

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:

ERCA NO. 09 OF 2012

BETWEEN:

AUTOMART LIMITED

APPELLANT

AND:

WAQA ROKOTUINASAU

RESPONDENT

Appearances:

Mr. S. Singh for the Appellant.

Mr. Senitiki for the Respondent.

Date /Place of Judgment:

Friday 20th April 2012 at Suva.

Coram:

The Hon. Justice Anjala Wati.

RULING

CATCHWORDS:

LEAVE TO APPEAL OUT OF TIME - FACTORS NEEDING CONSIDERATION TO ASSESS WHETHER LEAVE SHOULD BE GRANTED; LENGTH AND REASONS FOR THE DELAY, CHANCES OF APPEAL SUCCEEDING AND THE PREJUDICE TO THE RESPONDENT IF LEAVE IS GRANTED

LEGISLATION:

THE EMPLOYMENT RELATIONS PROMULGATION 2007 ("ERP").

1. The appellant applies for leave to appeal out of time of the decision of the Employment Relations Tribunal ("*ERT*").

2. The application is supported by an affidavit sworn by the counsel who had been handling the case of the employer, Ms. Milinia Drova.
3. Ms. Milinia deposed in her affidavit that she was ill for several weeks in the months of September and October 2011 and was not able to attend to all her matters which resulted in a backlog of majority of her matters. The decision therefore could not be referred to the employer in time to seek instructions for appeal. Ms. Drova also deposed that the grounds of appeal posed by the employer are good and arguable.
4. Mr. Shelvin Singh argued that the appellant is 26 days out of time from the date of delivery of the decision. However the actual decision was made available to the appellant about a week later. The delay in that regard is not substantial.
5. Mr. Singh stated that the illness of counsel leading to her inability to file the appeal on time is an excusable ground.
6. It was contended that there would be no prejudice to the employee as he himself chose to wait for at least 8 months from the date of his termination before lodging a complaint. He is also in paid employment so any further delay will not prejudice the employee.
7. In respect of the strength of the grounds of appeal Mr. Singh argued that he had good arguable case in that:
 - (a) *The Tribunal allowed the respondent to make this application in breach of section 111 of the ERP.*
 - (b) *The evidence on behalf of the respondent was unsatisfactory and does not support the determination by the ERT that the respondent was unfairly dismissed and was disadvantaged by the appellant's act to summarily dismiss him.*
 - (c) *If a summary dismissal procedure is adopted by the employer, there is the no notice requirement and no need for the employer to hold procedural hearing as adopted by the ERT.*
 - (d) *There is a requirement to give a notice stating the reasons for the dismissal but the absence of the written notice does not constitute unfair dismissal. In this case, there was no prejudice to the respondent as he had been orally advised of his reasons for termination.*

- (e) *The Tribunal had not made a finding that the respondent was humiliated, had suffered loss of dignity or injury to feelings as a direct result of the conduct of the employer and no evidence on this aspect was tendered by the respondent. Clearly, therefore an award under this head is in error.*
- (f) *One of its remedies under section 230(1) (b) of the ERP is the power to order reimbursement of the whole or part of wages lost as a result of the grievance. This however should be construed in context with the individual workers contract of service in that the wages lost as a result of the grievance should be calculated by reference to notice period and not be reference to the time the matter takes to come up to hearing. In this case, the respondent was paid weekly and if the decision were to be upheld, the award ought to have been restricted to a week's wages being notice requirement.*
- (g) *The ERT offered no justification for the award of 2 years pay lost as a result of the grievance.*
8. Mr. Senitiki argued that application by the employer is entirely unmeritorious. There was no affidavit filed in opposition.
9. The principles on which extension of time are granted by the Courts are well settled. When considering the application for extension of time to appeal the court normally considers :-
- (a) *The length of delay;*
- (b) *The reasons for the delay;*
- (c) *The chances of success if leave is granted; and*
- (d) *Any likely prejudice to the respondent.*
10. The parties agree that the delay is of 26 days. The written judgment was indisputably given a week after the pronouncement. Ms. Drove was ill and that affected her performance of completing all her work on time. She could not send the judgment to the employer to seek instructions to appeal. I find that although there is some delay there is excusable ground for the same.
11. There are 6 grounds of appeal raised as follows :-

1. *The Tribunal erred in considering that it was improper for the appellant to verbally terminate the services of the respondent when during cross examination the respondent admitted to actions of gross misconduct;*
 2. *The Tribunal erred in failing to give consideration to the evidence and submissions presented by the appellant and failed to assess this in the decision delivered on 17 September 2011;*
 3. *The Tribunal erred in considering that the employer made no attempt to accord the respondent all the fair procedure;*
 4. *The Tribunal erred in failing to give consideration to the contradictory evidence given by the respondent and his witness and should have discredited the evidence and submissions given on its behalf;*
 5. *The Tribunal erred in its decision in awarding the respondent a reimbursement for the wages for 2 years lost as the result of grievance and further 6 months of wages as compensation. The damages awarded are manifestly excessive and failed to take in to account the appellant's evidence and submission; and*
 6. *The Learned Tribunal erred in determining a case of summary dismissal on principles applicable for termination of employment for cause.*
12. Out of the grounds raised I find that the appellant has a strong case on the grounds of quantum. Ex-facie the award seems to be exorbitant and improperly based. I also cannot help noticing that the ERT has followed a New Zealand case to outline the procedure for summary dismissal of an employee. Our statute, the ERP, in Fiji, only requires written reasons for dismissal to be given to the employee at the time of dismissal and that all his due wages must be paid. The following of the New Zealand case apparently seems to have brought about a different result.
13. On the grounds of prejudice, the employee will definitely not be able to enjoy the fruits of the judgment but I take notice of the undisputed fact that the employee is in paid employment now and that his wages were not professed to be so exorbitant that he will be able to refund the monies paid to him.

14. I find that this is a case in which I should, for the reasons enunciated above, exercise my discretion in favour of granting leave to appeal out of time.
15. The application for extension of time to appeal is granted.
16. The appeal must be entered within 21 days.
17. The costs of the application shall be costs in cause.

Anjala Wati

Judge

20.04.2012

To:

1. *Mr. S. Singh, counsel for the appellant.*
2. *Mr. Senitik, for the respondent.*
3. *File: ERCA No. 09 of 2012.*