

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0079 OF 2007S
(High Court Civil Action No. HBJ 14 of 2007S)

BETWEEN: FIJI ELECTRICITY AUTHORITY *Appellant*

AND: THE ARBITRATION TRIBUNAL *Respondent*

AND: FIJI ELECTRICITY AND ALLIED
WORKERS UNION *Interested Party*

Coram: Devendra Pathik, JA
Randall Powell, JA
Andrew Bruce, JA

Hearing: Wednesday, 9th July 2008, Suva

Counsel: J. Sloan for the Appellant
N. Karan for the Respondent
R. Singh for the Interested Party

Date of Judgment: Thursday, 10th July 2008, Suva

JUDGMENT OF THE COURT

1. The Fiji Electricity Authority ("Fiji Electric") and the Fiji Electricity & Allied Workers Union ("the Union") could not settle the Union's 2004 log of claims consisting of nineteen items. The matter was referred to the Arbitration Tribunal ("the Tribunal"). Most of the items in dispute were settled and the Tribunal only had to decide three outstanding matters namely:

- Public holiday pay
 - A \$200 bonus for hourly paid workers represented by the Electrical Trade Union
 - Day workers to be paid more for working shifts
2. On 9 May 2006 the Tribunal allowed two of the claims, namely the holiday pay and the \$200 bonus, but rejected the shift work claim.
 3. Fourteen months later the Fiji Electricity Authority (“Fiji Electric”) filed an application for judicial review of those two parts of the award (the public holiday pay and the \$200 bonus). The cause of the delay was the failure of the solicitors to follow instructions and file an application and the failure of the appellant to discover, until 30 April 2007, that an application had not been filed. On 16 May 2007 the appellant obtained legal advice and on 15 June 2007 filed a Notice of Motion seeking leave for judicial review.
 4. Order 53 Rule 3(1) of the High Court Rules provides that no application for judicial review shall be made unless the leave of the Court has been obtained within this rule.
 5. On 27 July 2007 Singh J gave Fiji Electric leave under Rule 53 Rule 3(1), finding that there was an arguable case. He gave leave notwithstanding the delay in bringing the leave application, holding that the issue of delay would be fully considered at the review hearing.
 6. The review hearing was heard by Singh J on 11 October 2007 and on 28 November 2007 he delivered his judgment in which he dismissed the application for judicial review because of the delay in making it. In the event that he was wrong in dismissing the application for delay he rejected Fiji Electric’s argument that the Tribunal had made an error of law. The application for judicial review was refused with costs.

7. Order 53 Rule 4 (1) of the High Court Rules provides that where the Court considers that there has been an undue delay in making an application for judicial review the Court may refuse to grant (a) leave for the making of the application or (b) any relief sought in the application.
8. An order pursuant to Rule 4(1) of the High Court Rules is discretionary.
9. An appellate court ought not to interfere with the exercise of a discretionary order by a trial judge unless it appears that some error has been made in exercising of the discretion and a substantial wrong has occurred: ***House v The King*** (1936) 55 CLR 499.
10. Fiji Electric submits that merit of the substantive issue is something the court must consider when exercising its discretion to give or refuse leave. Mr Sloan submitted with force, flair and considerable coherence that there are important issues of principle involved in these proceedings, including the doctrine of freedom to contract, and further says that there will be serious practical consequences if the decision of the Tribunal is not overturned.
11. In ***Vimal Construction & Joinery Works Ltd & Prakash v Vinod Patel & Co Ltd*** [2008] ABU0093 of 2006S at p15, and ***Woodstock Homes (Fiji) Ltd v Sashi Kant Rajesh*** [2008] ABU0081 of 2006 at p13 this Court held that leave to bring or maintain appeals or other applications out of time will not be given unless there are clear and cogent reasons for doing so. A contention as to incompetence of legal advisers will rarely be sufficient and merit of the appeal or proceeding, without more, will not justify an extension of time except where the delay was minimal and where no prejudice to the other party had been occasioned by the delay.

12. No error in the trial judge's exercise of his discretion has been demonstrated. The issue of delay can be considered at any substantive stage of judicial review proceedings: Harkissun Ltd v Singh ABU0019 of 1995. The trial judge considered a number of relevant matters, namely that Fiji Electric had been aware of the award since May 2006, that there would be obvious prejudice to the Union (or more particularly its members) if an order for review was granted after such a long delay, and the excuse for the delay offered by Fiji Electric, namely shortcomings of its solicitors.

13. These are proper matters to take into account. Moreover it can be inferred that the trial judge, in proceeding to consider and reject Fiji Electric's argument that the Tribunal had made an error of law, considered the merits of the judicial review application in the exercise of his discretion to refuse relief under Order 53 Rule 4(1)(b).

14. The trial judge's exercise of his discretion did not miscarry. The Union's log of claims had remained unresolved for three years. He was right to rely on the authority of R v Ashton University Senate; Ex parte: Roffey (1969) 2 Q.B. 538 at 555 where Donaldson J held:

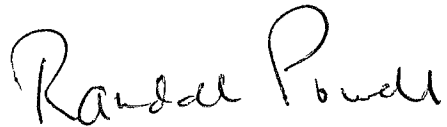
"The prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights."

15. The orders of the Court are:

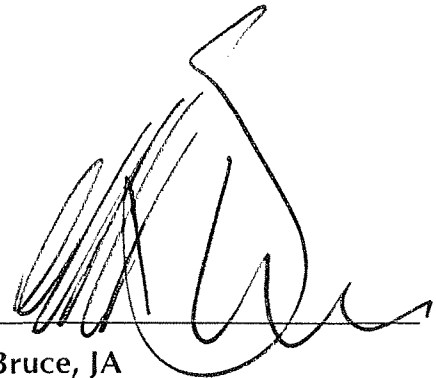
1. The appeal is dismissed.
2. The appellant is to pay the respondents' costs as taxed or otherwise agreed.



Pathik, JA



Powell, JA



Bruce, JA

Solicitors:

Siwatibau and Sloan, Suva for the Appellant
Office of the Attorney-Generals Chambers, Suva for the First Respondent
Kohli Singh, Suva for the Interested Party