IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 09 of 2023
[In the Employment Relations Court at Lautoka Appeal No. ERCA 09 of 2015)

BETWEEN	**:**	**PACIFIC DESTINATION**
		Appellant
AND	**:**	**TEVITA TIKOMAILEPANONI**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Morgan, JA** **Clark, JA**
Counsel	**:**	**Mr. C. B. Young for the Appellant** **Ms. M. Tuiloma and Ms. P. Mataika for Respondent**
Date of Hearing	**:**	**16 November 2023**
Date of Judgment	**:**	**30 November 2023**

JUDGMENT

Prematilaka, RJA

[1] This is an appeal against the judgment of the Employment Relations Court ('ERC') delivered on 17 February 2023 ('ERC judgment') where the ERC dismissed the appellant's appeal against the determination of the Employment Tribunal ('determination') dated 16 March 2015.

Sequence of events

[2] The respondent who was an employee of the appellant had filed a grievance against the appellant before the Employment Tribunal ('ET' or 'Chief Tribunal') in March 2012.

[3] Before the ET, the respondent and one witness from the appellant gave evidence on 13 and 17 August 2012 and both of them produced several exhibits. Thereafter, both parties filed their written submission in September 2012.

[4] The Employment Tribunal delivered its determination some two and half years later on 16 March 2015 and in its determination, the ET made the following orders:

> 1. *Under Section 230 (1)(b) of the Employment Relations Promulgation 2007 (ERP) the Tribunal Orders the reimbursement to Tevita of nine (9) months wages lost as a result of the grievance; the Tribunal calculates the wages from the date of the second suspension about 28 October, 2011 to the date of the hearing of the matter in the Tribunal which was on 17 August, 2012. A period of about nine (9) months and that includes the four (4) months of indefinite suspension.*
>
> 2. *The parties to bear their own costs.*

[5] The appellant filed an appeal in the Employment Relations Court (High Court) against the ET determination on 09 April 2015 on the following grounds:

> 1. *The learned Chief Tribunal erred in law when the Tribunal failed to render its decision on a matter referred to it without delay and, in any case, within 60 days from the date of the completion of the hearing on 28 October, 2012 and in so doing was in contravention of Section 171 of the Employment Relations Promulgation 2007.*
>
> 2. *The Chief Tribunal failed to give appropriate or proper weight to the fact that:*
>
> *(i) The Appellant was involved in the tourism industry;*
> *(ii) The Respondent had a history of breaches of the terms of his employment which included repeated acts of over speeding, not turning up to work to drive when he was in no proper condition either physically and or emotionally to do so;*
> *(iii) The Respondent has found alternative employment.*

[6] On 05 December 2016 by consent of the parties, the ERC ordered the appeal to be dealt with by way of written submissions. The appellant filed its submission on 31 March 2017. On 10 March 2017, the respondent's solicitor had sought further time to file his submissions and a further 21 days was given. However, neither the respondent in person nor his solicitor filed any submissions.

[7] The ERC judgment was delivered on 17 February 2023, more than 5 years and 10 months after the timetable was set for submissions to be filed by the respondent and in its judgment the ERC dismissed the appeal and made the following orders:

> *"(34) .... I order the employer to pay to the employee 9 month's lost wages within 21 days from now. The employer is to also pay 4% interest on the 9 months gross wages for 2 years as this is the period that it took for the appeal to be heard since the delivery of the judgment of the tribunal. The employer had not paid the compensation when ordered by the tribunal due to the pending appeal.*
>
> *(35) I further order the employer to pay costs of the sum of $5,000.00 to the employee within 21 days."*

[8] The appellant being dissatisfied with the judgment of the ERC, appealed to this court on 07 March 2023 on the following grounds of appeal:

> ***Ground One***
>
> *Judgment of the Employment Relations Court was perverse in that the Court took some five years to deliver the judgment.*
>
> ***Ground Two***
>
> *There was a miscarriage of justice in that the Employment Relations Court did not consider the written Submissions (hereafter of the Appellant filed on 31 January 2017 (more particularly paragraphs 2 to 3.10) which submissions included reference to case law which held that if the legislation provided for a time frame where the Tribunal decision was to be pronounced within 60 days (as provided for in section 171 of the Employment Relations Act) from the date of completion of hearing (as in the said submissions) held then that decision is to set aside.*

Ground Three

There was a miscarriage of justice when the Employment Relations Court did not give an opportunity to address the Court in regard to the reasoning set out in paragraph 16 of the Judgment which states:

> *"The difficulty however is that the Act does not state the consequence of a late judgment. Should it be set aside because of the delay? I do not think that is the intention of the legislature. If there is a judgment which has not been delivered within 60 days, then, unless some miscarriage of justice or prejudice which cannot be corrected can be shown, the judgment will not be set aside. If I were to set aside the judgment just because there was non-compliance of s. 171 of the ERA, the purpose of an early judgment will be lost. The matter will have to be sent back for re-trial and a lot more time will be consumed in finalizing the cause."*

When the reasonings were never put to the Appellant and was never raised by the Respondent (as the Respondent) had not filed any written submissions.

Ground Four

There was a miscarriage of justice when the Employment Relations Court did not consider the written submissions of the Appellant as referred to in paragraphs 4.9 to 5.7 therein

Ground Five

There was a miscarriage of justice when the Employment Relations Court awarded $5,000.00 cost to the Respondent when there was no oral hearing, the Respondent did not file any written submissions in opposition and the quantum was never put to the Appellant.

Ground Six

There was a miscarriage of justice when the Employment Relations Court failed and/or neglected to consider the written submissions of the Appellant set out at paragraphs 4.1 to 4.12 of the written submissions

Ground Seven

There was a miscarriage of justice when the Employment Relations Court proceeded to set out reasons for its conclusion as set out in paragraphs 18 to 31 when the reasoning were not raised by the Respondent in the appeal and fairness and justice imposed a judicial obligation on the Honourable Court to put the said reasoning to the Appellant and then consider the Appellant's response before delivering judgment.

[9] Mr. Young conceded at the commencement of the hearing that there was a constructive dismissal of the respondent by the appellant. It is common ground that the respondent was employed with effect from 09 June 2010 and was served with a letter of suspension

for a week on 21 October 2011 from work pending further instructions from the appellant's Managing Director upon his return. When the respondent reported for work after one week, no such further instructions were given and he was put on 'indefinite suspension' by asking him to be at home until called by the appellant at an appropriate time which never happened and it is this conduct on the part of the appellant that Mr. Young conceded as amounting to a constructive dismissal or termination of the respondent's employment. However, Mr. Young submitted that whether this constructive termination was justifiable or fair in the circumstances had to be addressed in as much as a mere finding of *'constructive dismissal'* does not mean a finding that the constructive dismissal is unfair or unjust. He contended that ET was still obligated to examine the circumstances to determine the justification or fairness of the dismissal albeit constructive.

02nd and 03rd grounds of appeal

[10] One of Mr. Young's main arguments is that the ET erred in law when it failed to render its decision on a matter referred to it without delay and, in any case, within 60 days from the date of completion of the hearing (assuming the completion of the hearing as 28 October 2012) and in so doing was in contravention of section 171 of the Employment Relations Promulgation 2007 and its determination should accordingly be set aside. According to him, substantial compliance is not sufficient but there must be absolute compliance with the requirement of 60-day period. The impugned determination of the ET is dated 16 March 2015 and clearly out of the 60 day period by over 02 ½ years stipulated in section 171. The 02nd and 03rd grounds of appeal broadly cover the issue raised by Mr Young and will be considered together.

[11] Section 171 states that the ET must make its decision on a matter referred to it without delay and, in any case, within 60 days from the date of the completion of the hearing. Mr. Young argues that this provision is mandatory but not directory for the following reasons:

(i) The use of the word "must" in section 171 makes the requirement to deliver a decision within 60 days as mandatory.

(ii) Reading the whole of section 171 and giving a reasonable application of the words "without delay", the only conclusion is that the section makes it clear that a decision must be made without delay and any date after the 60 days is considered a delay.

(iii) This requirement is there for the benefit of both the employer and the employee for the purposes of allowing both parties to know what the future holds for them respectively within a specified period.

(iv) The previous legislation in the form of the Trade Disputes Act Cap. 97) section 23 made provision for the Arbitration Tribunal to make its award *"without delay and in any case within 28 days from the date of reference thereto:"* but with the proviso that the Minister *"if in his opinion the circumstances of the case makes it necessary or desirable so to do, extend such period of 28 days or such further period as he thinks fit".* However, there is no equivalent proviso or similar equivalent in section 171 or generally in the Employment Relations Act 2007 for extension of time to deliver a decision.

[12] The appellant relies on **Hawkes Bay Hide Processors v Commissioner of Inland Revenue** (1990) 3 NZLR 313 at 314 where at 314 Justice Cooke said:

> *"The statute is unambiguous as to the time requirement. I can see no basis on which the Court could hold that the requirement is not mandatory. It does not seem to be legitimate to read into such provision any such words as "or within a reasonable time thereafter" and the doctrine of substantial compliance cannot apply to fixed time limit."*

[13] In ***Hawkes Bay***, section 43(6) of the Inland Revenue Department Act 1974 required an appellant to transmit a case on appeal to the Registrar of the High Court within 14 days after receipt by the appellant of the case from the Taxation Review Authority. The appellant filed the case stated in the High Court 34 days after receiving it from the Authority due to an advertence. The question was whether non-compliance with the time requirement was fatal to the pursuit by the appellant of its proposed appeal from the decision of the Authority.

[14] Richardson J. in ***Hawkes Bay*** said at 316:

> *Ascribing such labels as 'imperative', 'mandatory' and 'directory' to a statutory provision is not, of course, a substitute for "trying to get at the real intention of the legislature by 'carefully attending to the whole scope of the statute to be considered'" (Wybrow v Chief Electoral Officer [1980] 1 NZLR 147, 161). The true question is whether the legislature intended that language which is*

obligatory in form should have the effect of invalidating the non-complying act, or whether the act should nevertheless have legal effect. The question arises only because the legislation itself has not spelled out what the effect of non-observance is to be. The answer turns on an analysis of the language, scheme and purpose of the statute. That analysis often leads to discussion in the cases of the purpose of such a requirement, and the weighing of private rights and public interest. In the end, however, it is a matter of ascertaining what the legislation intends rather than developing or criticising judicial rationalisations for that legislative intention.

[15] What is important to understand here is that ***Hawkes Bay*** dealt with a situation where section 43(6) of the Inland Revenue Department Act 1974 cast an obligation or duty on the appellant (a party to the case) to transmit a case on appeal to the Registrar of the High Court within 14 days after receipt by the appellant of the case from the Taxation Review Authority and treated the time requirement as mandatory. Therefore, ***Hawkes Bay*** cannot be considered as an authority to the proposition that when a time requirement is cast on the decision making body (whether it is a court of law or tribunal) as opposed to a party invoking the jurisdiction, to pronounce its determination within a specified time period, the same principle would apply and any decision given outside the prescribed time is *ipso facto* null and void and has no force or avail in law. The cases relied on by the appellant are cases where the duty to comply with the time requirement or any specified particulars as in **Scurr v Brisbane City Council** [1973] 133 CLR 242 had been placed on the party in breach and not on the court or tribunal.

[16] The question is when a statute requires that something shall be done within a certain time, or done in a particular manner of form, without expressly declaring what shall be the consequences of non-compliance, is the requirement to be regarded as imperative (or mandatory) or merely as directory (or permissive)? An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially [see **Woodward v Sarsons** (1875) L.R. 10 C.P. 733 per Lord Coleridge C.J. at pa.746]. *'No universal rule'* said Lord Campbell L.C., *'can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by*

carefully attending to the whole scope of the statute to be construed' [see **Liverpool Borough Bank v. Turner** (1860) 2 De G.F. & J. 502, at pp. 507, 508].

[17] Lord Penzance in **Howard v Bodington** (1877) 2 PD 203, at p. 211 said:

> *'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.'*

[18] **Sutherland, *Statutory Construction*, third edn, vol III, p 77** states:

> *"The difference between mandatory and directory statutes is one of effect only. The question generally arises in a case involving a determination of rights as affected by the violation of, or omission to adhere to, statutory directions. This determination involves a decision of whether or not the violation or omission is such as to render invalid Acts or proceedings pursuant to the statute, or rights, powers, privileges or immunities claimed thereunder. If the violation or omission is invalidating, the statute is mandatory; if not, it is directory."*

[19] **Craies, *Statute Law*, fifth edn, p.60** puts the matter thus:

> *"When a statute is passed for the purpose of enabling something to be done and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called imperative or absolute, but those which are not essential, and may be disregarded without invalidating the thing to be done, are called directory."*

[20] There is ample authority that the mere use of the word 'must' or 'shall' in a statute does not necessarily denote a mandatory requirement. Regard must be had to the context, subject matter and object of the statutory provision in question in determining whether the same is mandatory or directory. Similarly it is well-settled that the use of the word 'may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word 'may' as a matter of pure conventional courtesy and yet intend a mandatory force (see **N S Bindra's Interpretation of Statutes 12th Edition at pp. 444, 446**).

[21] The words 'without delay' and 'in any case within 60 days' in section 171 of the Employment Relations Act, 2007 certainly emphasises the need to have a speedy disposal of employment related grievances. However, the legislature has not spelt out any penalty for the breach of this requirement or what the consequence would be in case of non-compliance. This is very significant, for the Parliament was introducing Employment Relations Act, 2007 which *inter alia* repealed the Trade Disputes Act where under section 23 Arbitration Tribunal also had to make its award 'without delay' and 'in any case within 28 days' extendable by the Minister.

[22] Even under section 23 of the Trade Disputes Act, there was no penalty or adverse consequence laid down for non-compliance with the prescribed time or the extended time period for making the award by the Arbitration Tribunal.

[23] If the Parliament intended to make the time requirement in section 171 of the Employment Relations Act, 2007 mandatory or absolute from which no deviation is permitted so as to make any determination made outside the allocated time period of 60 days a nullity, it had the opportunity of doing so in express words. Thus, it is clear that the legislature had deliberately refrained from doing so as it did not intend to make a determination by the ET null and void simply because it is not made within 60 days.

[24] As permitted in **Pepper and Hart** [1992] UKHL 3; (1993) 1 All ER 42; [1993] AC 593, no such legislative intention could be gathered from the speech of Minister of Labour and Industrial Relations during the first reading of the Employment Relations Bill 2006 in parliament either where he had said:

> *'Mr. Speaker, Sir, the Bill also establishes a separate adjudicating body, known as the Employment Relations Tribunal, to hear and determine employment matters in a speedy and sometimes non-adversarial way. The Tribunal will have the power to gather information, call evidence and investigate matters as they see fit, in order to understand the key issues in dispute, and make pragmatic determinations about them. It is intended that the Tribunal will make practical decisions with a minimum of detail, focussing on key issues and how to resolve them" (emphasis added)'*

[25] If this court were to interpret the time prescription in section 171 of the Employment Relations Act, 2007 as mandatory and set aside the ET determination for that reason alone, would it be to the benefit of both the employer and the employee? The answer is clearly 'no', for both parties would be left in limbo not knowing as to what the future holds for them in so far as the employer-employee relationship goes without having any determination on the employment grievance. It would force them to start the litigation all over again because the decision of this court would not involve merits of the dispute resulting in further delay which will negate the intention behind the provisions relating to the speedy resolution of employment disputes under Part 17 of the Employment Relations Act, 2007.

[26] Therefore, I am of the view that the time requirement in section 171 of the Employment Relations Act, 2007 is not mandatory but only directory and a determination made outside the 60-day period is not necessarily invalid in law so as to be set aside in appeal. I further hold that substantial compliance with section 171 of the Employment Relations Act, 2007 is sufficient unless the delay *per se* has caused a substantial miscarriage of justice which cannot be rectified without a retrial.

[27] In **Gardiner Fire Limited v. Jones** [1998] 10 WLUK 319 (20 October 1998) CA, a case in which there had been delay of 22 months between the end of the hearing and delivery of judgment, Lord Woolf MR pointed out that it was part of the responsibility of the court *'to try, so far as practicable, to ensure that no greater injustice occurs in consequence of what happened other than that which is inevitable'*.

[28] In the circumstances, I would agree with the following conclusion by the ERC on the consequence of non-compliance with section 171 of the Employment Relations Act, 2007.

> *'[16] The difficulty however is that the Act does not state the consequence of a late judgment. Should it be set aside because of the delay? I do not think that that is the intention of the legislature. If there is a judgement which has not been delivered within the 60 days period, then, unless some miscarriage of justice or prejudice which cannot be corrected can be shown, the judgment will not be set aside. If I were to set aside the judgment just because there was*

non-compliance of s.171 of the ERA, the purpose of an early judgment will be lost. The matter will have to be sent back for re-trial and a lot more time will be consumed in finalizing the cause.'

[29] The appellant also challenges the ET determination on the premise that in any event the ET would not have been in a position to recollect the proceedings after a lapse of more than 02 years and therefore, by logical extension its findings are flawed. Mr. Young relies on **Campbell v. Hamlet** (2005) 3 All ER 1116 and **Goose v. Wilson Sandford & Co.** (1998) TLR 85 at p. 1124 **(*Goose v, Wilson Sandford & Co., The Times, 19th January, 1998)*** in support of his contention.

[30] In ***Campbell,*** in February 1987 a complaint of professional misconduct was made against the appellant, an attorney-at -law to the Attorneys at Law Disciplinary Committee (the Committee). The hearing lasted for eleven days stretching over a ten month period ending on 06 December 1988 when there was a final adjournment for attorneys' addresses. When these were made is not known but, it was not until 29 October 1996 that the Committee produced its Findings and Orders. The Committee found the allegation of professional misconduct substantiated and ordered the appellant to pay the respondent, Hamlet, compensation of $29,400 together with interest and costs. His appeal to the Court of Appeal was dismissed and he appealed to the Privy Council *inter alia* that the 08 year delay in the delivery of the Committee's judgment was manifestly unfair and had adversely affected the quality of the judgment. The Privy Council held that for the Committee to have delayed 08 years in giving judgment was highly reprehensible and unforgivable but it did not follow that that appellant was in any way prejudiced by the delay nor did it afford him any sustainable ground of appeal, for the Committee's ability to decide the case had not been compromised by the delay; it had full transcript of all the evidence and it had been well able to provide a reasoned decision in reliance upon them.

[31] However, the Privy Council agreed that there are cases where the delay adversely affect the determination and cited ***Goose*** as one such case. Mr. Goose argued that it should be inferred that the trial judge had forgotten large parts of the essential facts and evidence and that he had no clear recollection or impression of the demeanour of witnesses of fact or their credibility by the time he came to deliver judgment 20 months after the hearing where opening submissions lasted two days, the trial took over a month, the evidence

took 17 days and closing submissions lasted eight days. The Court of Appeal, having described the case as 'complex', referred to the trial judge having mislaid detailed chronology and manuscript notes he had made and written closing submissions of counsel some of which were made available later but not the judge's notes. The Court criticised the trial judge's tardiness in completing the judicial task by postponing the delivery of the judgment several times despite requests from Mr. Goose's solicitors. The Court of Appeal decided that the huge delay had weakened the trial judge's advantage of having seen and heard the witnesses and effects the witnesses made on him when they gave evidence on disputed matters and took the 'exceptional course' of allowing the appeal on the ground that substantial miscarriage of justice would be occasioned without a retrial.

[32] Lord Carswell in **Boodhoo v A-G of Trinidad and Tobago** [2004] UKPC 17 at [11], [2004] 5 LRC 483 at [11], [2004] 1 WLR 1689 said that ***Goose's*** case provides an example of where:

> *'"Delay may have so adversely affected the quality of the decision that it cannot be allowed to stand. It may be established that the judge's ability to deal properly with the issues has been compromised by the passage of time, for example, if his recollection of important matters is no longer sufficiently clear or notes have been misled."*

However, Lord Carswell referred to cases such as ***Goose's*** as extreme cases ordinarily associated with inordinate long periods of delay.

[33] It is clear to me from the reading of the ET determination that the Chief Tribunal had set out in detail the narratives of both parties to the hearing though the oral evidence recorded on 13 and 17 August 2012 had been brief in contents. Obviously, the Chief Tribunal must have made contemporaneous notes of the evidence of the respondent and the appellant's witness and relied on them to prepare the determination supported by the exhibits. The brief recorded versions must have been only supplemental of such notes, for they are devoid of many details of each account referred to in the determination. From a careful reading of the determination, I do not find that the Chief Tribunal has had any difficulty in recounting the evidence presented by both parties and analysing them before concluding that the indefinite suspension and then the alleged termination of

employment was unfair. Given the issues involved, I do not think that the Chief Tribunal had any special advantage of having seen and heard the witnesses and effects they made on him when they gave evidence on disputed matters. Demeanour of the witnesses would have played a minimal part, if at all, in the issues before the ET and the appellant does not argue that it was not the case.

[34] **Cobham v. Frett** [2001] 1 WLR 1775 at page 1783, Lord Scott said that, if excessive delay is to be relied on in attacking a judgment:

> *'a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant'*, but that *'[i]t can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party'*.

[35] United Kingdom Employment Appeal Tribunal said in **Kwamin v Abbey National plc EAT** [2004] UKEAT 0564_03_0203 (2 March 2004) said that delay does not necessarily lead to rehearing (that in itself is bound to compound the delay and injustice) and the test is whether decision (or part of it) rendered unsafe by delay. Unsafeness must be established on a balance of probabilities. UKEAT added:

> *'In **Chinyanga v Buffer Bear Ltd** 8 May 2003 EAT unreported (EAT/0300/02), after concluding (at paragraph 39), in a passage with which we entirely agree, that "the question is whether the delay made the decision unsafe"....*
>
> *Each case must depend upon its own facts, and the unsafeness of the judgment must be considered against the background of the delay……*
>
> *....it is primarily important to state that we do not agree that there is any period of delay as a consequence of which the presumption, or even the result, is one automatically of setting aside. As we have indicated, an automatic setting aside of a judgment, which is not otherwise found to be unsafe, is simply an inapposite sanction on the parties, when the sanction and criticism ought rather to be on the Tribunal, or sometimes the administration lying behind the Tribunal, whose responsibility it would have been, and the concentration of the appeal court must always be on the consequence of the delay, to which we now turn. The aim must be to attempt to avoid injustice to either party (see **Poundall v Lincolnshire County Council** 9 February 1998*

CA per Peter Gibson LJ and ***Keith Davy (Crantock) v Ibatex Ltd*** *[2001] EWCA Civ. 740 at paragraph 31 per Tuckey LJ).*

The Appellant will need to invite the appellate court to examine the delayed judgment for any sign of error due to faulty recollection. The party impugning a judgment will need to show a material error or omission (if only one, then it would need to be the more significant) or a series of material errors or omission…….material in the sense that, taken separately or together, it or they show a real risk that there has been a failure of recollection, so as to establish that the decision is unsafe by virtue of the delay'.

[36] **Bond v. Dunster Properties Ltd** [2011] EWCA Civ 455, there was 22 months delay. Arden LJ emphasized once again that delay, by itself, is not a ground for allowing an appeal.

[37] Therefore, I do not think that the delay of 02 years has adversely affected the quality of the determination by the ET or the Chief Tribunal's ability to deal properly with the issues, which were not complex at all, has been compromised by the passage of time. Chief Tribunal seems to have had in its possession detailed notes of all the evidence and therefore it had been in a position to deliver a reasoned decision in reliance upon them in conjunction with several exhibits. I see no real risk, nor has the appellant established on a balance of probability that the delay has made the ET determination unsafe or it had caused unfairness and injustice to the appellant. If at all, the delay has been unfair to the respondent and caused injustice to him, for he was the aggrieved party by the indefinite suspension of his employment by the appellant.

[38] As in the appeal before the Privy Council in ***Campbell***, the appellant had not complained to the High Court about the general delay in delivering the determination by the ET (other than the challenge on technical non-compliance with section 171) in that the delay alone had deprived the ET of or compromised its ability to deliver a fair determination. To that extent, the appellant is taking it up for the first time now.

[39] Therefore, in my view, though the unexplained delay of 02 years is unacceptable that alone is not a sustainable ground to assail the ET determination.

01st ground of appeal

[40] Similar to the complaint on the delay of 02 years in the ET determination, the appellant criticises, I think rightly, the delay of some 05 years by the Employment Relations Court in delivering its judgment. In the absence of any explanation in the judgment as to what caused this unprecedented delay, as the Privy Council said in ***Campbell***, it is highly reprehensible, unforgivable and unconscionable. I cannot say that the issues before the ERC did involve maters of extreme complexity either.

[41] Having said that, once again the vital question is whether that delay alone will invalidate the High Court judgment. I have already dealt with this matter under the 03rd ground of appeal to a great extent and no repetition is attempted here of the same discussion.

[42] In my view, the principles relating to the consequence of delay in delivering a judgment is less significant when it comes to an appellate judgment as opposed to a judgment by a trial court which heard the evidence. The appellant argues that the High Court judge's ability of the ERC to deal with the issues properly had been compromised by the delay of some 05 years.

[43] **Boodhoo et Al v Attorney General** Criminal Appeal No. 102 of 1999 TT 2001 CA 71 (14 December 2001) was a case of delay by an appellate court in delivering judgment. The question raised was whether a delay of 14 months by the Court of Appeal in giving judgment against a decision of the High Court constituted a breach of the appellants' constitutional rights. De la Bastide, C.J. in the Court of Appeal (Trinidad and Tobago) drew a distinction between cases where delay by a trial judge in delivering judgment is relied on for the purpose of attacking the judgment and delay by an appellate court in delivering judgment. His Lordship said that the objection that quality of the judgement is suspect because it was given so long after the trial derives much of its force from the fact that the impression which a witness makes on a judge by his manner and demeanour is an important element in the fact-finding exercise which the trial judge must perform. However, De la Bastide, C.J. said that:

> *'3. ……The complaint therefore loses much of its force if made with respect to delay by an appellate court in delivering judgment since such a court*

does not ordinarily find facts or take evidence, and in the case of our Court of Appeal, has available to it a verbatim record of counsel's oral submissions as well as their skeleton arguments……'

[44] Lord Carswell in the Privy Council in ***Boodhoo v A-G of Trinidad and Tobago*** (supra) said that it being an appeal, the judge's decision did not depend on oral evidence or the recollection of witnesses' testimony, and there was no suggestion that any documentation had been lost or mislaid and accordingly did not uphold the ground of appeal based on delay in the delivery of the appellate judgment. Therefore, when it comes to an appellate judgment, the relevance of ***Goose*** is minimal and the threshold in ***Boodhoo v A-G of Trinidad and Tobago*** must necessarily be significantly lower.

[45] I am in full agreement with the sentiments expressed by Lord Carswell in the Privy Council in ***Boodhoo v A-G of Trinidad and Tobago*** (supra) that:

'1. The law's delays have been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely affected by delay in dealing with the cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard……..'

[46] Long delays in delivering judgment can cause concern and suspicion amongst litigants who lose - and those who win may feel they have been deprived of justice for too long. Long delays should not occur unless there are compelling reasons and, if there are such, it would be prudent of a judge to refer to them briefly[1].

[47] There has been said to be a common law duty to give judgment very soon after a decision has been pronounced - **Palmer v Clarke** (1989) 19 NSWLR 158 at 173 and in Fiji every party to a civil dispute has a constitutional right to have the case determined within a reasonable time [vide section 15(3) of the Constitution of the Republic of Fiji].

[1] see **Rolled Steel v British Steel** [1986] Ch 246 at 310; [1985] 2 WLR 908 at 960; [1985] 3 All ER 52 at 96 (8 months); **Goose v Wilson Sandford** [1998] EWCA Civ 245 at [112] – [113] (20 months); **Cobham v Frett** [2002] UKPC 49 at [34]; [2001] 1 WLR 1775 at 1783 (12 months).

[48] While I express strong disapproval of unreasonable delays by judges in giving judgment after trial and upon hearing an appeal and would stress the importance of appellate courts as well as trial judges giving their judgments promptly, having examined the ERC judgment in this appeal, I do not think that the ERC judge's ability to decide the appeal in this case had been compromised due to the delay or delay has adversely affected the quality of the appellate judgment so as to result in a miscarriage of justice. The ERC had dealt with the all the issues raised before it by the appellant in a coherent and methodical manner in the relevant and applicable factual and legal context and unambiguous findings had been made with regard to them. The concise nature of the judgment and absence of references to the legal authorities cited by the appellant does not mean that the ERC judge had been oblivious to those or acted in breach of the obligation of a judge to deal with counsel's arguments as highlighted by Justice Handley in **Wrigley v Holland** [2002] NSWCA 109 at para. 16 and 17. Although a judge has a duty to the parties to at least refer to the arguments of counsel on any relevant question and to say why he rejects those arguments, he need not give detailed reasons for this unless the facts require it [see **Airports Fiji Ltd v Permanent Secretary for Labour, Industrial Relations & Productivity** [2009] FJCA 61; ABU0070.2007 (7 July 2009)].

Fourth and sixth ground of appeal

[49] Having stated that the ERC failed to consider the appellant's written submissions, the counsel for the appellant has submitted that the ET also neglected to consider whether there was a:

(i) Constructive dismissal in the circumstances;
(ii) Whether it was fair or just;
(iii) If it was found to be unfair or unjust then what was the appropriate compensation in view of the fact that the respondent had found employment in December 2011 some 4 to 5 weeks after his suspension.

Whether there was a constructive dismissal in the circumstances

[50] Mr. Young has cited **Barton Ltd v Disputes Committee** [2016] FJHC 2; HBJ007.2001 (4 January 2016) in support of his contention. However, ***Barton Ltd*** was a judicial review application on jurisdiction of the Disputes Committee to hear the case and

whether it acted on wrong terms of reference and whether there was procedural impropriety in hearing the case. It is in this context that the High Court said:

> *30. When the parties had two different positions on whether there was constructive dismissal or voluntary resignation, the DC ought to have made findings of fact. In order to do that a right of hearing by allowing witnesses to be produced and examined ought to have been granted to the parties. That right on the material before me was not afforded to the parties and thus due process of hearing both sides before arriving at the facts was not afforded. There was therefore procedural irregularity in arriving at the decision that the DC did.*

[51] In this case, the appellant's position at the ET was that the respondent was suspended for a week on 21 October 2011 pending further decision by its MD and after one week when the respondent came back to work, he was informed that the suspension had been extended indefinitely forcing the respondent to wait at home for 04 months waiting to be called back or terminated. There was no express termination of his employment at all though its 'intention' was to terminate if no genuine remorse was shown. Even in its closing submissions at the ET the appellant maintained that *'this is clearly not case of dismissal….'*. Though the appellant did not do so before the ET, Mr. Young conceded at the hearing that the indefinite suspension in fact amounted to a constructive dismissal. The ET came to the same conclusion having evaluated and analyzed the material before it. Suspension for the remainder of the employee's position as the Head of School in effect, was found to be tantamount to dismissal (see **Moshirian v University of New South Wales** [2002] FCA 179 at [219], [222]-[223]. In **Avenia v Railway & Transport Health Fund Ltd** [2017] FCA 859 (4 August 2017) the Federal Court of Australia held that indefinite suspension was a breach of contract and unlawful.

Whether the constructive dismissal was fair or just?

[52] Thus, the burden of showing the ET that constructive dismissal was just and fair fell on the appellant. **Spillane v Commonwealth Bank of Australia** [2002] QSC 367 para. 64 & 65 the Supreme Court said:

> *'[65] The onus is on the employer to establish that the circumstances are sufficiently serious to justify summary dismissal. If, contrary to my view, the circumstances were such as could be*

> *characterised as a constructive dismissal, then the bank has satisfied the onus of showing that summary dismissal was open to it in these circumstances."*

[53] Despite claiming (at the point of indefinite suspension) that the respondent's conduct was unacceptable, unbecoming and his demeanour had resulted in wasting company resources and therefore justified summary dismissal, the appellant never ventured to do so. The suspension dated 21 October 2021 did not have any hint of an intention to terminate the respondent's employment but it implored the respondent to take heed of the matters therein and make an effort to improve his behaviour and attitude towards work and workplace. The appellant gave no justification for a further suspension leave aside an indefinite suspension after the initial suspension for a week. Neither was there any assertion by the appellant that the respondent had failed to show genuine remorse after the initial suspension. Ms. Emele Tuilagivou, appellant's Human Resources Coordinator had stated in her evidence before the ET that the intention of the management in suspending the respondent was to teach him a lesson for absence from and being late for work and he was terminated (there was no formal termination at any stage) for reporting the grievance to the Ministry of Employment.

[54] The ET has fully ventilated the respective positions of the parties as borne out by oral and documentary evidence along with the applicable legal concepts and determined that the indefinite suspension (neither suspension nor indefinite suspension is recognised under the Employment Relations Act or the respondent's written contract of employment), which meant that the respondent could not look for work whilst being unemployed, or 'termination' was unfair and unjustified.

[55] The ERC has also fully discussed in its judgment and given its mind to the central issue whether the indefinite suspension was unfair and unjustified at paragraphs 9, 10, 18-31. I see no evidence to safely assume that the matters mentioned in the suspension letter dated 21 October 2021 were considered by the appellant to be serious enough to effect a summary dismissal, for if that be the case the appellant should have done so in the first instance itself. In my view, the appellant's actions militates against such a hypothesis and its assertion in evidence that the respondent's previous conduct and demeanour justified summary dismissal was an afterthought and appears to have been put forward merely as

part of the defence strategy at the ET to resist the respondent's claim. The 'intention', according to the appellant, was to terminate if no genuine remorse was shown even after the initial suspension. The appellant specifically wanted the respondent to take heed of the matters mention in the letter of suspension and make an effort to improve his behaviour and attitude towards work and workplace but he was not given a chance to do so after he came back to work. If the appellant thought that it was effectively terminating the respondent's employment after the initial suspension, it should have followed the relevant provisions in the ERA to bring the contract of employment to an end with ensuing legal consequences for both parties.

[56] Having examined the reasons adduced both by the ET and the ERC in coming to the conclusion that indefinite suspension or subsequent alleged 'termination' without a termination letter was indeed unjust and unfair, I have no reason to take a view different to those of the ET and the ERC.

The award of 09 months' wages as compensation

[57] The appellant challenges the award of compensation made by the ET and affirmed by the ERC on the premise that the respondent was under an obligation to mitigate his damages by finding alternative employment and he did that. The basis for this submission is the respondent's evidence that a friend had given him a taxi in December, 2011 and he was driving it in the second and last week and earned $200 per week.

[58] The ET in its determination had not elaborated this aspect of the respondent's evidence but seems to have considered that the respondent was unemployed since the indefinite suspension on 28 October 2011 till 17 August 2012 (the last day of inquiry). However, the respondent's evidence was that from the initial suspension on 21 October 2011, he was not paid. Thus, the period of unemployment would have been 10 months short of one week. However, the ET awarded compensation amounting to 09 months' salary out of which 04 months were the indefinite period of suspension. ET seems to have ignored the month of December 2011 in the calculation for obvious reasons.

[59] I do not find from the evidence that the respondent had been contradicted on his period of unemployment, in particular there is nothing to even remotely suggest that from December 2011 he may have been continuously driving a taxi earning $200 per week as submitted by the appellant before this court. The closing submissions filed by the appellant before the ET does not advocate such a proposition either. I have no reason to doubt the credibility and reliability of the ET's conclusion that barring a brief period in December 2011, the respondent was unemployed. Therefore, I am not inclined to hold as urged by the appellant that the compensation should have been limited to 02 months and 09 days (i.e. from 21 September2011 to the beginning of December 2011). In any event, during the period of 04 months of indefinite suspension, the respondent was not in a position to look for any permanent employment except for casual means of some income such as driving a taxi. It is not only whether the employee mitigated his loss but also the employer's conduct particularly whether it assisted or hindered the employee in mitigating his loss that are among several relevant factors needed to be considered in granting the remedy for summary dismissal [see **Automart Ltd v Rokotuinasau** [2013] FJHC 230; ERCA 09.2012 (26 April 2013) – which, in my view, should be applicable to constructive dismissal as well]. The fact that the respondent had disclosed honestly that he earned $200 per week by driving a taxi in December 2011 should not be held or interpreted against him to conclude that therefore since December 2011 he must have been engaged in that employment as a matter of routine. His evidence only goes to show that he had attempted to mitigate the hardship by trying to find some method of earning an income which had been duly accounted for by the ET in not awarding compensation for 10 months.

[60] The ERC has earnestly given its mind to this matter and concluded that the respondent had driven the taxi for one month. I am not inclined to disturb findings of fact by the ET that heard the evidence and affirmed by the court of first appeal simply based on an argument seeking to give an overwrought interpretation of respondent's evidence. The ERC has stated:

> *32. The award of 9 month's wages is justified. The employee was out of work from 21 October 2011. He drove taxi in December 2011. There was no evidence that the worker found permanent work. His friend had assisted him*

and gave him a taxi to drive, however, he needs to be compensated for being out of work for the period he did not work.

33. *The matter was heard in August 2012. The employee was out of work for 10 months until the date of hearing. Since he drove taxi for one month, he was not given compensation for that month. The loss of income until the date of hearing is for 9 months and the award is justified under s. 230 of the ERA which allows for compensation for part or full loss of wages as a result of the grievance.*

[61] Accordingly, the ERC had directed the appellant to pay to the respondent 09 month's lost wages within 21 days with 04% interest on the 09 months gross wages for 02 years taken for the appeal to be heard by the ERC since the delivery of the judgment of the ET (the appellant had not paid the compensation ordered by the ET due to the pending appeal).

Fifth ground of appeal

[62] The appellant's complaint is regarding the costs of $5000.00 cast on the appellant by the ERC judge. As far as costs are concerned, there is just a single paragraph in the judgment to the effect that *'I further order the employer to pay costs of the sum of $5,000 to the employee within 21 days'.*

[63] Order 62 Rule 3(3), 3(6) and 8(3) of the High Court Rules 1988 read together permit the High Court to award costs. The respondent was entitled to costs upon the dismissal of the appeal. However, the appellant raised one important question of law before the ERC as it has done before this court as to whether the time requirement in section 171 of the Employment Relations Act was mandatory or directory. There does not appear to have been any binding precedent on this matter in Fiji other than judgments of persuasive value in foreign jurisdictions. Therefore, the appellant cannot be penalised for taking up the matter of interpretation of section 171 in the ERC and now in this court even if other grounds of appeal were unmeritorious.

[64] In **New Zealand Pacific Training Centre Ltd v Training & Productivity Authority of Fiji** [2011] FJSC 3; CBV0016.2008 (8 April 2011) the Supreme Court said that the principles of reasonableness and principles of natural justice should be observed when awarding higher costs in favour of the respondent and expressed the view that there is no

justification to impose higher costs on the unsuccessful petition without giving reasons based on principles of reasonableness and fairness.

[65] The ERC has not given any reasons as to why it decided to award $5000 as cost against the appellant, particularly when the ET had delayed its determination by more than 02 years and the ERC has delayed its judgment by more than 05 years, none of which could be attributed to the appellant.

[66] The respondent has conceded that the order of costs cannot stand as it was unreasonable and unfair. Accordingly, I am inclined to set aside the order of cost issued by the High Court.

07th ground of appeal

[67] The appellant argues that there was a miscarriage of justice when the Employment Relations Court proceeded to set out reasons for its conclusion in paragraphs 18 to 31 when such reasoning was not raised by the respondent in the appeal and fairness and justice imposed a judicial obligation on the ERC to put the said reasoning to the appellant and then consider the appellant's response before delivering judgment. It is also alleged that the manner in which the judge had arrived at the conclusion indicates that the ERC judge had entered into the arena of litigation as an advocate.

[68] Lord Brown's statement in the Privy Council in **Michel v The Queen** [2009] UKPC 41 at para 31 that the core principle that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials, is not directly relevant here as I do not see any attempt by the ERC to play the role of an advocate *in the appeal* before it. In ***Michel*** with reference to the trial it was acknowledged by counsel that the Commissioner's interventions *at the trial* were both excessive and inappropriate and Lord Brown's comments were made in that context and the arguments were confined to the question whether the Court of Appeal was nevertheless entitled to conclude that these interventions did not result in the trial being unfair.

[69] In this case, the evidence led in the ET was already there before the ERC. Similarly, I do not think that there has been any breach of the principle expressed in **Wrigley v Holland** [2002] NSWCA 109 by Justice Handley at para. 16 and 17 where the High Court ordered a new trial because there had been a denial of natural justice affecting the entitlement of a party to make submissions on an issue of fact. Both parties in this mater had agreed to have a judgment on written submissions alone.

[70] *'At the root of procedural fairness is the provision of a fair hearing to a litigant and the basal notion that the litigant has understood the proceedings before him or her and has had an adequate opportunity given to him or her….. Analogies of the rules of the game and how the game is played may be helpful at one level, but ultimately each circumstance has to be analyzed and evaluated to see whether, in a human context, a fair hearing has been provided'* [see **Jeray v Blue Mountains City Council (No 2)** [2010] NSWCA 367 (10 December 2010) at paragraph 6].

[71] The appellant had made the same submission before the ERC that was made in this court on the question whether the indefinite suspension or the alleged termination was unjust or unfair. It is this issue that the ERC judge had addressed at paragraphs 18-31 of the judgment where detailed reasons had been given for the conclusion reached. The ERC was entitled to draw necessary inferences from the applicable law and facts placed before it by both parties and justify them by logical reasoning. The ERC judge's reasoning are not referable any material outside what the parties had submitted to court and such reasoning and conclusions need not be once again canvassed with the parties prior to delivering the judgment. I do not see any breach of procedural fairness to the appellant and the ERC has provided a fair hearing to the appellant.

Morgan, JA

[72] I concur with the reasoning and conclusions of the judgment of Prematilaka, RJA

Clark, JA

[73] I concur in the judgment and the orders made.

Orders of the Court:

1. The appeal is partly allowed to the extent that the order of costs for $5,000 awarded by the Employment Relations Court against the appellant is set aside.

2. Subject to the above, the Judgment of the Employment Relations Court and the Determination of the Employment Tribunal are affirmed.

3. The appellant is directed to pay to the respondent 09 months' lost gross wages with 04% interest on the said wages for 02 years, within 21 days hereof.

4. Parties to bear their own costs.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice W. Morgan
JUSTICE OF APPEAL

.....
Hon. Madam Justice K. Clark
JUSTICE OF APPEAL

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