

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 16 OF 2011

BETWEEN: LATEEF & LATEEF LAWYERS
APPLICANT

AND: ROBERTA TAYLOR MOSESE
RESPONDENT

Appearances: Ms. B. Narayan for the Applicant.

Ms. L. Ratumaitavuki for the Respondent.

Date /Place of Judgment: Wednesday 17 April 2013 at Suva.

Coram: The Hon. Justice Anjala Wati.

JUDGMENT

CATCHWORDS:

LEAVE TO APPEAL OUT OF TIME-LENGTH OF DELAY-REASONS FOR DELAY: IS IT SUFFICIENT-NATURE OF THE GROUNDS OF APPEAL: IS IT ARGUABLE- DEGREE OF PREJUDICE TO THE RESPONDENT IF LEAVE IS GRANTED- APPEAL AS OF RIGHT vs DISCRETION OF COURT.

LEGISLATION:

THE EMPLOYMENT RELATIONS PROMULGATION 2007 ("ERP").

CASES:

Ist Deo Maharaj v. Burns Philip (South Sea) Company Ltd. (unreported) Court of Appeal of Fiji Islands Civil Appeal No. ABU 0051 of 1994S.

Norwich and Peterborough Building Society v. Steed (1991) 2 All ER 880.

In Avery v. Public Service Appeal Board (No.2) (1973) 2 NZLR 86.

Gatti v. Shoosmith (1939) 3 ALL ER 916.

The Cause

1. The applicant seeks an extension of time to file its notice of appeal against the decision of the Employment Relations Tribunal (“ERT”) of 29 June 2011. The application was filed on 4 August 2011.
2. Under s. 242(2) of the ERP a party has 28 days to appeal from the decision of the ERT.
3. The applicant in essence is 7 days out of time.

The Grounds/Submissions in Support

4. Ms. Narayan stated that she is only 7 days out of time and this is not an inordinate delay. There is, she argues, sufficient explanation for the delay.
5. She explained that the file in this case was in the carriage of her former associate Ms. Emily King. Ms. King handled the matter in the ERT. She resigned from the firm towards end of 2010. The hearing in the case was conducted in February 2010. Closing submissions were filed on 2 March 2010 and a decision pending since then. The decision was not delivered in the Tribunal but collected over the counter from the ERT on 4 July 2011 after the firm received a call from ERT to collect the decision. Since then they had been trying to locate the file and managed to find it but by which time the period for filing the appeal had lapsed.
6. Ms. Narayan further argued that the appeal raised important questions of fact and law and has reasonable prospects of success and the employer should be given an opportunity to argue those grounds. Ms. Narayan stated that the only grievance alleged by the grievor was that she was forcefully told to resign by the employer when she was three months pregnant and she believed that was the reason for the termination. The ERT made a finding of fact that the reason for her termination was due to poor performance of her work and not as a result of her pregnancy. The ERT should have then held which it failed to, that the employer had discharged its burden under s. 104(2) of the ERP. S. 104(1) of the ERP prohibits a woman from being terminated on the grounds of pregnancy. S. 104(2) states that *“where a termination occurs while a woman is pregnant, the burden of disproving that the termination was related to that condition*

rests with the employer." Ms. Narayan argued that in light of this no compensation should have been awarded.

7. Ms. Narayan also stated that the ERT found that the employee had made a lot of mistakes and her performance deteriorated which was really damaging to the nature of work that the employer carries. The ERT then erred in law and in fact in holding that the employer did nothing to take any remedial action and that it was an omission on the part of the employer not to have put the employee through a performance management process over a six month period when there was no agreement of any such requirement in relation to this or any such complaint made by the employee. The employer was entitled to summarily dismiss the employee for her incompetence. The ERT should have found that as a matter of law.
8. Ms. Narayan also argued that the ERT stated in paragraph 10 of its judgment that according to the ERT the employee believed that the employer was concerned over her performance which was due to her pregnancy and its associated illness. This is contrary to its own finding that the resignation had nothing to do with her pregnancy but that she was terminated due to her poor performance. The ERT also should not have found what the employee perceived was the cause of her termination because that perception would not stand in light of the fact that the employee has twice fallen pregnant during the course of her employment and kept at work.
9. Ms. Narayan further contended that the ERT should not have found that the employer had breached the implied terms of the contract to maintain the relationship of trust between itself and its employees, or not to treat its employees arbitrarily, capriciously or inequitably or not to behave intolerably and not in accordance with good and accepted practice based on the exchange of good faith when the employee failed to substantiate any act of bad faith or breach of trust by employer. It was in fact the employee who breached the trust of the employer by habitually and substantially neglecting her duties.
10. It was contended that the ERT also assessed compensation for humiliation and injury to feeling when there was no such claim and evidence by the employee.
11. Ms. Narayan also argued that there will not be any prejudice if extension of time was granted.

The Grounds/Submissions in Response

12. Ms. Ratumaitavuki argued that the decision of the ERT was fair and just. The applicant is learned in law and it has no excuse for filing the appeal late. The employee is not able to enjoy the fruits of her judgment. There is therefore an inordinate delay and no meritorious grounds of appeal have been raised. The excuse that the file was missing is not a sufficient explanation.

The Law and Analysis

13. It is well settled law that once the rules are not followed it is the discretion of the court to grant leave to appeal out of time and that the onus rests upon the appellant to satisfy the Court that in all circumstances the justice of the case requires that he be given an opportunity to appeal out of time against the judgment he wishes to appeal.

14. In *Ist Deo Maharaj v. Burns Philip (South Sea) Company Ltd.(unreported) Court of Appeal of Fiji Islands Civil Appeal No. ABU 0051 of 1994S* citing the judgment of *Norwich and Peterborough Building Society v. Steed (1991) 2 All ER 880 CA* it was said:

“The court has unfettered discretion in the grant or refusal of leave. The factors which are normally taken into account in deciding whether to grant an extension of time are:

(a) The length of the delay;

(b) The reasons for the delay;

(c) The chances of succeeding if time for appealing is extended; and

(d) The degree of prejudice to the Respondent if the application is granted.”

15. In *Avery v. Public Service Appeal Board (No.2) (1973) 2 NZLR 86* it was said:

“Everything is left to the discretion of the court on wide basis that leave may be granted in such cases as justice of the case may require. In order to determine the justice of any particular case the court should I think have regard to the whole history of the matter, including the conduct of the parties.”

16. The delay is for 7 days. The reason is the missing file which was previously handled by another lawyer who had resigned from the firm. The decision in the case was pending for a year and the file was definitely in abeyance. No one paid attention to it as from the lawyer’s side, their task was complete. Whilst I can say that when the judgment was received the appeal could have been filed without reference to the file to avoid delay and a search for the file could have been made later, it may not have been practical to take that step as all the evidence and pleadings needs to be perused before an appeal was lodged.
17. It is also arguable that the firm was involved as the applicant and particular attention should have been paid but it is also true that the firm of lawyers may be treating unfinished files as more in the need for attention than this as I have already said the task for lawyers was just to wait for judgment in the case.
18. On this aspect in *Gatti v. Shoosmith (1939) 3 ALL ER 916 at 917* Sir Wilfrid Greene, M.R. said:

“Under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say “may be,” because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.

The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised."

19. I find that on the facts of the case the reasons are excusable.
20. I find that the grounds of appeal pose questions of law and fact which are arguable. I need not say more than that.
21. As to the question of prejudice, if the appeal was filed on time the employee would have to wait for an appeal verdict. There would have been a delay any way. I do not think that 7 days delay will work much difference to her.
22. The applicant had also asked for a stay of execution of judgment. Neither party referred to this matter in any sensible way in the affidavit or the submissions. I therefore do not have the legal or factual basis to deal with the issue.

The Final Orders

23. The applicant is given extension of time to file its appeal. The appeal must be filed and served within 14 days.
24. The appellant must pay costs of this proceeding in the sum of \$350.00. The time for payment shall be 14 days.

Anjala Wati

Judge

17.04.2013

To:

1. *Ms. B. Narayan, counsel for the applicant.*
2. *Ms. L. Ratumaitavuki, counsel for the respondent.*
3. *File: ERCA 16 of 2011.*