

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCM 1 of 2013

BETWEEN: THE LABOUR OFFICER for KAMAL KANT
APPELLANT

AND: INLAND TOURS
RESPONDENT

Appearances: Mr. S. Ali for the Appellant.

Mr. D. Naidu for the Respondent.

Date/Place of Judgment: Tuesday 22 November 2016 at Suva.

Coram: Hon. Madam Justice A. Wati.

Catchwords:

Employment Law – Leave to Appeal out of time – Challenges made to orders for striking out charges and not deciding the case on merits – Charges are time barred under s. 262 of the ERP and therefore not sustainable for the employer to answer the same.

Legislation:

1. *The Employment Relations Promulgation 2007 ("ERP"): ss.262.*
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Cause/Background

1. The employer seeks leave to appeal out of time the decision of the Employment Relations Tribunal ("**ERT**") of 1 February 2013 wherein it struck out 2 counts of charges against the

employer on the basis that the same charges had been struck out by it on 21 March 2012. The ERT had further ordered on 1 February 2013 that if the matter is further brought in the ERT, it will be considered an abuse of the process of the Court.

2. I think that it is important to set the out background of this case to fully comprehend the orders of the ERT. The matter initially started in the Magistrates' Court Nadi. On 21 April 2008, the Labour Officer had filed a Criminal Case Number 546 of 2008 against the employer. The charge was for failing to pay the employee Kamal Kant Prasad wages for the period 5 March 2007 to 29 June 2007 amounting to \$2,912.38. The charges were laid pursuant to s. 9(2) of the Wages Council Act, Cap.98.
3. On 28 July 2008, the matter was set down for hearing in the Magistrates' Court in Nadi. Inadvertently, the Labour Officer did not appear in Court for the hearing as he was mistaken as to the date. The Magistrates' Court in Nadi struck out the matter due to non-appearance of the Labour Officer in Court.
4. The Labour Officer states in his affidavit that subsequently on 20 April 2010, it issued a demand notice to the employer for compliance with s. 45(2) of the ERP and Regulation 18(3) of the ERAR. Another demand notice was sent on 25 May 2010 asking for compliance with s. 55(1) of the ERP and the Wages Regulation (Road Transport) Order 2007. The employer refused to meet either demand.
5. Based on the demand notices, new charges were filed in the ERT on 19 January 2012 and the action was assigned case number ERT 08 of 2012. The employer was charged with two counts. The first count was for failing to produce on demand of April 2010 wages and time records required to be kept under s. 45(1) of the ERP for the period 5 March 2007 to 13 June 2007. The second count was that the employer had failed to pay wages to the employee for the period 5 March 2007 to 13 July 2007 in the sum of \$2,912.38.

6. The case number ERT 08 of 2012 was struck out by the ERT on 21 March 2012 and the employer was acquitted. The reason for the striking out was that the Nadi Magistrates' Court had already struck out the earlier charges of the same nature against the employer and that the ERT could not change the orders of another Magistrate as there was no formal referral from that Court to ERT. The ERT also found that the Labour Office had failed to inform the ERT of the earlier striking out.
7. After ERT Case 08 of 2012 was struck out, the Labour Officer then proceeded in August 2012 to make an application for reinstatement of the matter that was struck out in the Nadi Magistrates' Court. The ERT struck out the application for reinstatement on 17 August 2012. No written reasons or any reasons appear to have been provided for the striking out of the application for reinstatement.
8. Upon the advice from the office of the Solicitor- General, the Labour Officer then filed a fresh case which was assigned ERT Criminal Case Number 4 of 2013. That case again relied on the demand notice of 2010. The charge was contravening ss. 45(1) and ss. 247(b) of the ERP. This case was struck out by the ERT on 01 February 2013 and written orders were delivered on 5 March 2013. The basis on which the striking out was given was that the ERT had struck out the case on 21 March 2012.
9. It is the orders of 01 February 2013 in respect of which leave to appeal out of time is sought. The application for leave to appeal out of time was filed on 27 May 2013, some three months after the time limited for filing of the appeals.

Grounds/ Submissions

10. The delay in bringing the appeal is said to have occurred when the Labour Officer had sent the file to the office of the Solicitor General to seek legal advice on the position of the employee when his matter was struck out on 1 February 2013.

11. It was submitted that the correspondences between the two offices took considerable time and when an advice was finally received on 7 May 2013, an application for leave to appeal out of time was filed.
12. It was argued by Ms. Ali that the employee's case was never heard on merits by the Magistrates' Court and for the ERT to strike out the matter again on the basis that the Magistrates' Court had struck out the matter and that it could therefore not hear the case is an improper order which deprives the employee of having access to justice and have his case heard.
13. Ms. Ali contended that it is prudent that any application for reinstatement ought to have been made in the Court in which the matter was struck out but despite the fact that the application was filed in the ERT, the wrong choice of procedure should not affect the rights of the employee.
14. It was also argued that the ERT had acquitted the employer without hearing any evidence and that is a wrong exercise of discretion as the non-appearance of a prosecutor does not mean that the employer can be acquitted. A discharge would have been more appropriate.
15. Mr. Naidu argued that when the matter was initially struck out by the Nadi Magistrates' Court, an application for reinstatement ought to have been made to the Nadi Magistrates' Court. That did not eventuate. There is no reason why the Labour Officer did not choose to follow the procedure. It exchanged some correspondence with the Nadi Magistrates' Court and then filed the case in the ERT.
16. The filing of the application for leave to appeal out of time is normally supported by an affidavit shows the reasons for the delay in appealing and the proposed grounds of appeal. Mr. Naidu argued that in this case, there are no proposed grounds of appeal and leave cannot be granted as it cannot be shown whether the grounds of appeal have any chances of success.

17. It was further argued by Mr. Naidu that the application for leave to appeal out of time was filed in Suva Court when the original case was heard by the ERT Lautoka. This is an abuse of the process of the Court.

18. It was also averred that the matter has been considerably delayed and the employer will be seriously prejudiced by the delay if the case is to be heard.

Law and Analysis

19. Mr. Naidu had raised an issue that there are no proper grounds of appeal shown in the affidavit supporting the application for leave to appeal out of time. I find that this issue needs to be addressed first.

20. Generally when an application for leave to appeal out of time is made, the applicant has to file or show to the Court the proposed grounds of appeal. The reason is that one of the factors that the Court normally considers in determining the application for leave is the chances of the appeal succeeding.

21. In this case, although there are no proposed grounds of appeal attached to the affidavit, I do not find that the Court is left to hunt what ground of appeal is proffered by the applicant.

22. In essence, the issue clearly before the Court is whether the ERT was correct in striking out the charges against the employer without hearing the same only on the basis that a previous charge of similar nature filed in the Nadi Magistrates' Court was struck out due to non-appearance of the Labour Officer when the matter was set for hearing.

23. When addressing the above issue, if I find that the ERT was not correct in issuing the orders to strike out the charges, I would not even need to ask the applicant to file an appeal and

hear the same as the determination of the issue is sufficient for final orders for reinstatement to be granted by this Court.

24. Other cases are different in nature, as when leave is granted, the applicant is ordered to file proper grounds of appeal. The issue in this case is such that, the applicant, if successful, is entitled to hearing of the charges in the ERT.
25. I will now discuss the propriety of the orders in respect of which leave to appeal is sought. The reason why I am going straight into the merits of the issue on appeal is that the justice of the case demands that I first examine the procedure in which the matter was handled and the employee not allowed to vindicate his rights in Court. This is the primary issue of concern. The result of my finding will determine whether or not other factors will need to be addressed to any extent.
26. I do not think that the orders of 1 February 2013 can be looked at in isolation because the reason for the orders on 1 February 2013 was due to the orders made and granted initially in respect of ERT case 8 of 2012 which was struck out on 21 March 2012. I shall therefore first examine the orders for striking out issued in ERT case 08 of 2012.
27. The two counts of charges filed in the Magistrates' Court were fresh charges initially. The charges initially made no reference to the charges in the Nadi Magistrates' Court. Since the charges before the ERT were fresh charges, the ERT could not refuse to hear it on the grounds that it was earlier struck out by the Nadi Magistrates' Court.
28. The Nadi Magistrates' Court had not heard the matter on merits and the issue before the ERT was not res-judicata. I therefore find that the basis on which the ERT refused to hear the case was incorrect in law.
29. However the matter does not end there. The Labour Office had even then, when the matter was on foot before the ERT, a serious challenge or hurdle before it. The statutory

challenge was that the time for filing of the charges for offences against the ERP had expired.

30. S. 262 of the ERP states that "*notwithstanding anything in any other written law, 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*".
31. Both the counts in ERT 8 of 2012 are outside the 12 months limitation period. The first count of failure to produce wages and time records upon the demand of April 2010 should have been filed on or before April 2011. The second count alleges non-payment of wages for the period 15 March 2007 to 13 July 2007. The time limited for bringing a charge for the second count expired on or before 12 July 2008.
32. Given the statutory hurdle, even if the ERT decided to hear the case after exercise of proper discretion, it would have then had to strike out the charges pursuant to s. 262 of the ERP. In any circumstance therefore, the charges could not be sustained against the employer for it to answer the same.
33. I then turn my mind to the application for reinstatement of the Nadi Magistrates' Court matter. An application was made in case ERT 08 of 2012 for reinstatement of the Nadi Magistrates' Court Case. When the charges were filed in the Nadi Magistrates Court on 21 April 2008, the ERP had already come in force. It came in force on 2 April 2008. Despite the coming into force of the ERP, the Labour Officer filed the charges in Nadi Magistrates' Court under Wages Councils Act (Cap. 98) when that Act was already repealed by s. 265 (1) (c) of the ERP.
34. There was no Wages Councils Act in force for the charges to be sustained in the Nadi Magistrates' Court. The Nadi Magistrates' Court therefore did not have any jurisdiction to hear the case or the charge.

35. Any fresh charges had to be filed in the ERT and that ought to have been done very quickly after the Nadi Magistrates' Court struck out the matter on 28 July 2008. The Labour Officer could have asked for an extension of 6 months for the filing of the charges in the ERP. It did not do so and chose the wrong procedure to ask for a reinstatement of the matter struck out in the Nadi Magistrates' Court. The ERT did not have jurisdiction to reinstate a matter that was struck out by the Nadi Magistrates' Court.
36. The ERT Criminal Case Number 4 of 2013 is again fresh charges in respect of the same offence and therefore statute barred under s. 262 of the ERP. The ERT was not correct in striking out the same on the basis of the orders of 21 March 2012 but even if it proceeded to hear the charges, the same could not be sustained for want of it being brought within the limitation period.
37. I ought to also deal with the issue of the abuse of the process of the Court. Mr. Naidu says that since the ERT matter was filed in Lautoka Court, the appeal should have been filed in the Employment Relations Court in Lautoka. That is the correct position but since the matter has been filed in Suva, I did not find that it would have served the interest of justice to strike it out without hearing the application for leave to appeal out of time.
38. I do not find that the question of delay and the reasons for the delay ought to be addressed. However, having looked at the conduct of the matter, I find that the Labour Office has had serious flaws in the choice of procedure to bring the charges in the right forum and at the right time. It started acting on the default since 2008 but could not obtain any effective result until it was barred by time provided for in the statute to file charges.
39. On the question of prejudice, the employer will definitely be deprived of its right when it is asked to answer charges which are not sustainable in law.
40. Since the legislature does not permit charges to be filed beyond the prescribed period in s.262 of the ERP, there is no merit in granting leave to appeal out of time in this case.

Final Orders

41. In the final analysis, I refuse the application for leave to appeal out of time on the basis that the proposed charges filed in the ERT were time barred under s. 262 of the ERP.

42. I further order that each party shall bear their own costs of the appeal proceedings.


Anjala Wati

Judge

22.11.2016



To:

1. *Attorney-General's Chambers for the Appellant.*
2. *Pillai, Naidu & Associates for the Respondent.*
3. *File: Suva ERM 1 of 2013.*