

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA NO. 13 OF 2012

BETWEEN: NATADOLA BAY RESORT LIMITED
APPLICANT

AND: ISIRELI TAMANITOAKULA AND OTHERS
RESPONDENT

Appearances: Ms. S. Saro for the Applicant.

Mr. D. Nair for the Respondents.

Date/Place of Judgment: Wednesday 2 July 2014 at Suva.

Judgment of: The Hon. Justice Anjala Wati.

JUDGMENT

Catchwords:

Leave to appeal out of time-length of delay, reasons for delay, the chances of appeal succeeding and prejudice to the respondents if leave were to be granted.

Legislation:

The Employment Relations Promulgation 2007 ("ERP"): ss. 29 and 242(2).

The Cause

- [1]. Eight workers had brought an employment dispute to the Employment Relations Tribunal ("*ERT*") claiming that they were unjustly and unfairly dismissed from employment.

- [2]. On 19 April 2012 the ERT held that the workers had a grievance in that the employment contracts entered into did not comply with the spirit of the ERP and in that regard the terminations of the workers were unjustified and unfair.
- [3]. The ERT ordered that all the terminated workers be paid the balance of their contract under s.230 (1) (b) of the ERP as that will be the reimbursement of wages lost as the result of the grievance.
- [4]. On 6 July 2012 the applicant filed a notice seeking leave to appeal out of time.

The Grounds in Support

- [5]. An affidavit in support was filed through which it was deposed that:
- a. *The applicant is a subsidiary company of Fiji National Provident Fund (‘FNPF’) and is wholly owned by it. The Manager Commercial Loans of the FNPF and the Company Secretary of Natadola Bay Resort Mr. Vera Madigibuli had addressed the Board of Natadola Bay Resort Limited on the determination of the ERT.*
 - b. *Between the applicant company and the FNPF, there were a number of procedural delays in relation to the collection of the Tribunal ruling and the transmission of the same.*
 - c. *FNPF Legal Services Department was bound by the procedure of relaying the ruling to the Human Resources Department which then submitted the same to the Investments Department for consideration by the Board of the subsidiary company.*
 - d. *Upon receipt of the ruling, the Human Resources Department of the FNPF Legal Services Department were bound by procedure to submit the same to the Company Secretary to be tabled before the Board of Directors of the company for further instructions.*
 - e. *When the Investments Department and the Legal Services Department received instructions of the Company to appeal this action, the required timeline to file an appeal had lapsed.*
 - f. *The Company has a duty to protect the interests and investments of its shareholders.*

- g. *The total sum to be paid to the workers calculates to \$50,556.44.*
- h. *The act of the applicant in filing its appeal out of time is not in any way an intention to circumvent the decision on the ERT but a delay on the part of the applicant.*
- i. *The applicant company is truly apologetic of the delay caused in filling an appeal and it has taken necessary actions to ensure that such delay is not repeated.*
- j. *The appeal by the employer will not prejudice the interests of the workers.*
- k. *The applicant will be gravely prejudiced in complying with the terms of the Tribunal's order as there are serious issues which in the view of the employer were not addressed by the Tribunal.*
- l. *The applicant has good grounds to appeal against the determination of the Tribunal. The grounds of appeal were attached to the affidavit.*

Proposed Grounds of Appeal

- [6]. The proposed grounds of appeal are that the ERT erred:
- a. *in law by entering judgment against the Employer without giving consideration to s.230 (2) of the ERP.*
 - b. *by failing to consider the submissions of the employer on its position that the termination of the employees be considered as redundancy with due consideration to be given to the submissions made pursuant to s. 230 (2) of the ERP.*
 - c. *in fact by not considering the documentary evidence submitted by the employer and the evidence of Mr. Vera Madigibuli in that a commercial decision to terminate the workers was also related to the manner in which the worker's were claiming benefits and privileges and abused the facilities of the employer during the course of their engagement.*
 - d. *in law by analysing evidence submitted by both parties as amounting to an event of redundancy but made a determination that the terminations were unjustified and unfair.*

- e. *by failing to provide a link between the facts of the case and the analysis of evidence and the submissions of both parties in order for it to arrive at the decision that the 8 workers be awarded the remainder of their contracts.*
- f. *in fact by failing to consider the submissions of the employer based on facts and evidence submitted.*

Submissions of the Applicant

- [7]. Reiterating the averment in the affidavit in support, the counsel for the applicant argued that all the employees had entered into a written contract for a fixed period of one year to run from 6 April 2009 except Apisai Loganimoce whose contract was effective from October 2009. On 31 October 2009 all 8 workers were served with the letters giving notice on the immediate termination of their employment contract with 1 weeks pay in lieu of notice. The reasons provided in the termination letters referred to the review of the security needs at the hotel and that the services of the 8 workers were no longer required. As such immediate notice was given to effect termination.
- [8]. The counsel argued that the internal procedures to study the determination and give instructions to appeal consumed time and as such the time to file appeal ran out. She argued that there were substantial evidence and records of the 8 workers abusing the company property and funds during the course of employment.
- [9]. There would be gave miscarriage of justice if the decision was to be complied with.
- [10]. It was argued that since the workers have waited for a period of 1year there will not be any miscarriage of justice if they wait until the determination of the appeal. Payment of compensation involves the funds of the members and it is the duty of the applicant to preserve the funds for the members and not to pay any monies to the employees in the form of compensation.
- [11]. The counsel argued that another security company was engaged to provide service because the 8 workers had been abusing funds and property at the resort. It became commercially sensible and necessary to bring their contract to an end. They caused

the situation and thus the ERT should have considered the workers actions which contributed to the situation under s.230 (2) of the ERP.

- [12]. If there was an event of redundancy the employer should have been given a chance to comply with the provisions of the redundancy clause. The ERT found that there was a redundancy then contradicted itself when it stated that the employment contract did not comply with the spirit of the ERP.
- [13]. The contract does not require giving of notice prior to termination but the workers were given 1 week pay in lieu of notice.
- [14]. The counsel argued that it would be difficult for the applicant to retrieve this amount of money from the employees if it succeeds in its appeal whilst on the other hand the applicant has the means to pay the award if it loses the appeal.

Respondent's Submissions

- [15]. It was argued that there are no justifiable grounds for delay. The action of the applicant is a deliberate attempt to circumvent the decision of the ERT. The applicant has a pool of legal counsel as legal officers. They are well aware of the requirement of the statute and as such they ought to have filed the appeal within the given timeframe.

The Law and Analysis

- [16]. In considering the application I will deal with the following factors.
1. *The length of the delay and the reasons for it;*
 2. *The chances of appeal succeeding; and*
 3. *The prejudicial effect to the respondents if leave is granted.*
- [17]. The decision was delivered on 19 April 2012. The application for leave was filed on 6 July 2012. It is more than 1 ½ month after which leave was sought. The ERP by s. 242 (2) only grants 28 days time for appealing. It was thus incumbent on the legal

officers and internal department board members to expedite their procedure to comply with the time limit set by the statute. If the Courts are to give privilege to internal procedures of each company then the law will definitely become redundant and flouted.

- [18]. There are so many companies in this country. All have a channel to follow. If every company is having a different timeline to take actions and expects its timeline to be followed then there is no purpose of making laws. It would be prejudicial to apply the law to people only if it was not to apply to the companies because of its internal rules.
- [19]. It was for the applicant to act quickly on the decision and file an appeal within the required timeframe. I find its explanation for delay unjustifiable. However what prompts me to grant the application is that it appears that there are errors of law and fact in the decision of the ERT. I am not making a conclusive decision but the employees in this case were given a week's pay in lieu of notice although the contract provided that they can be terminated without notice. The ERT ruled that this is contrary to the ERP.
- [20]. The contract appears to be a fixed term contract and the ERP provisions on notice contained in s. 29 does not apply to it. If the provision on notice does not apply to the kind of contract entered into by the parties, can it be safely said that the contract was contrary to the requirement of the law. I need to examine the contract to answer this question.
- [21]. What I need to further examine are the letters of termination and the evidence on why the termination occurred. Was it because the employees conduct in misusing the property of the employer did not make it economically viable to continue with them? If that is the case, the ERT ought to have considered the employees actions that gave rise to the grievance.
- [22]. If I had the advantage of the records I could have perhaps made a reference to the same but unfortunately I do not have the records but it appears to me that there could be same errors in the decision. For that I think it is in the interest of justice that leave be granted and a stay of the judgment be ordered as indisputably the

employees will not be able to collectively refund the substantial amount of \$50,000 ordered to be paid to them.

[23]. On the question of prejudicial effect on the respondents I must say that every successful litigant is entitled to the fruits of the judgment but I do not overlook the fact that there appears to be errors of law and fact in the judgment of the Tribunal. It is improper in law to order compliance of orders when it appears per incuriam. On the basis that the appeal is arguable I can attach little weight to the question of prejudice to the respondents.

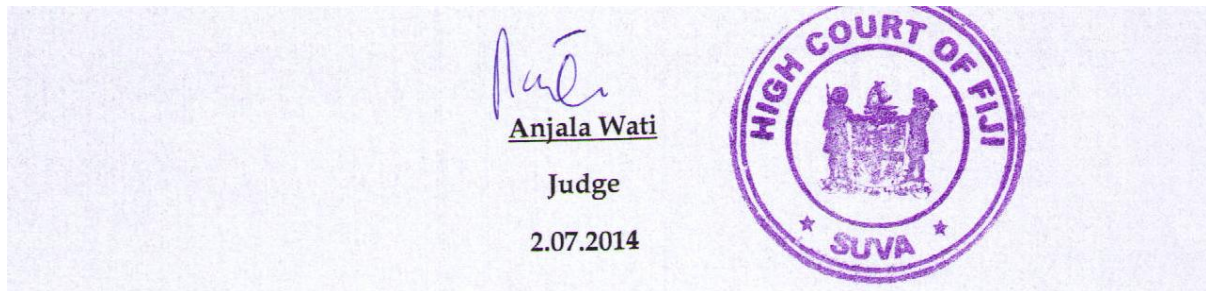
Final Orders

[24]. I grant the application to file the appeal out of time.

[25]. I order that the applicant files and serves its appeal within 14 days.

[26]. There shall be stay execution of judgment until the determination of the appeal.

[27]. The applicant must pay to the respondents cost for the delay which I summarily assess at \$750 to be paid within 7 days.



The image shows a signature in purple ink that reads "Anjala Wati". Below the signature, the name "Anjala Wati" is printed in a bold, black font. Underneath the name, the word "Judge" is printed in a smaller black font, followed by the date "2.07.2014". To the right of the signature and text is a circular purple seal of the High Court of Fiji. The seal features the text "HIGH COURT OF FIJI" around the top edge and "SUVA" at the bottom. In the center of the seal is a coat of arms depicting two figures holding a shield.

To:

1. Ms. Saro for the Applicant.

2. Mr. Nair for the Respondents.

3. File: ERCA 13 of 2012.