warranted. The defendant's failure to observe the above procedures was in breach of Clause 16 of the plaintiffs' respective Contract of Service with the Government of Fiji.

19. Clause 16 provides:

> *This contract is to be interpreted and constructed in accordance with the laws of the Republic of Fiji.*

20. The Originating Summons is built on the allegation that the defendants failed to observe the relevant laws stated above and that their failure as such:

    (i) amounted to a denial of natural justice to the plaintiffs.

    (the investigation panel went to the school to investigate the plaintiffs complaint against the principal, the principal was interviewed and made some disparaging allegations against the defendants, the panel believed the principal, and recommended action against the defendants, the defendants were not given a chance to refute the allegations by the Principal)

    (ii) led to the defendants taking a course which was unlawful and which led to a decision which was *ultra vires,* manifestly harsh, disproportionate and irrational.

    (iii) demands that the decision conveyed v*ia* letter dated 27 September 2021 be stayed and or reversed on the ground of actual malice by the first defendant.

21. The remedies they seek include a declaration that the Ministry's (and the Permanent Secretary's) decision (see paragraph 5 above) was taken in breach of clause 16 of their employment contracts and contravened the "principles of natural justice, procedural fairness, double jeopardy and fair labour practices". They seek an Order that the penalties imposed "be rescinded without any loss of benefit and entitlement". They also seek damages.

22. At this juncture, I do place here for the record that I have asked myself the question as to whether the issues raised (and remedies sought) ought properly to have been brought to this court under Order 53 (see discussion on distinction between private law and public law actions by the Fiji Court of Appeal in **Lakshman v Estate Management Services Ltd** [2015] FJCA 26; ABU14.2012 (27 February 2015), **Digicel Fiji Ltd v Pacific Connex Investments Ltd** [2009] FJCA 64; ABU0049.2008S (8 April 2009). This was not argued by the Office of the Attorney-General so I will leave it at that.

23. Section 4 of the Employment Relations Act 2007 defines an "employment grievance" as follows:

> "employment grievance" means a grievance that a worker, may have against the worker's employer or former employer because of the worker's claim that—
>
> *(a)* the worker has been dismissed;
>
> *(b)* the worker's employment, or one or more conditions of it, is or are affected to the worker's disadvantage by some unjustifiable action by the employer;
>
> *(c)* the worker has been discriminated within the terms of Part 9;
>
> *(d)* the worker has been sexually harassed in the worker's employment within the terms of section 76; or
>
> *(e)* the worker has been subject to duress in the worker's employment in relation to membership or non-membership of a union;

24. The plaintiffs in this case were not dismissed, nor were they ever subjected to any sexual harassment or duress. While they allege that they were discriminated against by the Principal, against the Permanent Secretary/Ministry - the allegation is strictly about the claimed lack of procedural fairness in the investigation and the subsequent disciplinary action taken. Ultimately, the remedy sought is that they be restored to their respective acting appointments.

25. In **State v Fiji Islands Revenue & Customs Authority, Ex parte Tagicaki** [2003] FJHC 100; HBJ0002R.2003S (9 April 2003), the CEO appointed a lawyer to the position of Acting Manager Legal. The applicant, understandably, felt slighted. The acting appointee was relatively junior to the applicant in terms of experience and years of service. The Court refused to grant leave to issue judicial review. Speaking on the nature of an acting appointment, the Court held *inter alia*:

> *As is the normal occurrence in any organisation, such a scheme is put in place to allow the management adequate time and space to find a suitable permanent appointment to the post. The decision is ephemeral. The Appellant does not in effect loose her position in the organisation, nor is she prevented from applying for the post when advertised. She therefore still has the opportunity to be appointed to the position provided she satisfies the criteria set by the appointing authority.*
>
> *Whatever will be the outcome of the search by FIRCA for a new Manager Legal, the fact of the matter is, insofar as the action of the Chief Executive and the Board is concerned in deciding an acting appointment in the meantime, such a matter is properly within the competence and the domain of operational or managerial decisions of the organization. This category of decisions, the Court holds, are not amenable to judicial review.*

26. In **State v Permanent Secretary for Youth, Employment Opportunities and Sports, *ex parte* Tuapati** [2001] FijiLawRp 60; [2001] 2 FLR 248 (1 August 2001), an officer who held the

substantive position of Senior Youth Officer (**"SYO"**) in the Ministry, and who had been acting in the position of Divisional Youth Officer (**"DYO"**), and who, along with other vying candidates, had applied for appointment to the substantive post of DYO in which he had acted – was aggrieved when his application was unsuccessful - and the substantive DYO post was filled by a side transfer within the Ministry – with the result that he was reverted to his substantive SYO post. His application for leave to judicially review the decision was refused by Mr. Justice Fatiaki (as he was) on the ground that he lacked locus, *inter alia*, there being no legitimate expectation on the part of any candidate that he or she will be appointed to any position.

27. Notably, the above cases were judicial review matters which were decided upon principles of public law before the Employment Relations Act 2007 and the 2013 Constitution. The thinking is clear though that an acting position is intended to be temporary only and that there is no legal right whatsoever to an acting position, let alone, any legitimate expectation vesting in an acting appointee - to be appointed to the substantive position.

28. Having said that, I take into consideration the following two relatively recent decisions. In **Vuto v Fiji Revenue and Customs Service** [2024] FJHC 60; ERCC25.2021 (1 February 2024) Mansoor J, seemingly, refused to accept the argument that the FRCS's acting policy was an implied term of the applicant's contract of employment. In contrast, in **Shankaran v Permanent Secretary for the Ministry of Education, Heritage and Arts** [2022] FJHC 622; ERCC 2 of 2020 (4 October 2022), Wati J held that the Ministry of Education, Heritage and Arts did not have the powers to issue the particular final warning letter in question against a teacher who had been acting in the position of Vice Principal, where the warning included a sanction that the teacher would be refused an acting position in the year 2020.

29. Wati J held that the Ministry's decision actually penalized the teacher in question, which penalties were imposed without following due process, and denied her an equal employment opportunity. She then declared the Ministry's decision null and void. On my reading, Wati J appears to acknowledge that the opportunity to act in a higher graded position outside an employee's substantive appointment, is a career development opportunity which, once given, ought not be revoked arbitrarily.

30. Based on all the above cases, I express the following views:

(i) an acting appointment is temporary only.

(ii) it (i.e. the acting appointment) is made internally in order to fill a temporary vacancy in a substantive position.

(iii) as such, there is no contractual entitlement to an acting appointment.

(iv) however, the opportunity to act in a higher graded position in the civil service, outside an officer's substantive appointment, is potentially, a career development opportunity.

(v) while, generally, a Government Ministry's Permanent Secretary has a discretion to make or revoke an acting appointment, the revocation of an acting appointment, may, if taken purportedly as a disciplinary sanction without due process, amount to a denial of a career development opportunity in an exceptional case.

CONCLUSION

31. Generally, there is no contractual entitlement to an acting appointment. However, I accept that the Constitution and the Civil Service Act and Regulations do establish clear principles which require fairness and transparency in disciplinary actions and decisions. As such, an acting appointee in the civil service has a statutory right to due process before any disciplinary decision or action can be taken against him or her. Where the acting appointee seeks as his or her main remedy that he or she be reinstated to an acting position on account of a disciplinary decision/action executed without due process, I am of the view that the cause is best described as an *"employment grievance"* rather than as an "action founded on contract". I uphold the preliminary objections raised by Mr. Kant. Accordingly, I hold that this Court sitting as an Employment Relations Court has no jurisdiction to consider the application before it. I dismiss the action. Costs to the defendants which I summarily assess at $800 (eight hundred dollars only).

....
Anare Tuilevuka
JUDGE

25 March 2025