

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA NO. 15 OF 2012

**BETWEEN:** **THE LABOUR OFFICER** for and on behalf of **SURESH PRASAD** and **SUREND PRASAD**

**APPLICANT**

**AND:** **SOUTHERN MOTORS LIMITED** trading as **REGENT TAXIS**

**RESPONDENT**

**Appearances:** ***Mr. Pickering for the Applicant.***

***Mr. Sharma for the Respondent.***

**Date /Place of Judgment:** ***Wednesday 15 July 2015 at Suva***

**Judgment of:** ***The Hon. Justice Anjala Wati.***

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**RULING**

**Catchwords:**

***EMPLOYMENT LAW – LEAVE TO APPEAL OUT OF TIME – The delay - whether the delay is explanatory - prejudice to the parties - chances of appeal succeeding – statutory period for laying charges – statutory timeframe to bring civil action for recovery of wages and other monies.***

**Legislation:**

***Employment Relations Promulgation 2007 (“ERP”): ss. 214(2), 242 (2), 247 (b), 262.***

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**The Cause**

1. The applicant had, in the Employment Relations Tribunal (“ERT”), filed charges against the respondent pursuant to s.247 (b) of the ERP for failure to pay wages due upon a demand in

writing made by a Labour Inspector on 20 November 2009 for payment of wages between the periods 3 August 2002 to 31 December 2004. The charges were filed in 2011.

2. The charges were struck out by the ERT on 11 May 2011 on the grounds that it was filed out of time.
3. The applicant wishes to appeal against that decision of the ERT. Since the appeal was not filed within the timeframe prescribed by the ERP, it is seeking leave to appeal out of time.

### ***Grounds in Support***

4. The applicant through an affidavit says that after the matter was struck out, the applicant sought legal advice within the ministry as to the best way forward in this matter. Due to the internal movement of staff within the Ministry of Labour ("**MOL**"), this file became dormant until the opinion of the Solicitor-General's office was sought.
5. Even though the delay is for 16 months, leave ought to be granted as there are important questions of law to be decided.
6. It was also alleged that the Chief Tribunal struck out the charges without giving the applicants an opportunity to make submissions on the aspect of whether the charges were barred by time.
7. It was professed that the action for recovery of wages began in 2006 so the respondent will not be prejudiced in anyway if leave is granted. The applicant would be prejudiced as it would not have any alternative cause of action to recover the wages due. The former employees have been waiting since 2006 for the recovery of wages.
8. Both the employees in respect of whom the application is brought are former employees of Southern Motors Limited trading as "*Regent Taxis*". Regent Taxis was charged with the offence of failing to produce on demand record of wages payments contrary to s.9 (1) (d) and 12 (i) of the repealed Employment Act Cap. 92.
9. On 17 January 2008 and 29 February 2008, Regent Taxis was convicted and fined respectively by the Suva Magistrate's Court in the sum of \$4,022.00.

10. On 20 November 2009, the MOL made a demand for payment of the said arrears of wages which was not complied with so on 26 March 2011 the charges were filed against Regent Taxis under s.247 (b) of the ERP.
11. On 11 May 2011 the Chief Tribunal struck out the charges for being filed out of time. The striking out was made pursuant to s.262 of the ERP.
12. The employer refused to acknowledge the claim on demand of 20 July 2009 because it disputed the accuracy of the calculation. It had only provided the MOL with only the payroll of the employees and not the wages record even after it accepted the decision of the Magistrates' Court.
13. Prior to the matter being struck out, the respondent was always willing to negotiate with the applicant. The following events took place:
  - i.* On 23 June 2008 the applicant sent out a demand notice.
  - ii.* On 8 June 2008 a meeting was held with the employer who was not happy with the amount demanded by the Ministry.
  - iii.* On 29 July 2008, the Ministry revised its calculation based on 12 working hours per day.
  - iv.* A second demand was sent to the employer on 13 November 2008.
  - v.* On 24 November 2008 the MOL met with the employer to discuss the demand notice dated 13 November 2008.
  - vi.* On 27 November 2008 the employer denied that Inoke Taucilagi was employed with Regent Taxis.
  - vii.* On 20 November 2009 the Ministry sent out a third demand notice.
  - viii.* On 1 December 2009 the employer disputed the calculation and produced the payroll.
  - ix.* On 8 December 2010 the charges were filed at the ERT under s.247 (b) of the ERP.
14. After the matter was struck out, the employer refused to negotiate or acknowledge further demand notice stating that it would be futile to meet.

### **Grounds in Opposition**

15. Through its affidavit, the respondent says that that the two named persons were former employees of Regent Taxis. Suresh Prasad was employed from January 2000 to 2003 and Suren Prasad was employed from 1993 to 2003.
16. Regent Taxis was charged with failure to produce wages records and fined \$4,022 which was duly paid by it. The maximum fine that a Resident Magistrate could impose was \$2,000 but it did not appeal against the fine. The offence related to wages record of period between 1 August 2002 and 31 August 2005.
17. Inoke Taucilagi was in a bailor/bailee relationship and was thus not covered under the Wages Regulation (Road Transport) Order.
18. For Suresh and Surend Prasad, the MOL demanded \$30,987.61 and stated that if payment was not forthcoming within 7 days then prosecution would be commenced under s.55 (2) of the ERP. What this notice did not address was the fact that they were demanding wages on behalf of former employees whose employment had been terminated in 2003 so as at 20 November 2009; the claims were already over 6 years old.
19. Under s.262 of the ERP, proceedings for an offence under the ERP can only be instituted if the offence arose within the period of 12 months after the act or omission alleged to constitute the offence unless the Court extends the period for a further 6 months.
20. This was a claim for wages that allegedly arose in 2003 and before that date. It was after a six year period when the demand for wages was being made by the MOL.
21. The summons in ERT was issued on 21 March 2011 which was over 12 months from the date the demand of 20 November 2009 was issued.
22. The matter was struck out on 11 May 2011 pursuant to s.262 of the ERP because it offended s.262 in that it was in breach of both ss.214 (2) and 262 of the ERP.
23. The delay in bringing the application for leave to appeal out of time is not sufficiently explained, is credible, or good enough. It would have been proper for the applicant to set

out the chronological sequence of events that transpired within the Solicitor- General's chambers before a legal opinion was given to the MOL. No such chronology was provided so it is obvious that the MOL did not follow up on this matter and sat on it that caused the delay.

24. There is no question of breaching the rule of natural justice since the provisions of the ERP are unambiguous and clear. The MOL failed under both sections 262 as well as section 214 (2) of the ERP to comply with the statutory timeframe to bring the charge and an action for civil recovery.
25. The MOL did not even apply for an extension of time before the Chief Tribunal.
26. The Chief Tribunal raised the issue of section 262 of the ERP 2007. Both parties had to be prepared for such an issue. It was obvious that the MOL had not given any thought to section 262 or even 214 (2) of the ERP. Ignorance of the law is not sufficient to cover up for negligence or incompetence.
27. There is substantial prejudice caused to the respondent. It is incurring substantial legal fees in having to defend this action and its name is being maligned by this claim. It had already paid all normal wages due to Suresh and Surend Prasad. It had submitted complete records to the MOL together with its letter of 1 December 2009. If one looks at the records for Suresh Prasad he only worked consistently from 5<sup>th</sup> April 2003 to 19<sup>th</sup> December 2003. As for Surend Prasad he only worked consistently from 3<sup>rd</sup> May 2003 until 7<sup>th</sup> November 2003.
28. After their employment was finished with Regent taxis they made bogus claims that they had worked hours in excess of 8 hours and deserved to be paid for those additional hours.
29. No recovery action commenced in 2006 as claimed. The only action that was commenced for recovery of wages was a Summons filed on 26<sup>th</sup> March 2010.
30. This application is chronically out of time and deserves to be dismissed.
31. Even if leave were granted to the MOL it does not mean that it will be able to claim the monies that they have put forward. The claim for any alleged arrears of wages is statute bared and according to its records, it had already paid the two employees whatever was owed to them.

32. There are only two claimants, not three. It is false that the two complainants have been waiting for wages since 2006. They were fully paid when they finished with Regent Taxis in 2003.

33. Regent Taxis did not accept any claim for wages made on behalf of the three persons. This is culminated in its letter of 1 December 2009 where it emphatically informed the MOL that no monies were owed to Suresh and Suren Prasad.

34. The claim for the employees were follows:-

<b>Suren Prasad</b>		<b>Suresh Prasad</b>	
<i>Overtime</i>	\$3,573.00	<i>Overtime</i>	\$4,576.65
<i>Annual Leave</i>	\$ 468.00	<i>Annual Leave</i>	\$ 476.00
<b>Total</b>	<b>\$4,041.00</b>	<b>Total</b>	<b>\$5,052.68</b>

35. These claims for overtime were bogus. Its record shows the period during which the two had worked, how much they were paid and when they were absent. The claim was dramatically increased in the letter of demand of 13 November 2008. Regent Taxis denied that it owed such monies and the MOL did not commence any prosecution within 12 months of this letter.

36. The second demand notice was date 20 November 2009. The figure had changed again and once against Regent Taxi denied this claim through its letter dated 1 December 2009. Regent Taxis thought they had satisfactorily explained their position to the MOL through their letter and exhibits because after that it did not hear from the Ministry.

37. It does not make sense to the applicant's claim that that parties met on 24 November 2008 to discuss a demand notice dated 13 November 2011.

38. The appeal has no merits. The summons filed on 26 March 2011 is out of time. No action was commenced in the ERT until 26 March 2011.

39. The fact of being found guilty of failing to produce wages records is a separate matter and has nothing to do with a claim for records of alleged overtime wages. Regent Taxis did produce the record which is clear from the Judgment of the Magistrate.

***Applicant's Submissions***

40. The Counsel for the applicant submitted that they were never given a chance to make a representation before the matter was struck out. This was denial of natural justice to it.

41. It was argued that the recovery of wages began in 2006. Even though it is 16 months from the date of decision of the ERT, leave should be granted as there are important questions of law to be decided.

42. The respondent will not be prejudiced in any way. The delay is explained in that the file lay dormant until an advice was sought from the Solicitor – General's chambers.

***Respondent's Submissions***

43. The respondent's counsel submitted that the starting point in this matter is the decision made by the Tribunal. The action was brought as a Criminal case in the ERT.

44. The charges were filed on 26 March 2011. All of the offences related to an alleged breach of section 247 (b) of the ERP.

45. Each of the offences state that the date of the demand was 20 November 2009.

46. The claims for wages related to the periods 2002 to 2004.

47. S. 262 of the ERP states that proceedings for an offence against the Promulgation may be instituted within the period of 12 months after the act or omission alleged to constitute the offence except that the Court may grant leave to extend such period for a further 6 months.

48. When the charges came before the Chief Tribunal it was obvious to him that the charges were for an offence relating to non-compliance with a demand for payment made by the Labour Inspector on 20 November 2009. Clearly the offence was out of time if one considers

section 262. There is no reasonable explanation why the charge was brought in March 2011. No application was made to Court to seek an extension of time.

49. The claim for wages relates to the periods 2002 to 2004. This claim was also out of time if one looks at section 214 (2) of the ERP. This section states that the claim for recovery of wages and other money may be commenced within 6 years after the day on which the money became due and payable.

50. Even if the leave to appeal is allowed, there are no merits in the appeal on the question of striking out.

51. The Tribunal gave its decision on 11<sup>th</sup> May 2011. Under s. 242 (2) an appeal must be made within 28 days from the date of the decision of the ERT. There has been inordinate delay of 16 months in making this application. No reasonable explanation has been provided.

52. The proposed Notice of Appeal is also deficient. The claim for wages and other money is also out of time. This is not a claim for ordinary wages. It is a claim for alleged overtime. There is no basis for the application to survive.

### **Analysis**

53. In granting leave to appeal out of time I will consider the length of delay, the reasons for the delay, the chances of appeal succeeding and the degree of prejudice to the respondent.

54. Under s.242 (2) of the ERP, an appeal must be brought to the court within 28 days from the date of the decision of the ERT. This was not done. The leave to appeal was sought after 16 months.

55. The explanation is that there was internal movement of staff in MOL. I find that even if there was movement of staff, the outgoing staff will definitely need to handover all the files and as such a new staff would be assigned the files. The job of the new staff was to then file an appeal immediately or if there was little delay, seek leave to appeal out of time. There is no evidence as to which staff was handling the file, when did she move and when was the handing over done to a new staff. Just a blanket statement has been made without any responsibility attached to any person.



56. In this case it appears that the MOL sat on the file without taking any action for one and a half years. Someone or something triggered the non-action and so it decided to apply for leave to appeal out of time.

57. I do not accept the explanation that because a staff has moved, work should be left in abeyance. The file does not belong to a staff but to the system and the system must be designed to function and not to become dormant with the movement of staff. There must be procedures and policies in place to administer the system without any hitches despite movement of staff.

58. I find that neither the 16 months delay nor the explanation is justified to grant leave to appeal out of time.

59. Even if I were to give leave, I do not find that this case can successfully surpass the hurdle in ss. 214 (2) and 262 of the ERP.

60. I gave Mr. Pickering an opportunity to make submissions on these sections as he asserted that at the Tribunal the MOL was denied natural justice in that it was not given an opportunity to address these sections. Mr. Pickering admitted that its case fails on merits.

61. Section 214(2) states that any claim for recovery of wages and other monies may be commenced within 6 years after the day on which the money became due and payable. This section applies to civil claims and not criminal charges.

62. S. 262 applies to criminal charges. It states that ***“notwithstanding anything in any other written law, proceedings for an offence against this Promulgation may be instituted within the period of 12 months after the act or omission alleged to constitute the offence except that the Court may grant leave to extend such period for a further 6 months”***.

63. This offence was brought under s. 247 (b) of the ERP which reads:

***“ An employer who –***

***(a) ...***

*(b) upon demand in writing by the Permanent Secretary, a labour officer or a labour inspector, fails within 7 days of the demand to pay any wages due to a worker;*

*commits an offence..."*

64. The charges against the respondent make reference to the demand to pay dated 20 November 2009. The charges were filed not in 2010 but in 2011 and as such it is time barred because it was not filed within the 12 months period prescribed by s. 262 of the ERP. The MOL ought to have sought extension of time from the Court to lay the charges and no such extension was ever made. I find that the charges therefore cannot be brought. The charges are barred by time.

65. Even the civil claim is time barred as the claim for wages is between the periods 2002 to 2004. Six years has already passed and no civil claim was made for recovery of wages.

66. The respondent is protected by the limitation period and it will be prejudicial for it to be made subject to charges which are barred by the statute.

#### **Final Orders**

67. On the factors governing grant of an application for leave to appeal out of time, I find that it is not permissible on the question of delay and time limitation to grant the application.

68. Each party must bear their own costs of the application.



  
Anjala Wati

Judge

15.07.2015

To:

1. Mr. Pickering for the Applicant.
2. Mr. Sharma for the Respondent.
3. File: ERCA 15 of 2012.