IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 07 of 2013**
BETWEEN:	**NATIONAL UNION OF FACTORY AND COMMERCIAL WORKERS**
	APPELLANT
AND:	**BISCUIT COMPANY FIJI LIMITED**
	RESPONDENT
Appearances:	*Mr. D. Nair for the Appellant.*
	No Appearance of the Respondent.
Date/Place of Judgment:	*Thursday 21 January 2016 at Suva.*
Coram:	*Hon. Madam Justice A. Wati.*

JUDGMENT

Catchwords:

Employment Law – Compliance order application: is it proper procedure to determine disputed questions of fact? Parties must not fast track disputes procedure where oral evidence may be necessary to establish any issue.

The Cause and Background

1. On 25 September 2012, the appellant filed an application in the Employment Relations Tribunal ***("ERT")*** on behalf of one Niumai Sekilevuka for compliance orders. The orders that were specifically sought were that the employee be paid her full maternity leave and that she be provided employment under s. 24 of the ERP upon completion of her maternity leave and pay for the period she had not been provided employment. It was further sought that the employer

desists from any form of discrimination against all female workers in regards their maternity leave entitlement.

2. The employee had filed an affidavit in support of the application. The employer had also filed an affidavit in response.

3. On 26 March 2011, The ERT, after perusing the application and the affidavits found that there were disputed questions of facts and law and that the compliance procedure was not the proper course to determine the issue. The ERT however granted leave to the appellant to file a substantive grievance case within 14 days through which the current issues could be determined. The respondent was given 14 days to respond to the substantive grievance. The ERT also stated that should a substantive grievance be filed, the meditation process be waived to expedite the process of finalization of the case. These orders were pronounced in the ERT on 3 May 2013.

4. Aggrieved at the decision, the appellant appealed on the grounds that:

(i). The ERT exceeded her jurisdiction and abused her powers when she refused to give any written decision as to why she could not adjudicate upon the compliance application.

(ii). The ERT erred in law and in fact when it failed to determine the compliance application as required under section 211(1) (f) of the ERP.

(iii). The ERT erred in law and in fact when she denied the appellant due process of hearing before determining that she would not hear the compliance application.

(iv). The ERT erred in law and in fact when she agreed with the employer based on the evidence that was given from the bar in not deciding to hear the compliance application.

Appellant's Submissions

5. Mr. Nair argued that the ERT was required by law to provide to the parties reasons why she refused to adjudicate upon the compliance application. The failure to give reasons is procedurally improper.

6. The ERT has the jurisdiction to make a compliance order under s. 212 of the ERP if a person has not complied with a provision of the ERP or an employment contract or an order, determination, direction or requirement made or given under the ERP by the ERT or a member or officer of the Tribunal.

7. The ERT's failure to comply with its statutory obligation of hearing the application for compliance makes the decision unlawful and invalid.

8. The appellant was denied the due process of being heard before it was decided that the compliance application will not be heard. The process adopted by the ERT has greatly prejudiced the appellant and the result does not promote effective relationship between the employer and the employee.

9. The employer's representative stated from the bar table that the facts presented by the employee were disputed and the ERT accepted the same and refused to hear the application. Since the facts were disputed by the employer, the ERT ought to have heard the parties but it instead dismissed the application.

Law and Analysis

10. There is no dispute that the ERT had the jurisdiction to hear the application before it. Compliance applications are determined on affidavits. There is no oral evidence adduced in such applications. After all the affidavits are filed, the counsel for the parties, argue the matter based on the evidence in the affidavit. The only legal argument that may come up is the provision of the ERP which is alleged to have not been complied with. The rest of the matters are factual.

11. The compliance application is not the process to determine disputed questions of fact. If the facts are disputed which would be apparent from the affidavits, the presiding officers will dismiss the compliance order application. The applicant can then file a substantive case where oral evidence can be adduced and tested and facts found upon the tested evidence.

12. In this case, when the ERT perused the affidavits, it dismissed the application on the ground that there were disputed questions of fact and law.

13. This is not a case where the ERT did not cast its mind to the application and the evidence. It undertook that exercise and only after doing so it found that there were disputed facts. The only process that the ERT omitted was that parties were not given an opportunity to orally address the Court.

14. Normally parties are given a chance to address the Court orally but that opportunity was not granted. Whether this has caused any prejudice to the parties requires me to examine whether indeed there were disputed facts on the affidavits which could not have been resolved even if the parties were given a chance to address the court orally.

15. The employee's position through the affidavit was that she commenced work on 11 May 2011 as a process worker until 31 March 2012 when she proceeded on maternity leave. She had submitted her medical certificate to the employer on 10 April 2012 which was effective from 31 March 2012. The employer only paid her 66 days of the maternity leave and not the full 84 days as required by the ERP. A copy of her payment slip was annexed in evidence.

16. The employee further said that she had been enquiring with the employer as to when she was to return to work but was informed that she should wait and that the employer will call her. It was not until 3 September 2012 when the employer decided to re-employ her.

17. The employee says that she was denied employment only because she proceeded on maternity leave and if she did not proceed on maternity leave, she would still be employed. The employer has directly breached the provisions of the ERP and liable to be penalized.

18. It was further stated that the employer was required by law to provide work to female employees upon expiry of their maternity leave and to pay 84 days maternity leave. The balance of 18 days' pay must be provided to the worker and also pay for the period she was not employed.

19. The employer's position was that on 30 March 2012, the employee, along with 250 others were informed that their last day at work would be 31 March 2012. They were all made redundant. They were given their one week pay in lieu of notice. At that time it was not revealed to the employer

that the employee was pregnant. The employer only had knowledge of this when it received the medical certificate of 10 April, 2012.

20. The employee was paid 66 days maternity leave initially due to the system failure and this was later rectified. Additional 18 days leave was paid to her as well.

21. The employee was not re-employed on 3 September 2012. She was offered re-employment in accordance with the letter of 30 March 2012 but she declined to be re-employed.

22. From the affidavit there appeared to be disputed issues on the following aspects:

    (i) ***whether the employee was made redundant or whether the employer refused to provide her work due to her pregnancy and her proceeding to maternity leave.***

    (ii) ***whether the employee was paid full 84 days maternity leave; and***

    (iii) ***whether the employer offered the employee work at any time later.***

23. The employer had annexed a termination letter to the affidavit saying that this was given to the employee and 250 other employees.

24. It is disputed by the employee that she was made redundant but that she was being discriminated because of her pregnancy status. Apart from the termination letter that the employees were allegedly given, the employer will have to establish that 250 other employees, and if there were female employees, also suffered the same fate on 31 March 2012 and that proper procedures were followed to carry out the redundancies. The employee will be entitled to test the evidence under oath. It is only upon the tested evidence that the Tribunal can make a finding of whether the employee's allegations are correct.

25. On the affidavit, neither the ERT nor can this court, make a finding of fact regarding the two extreme positions taken by the parties. In must be a substantive grievance case for unlawful and unfair dismissal where these findings can be properly made. That is the reason why the ERT ordered that a substantive case be filed. It relied on the evidence before it to make that order

and the evidence was sworn evidence. Mr. Nair is not correct in asserting that the evidence was from the bar table.

26. In the substantive case, it would also be established whether the worker was re-employed. If she was, she would be paid the wages. The employer says that she declined the offer. Definitely there would be an offer in writing or evidence from other personnel that a call was made to her asking her to return to work and what was the employee's response and to what effect.

27. On the question of whether the full 84 days maternity leave was paid, there is also a dispute. The employer has attached a payment slip to its affidavit confirming that full 84 days was paid although the 18 days was paid for later. If the employee wishes to challenge this evidence, the employer has to be cross-examined. The issue cannot be resolved on the affidavits.

28. Given the position of the parties which were at variance, the compliance order application could not proceed any further than the filing of the affidavits. The ERT had properly concluded that the issues ought to be decided in an open court hearing.

29. Even if the parties were allowed to make oral submissions, there is nothing that would have changed the position of the ERT. It would have arrived at the same conclusion that an open court hearing was the proper procedure.

30. Mr. Nair says that the ERT did not provide any reasons for not hearing the case. In fact, on the application before the ERT, there was nothing to hear the parties on. The ERT had read the application and the affidavit and then arrived at the conclusion that there were disputed questions of fact. The application was considered by the Tribunal and reasons provided why it could not proceed further. Although the reasons were not in the form of the judgment, it was contained in the court records.

31. I find that the ERT did no supersede its jurisdiction by dismissing the application because that was necessary to allow the appellants to file a substantive grievance case. There is no prejudice to the appellant as the same issues will be canvassed when the substantive grievance is filed.

32. The ERT was also generous in waiving the mediation process to expedite the process of hearing the main cause if it was filed. The degree of prejudice which might have arisen due to the delay was therefore cautiously curbed.

33. I find that the appellant wanted the dispute between the parties to be fast tracked by filing an application for compliance which given the position of the parties cannot be sustained. The proper course is a substantive grievance.

Final Orders

34. For the reasons I have enunciated, I find that the appeal does not have any merits and I dismiss the same.

35. I expect that the parties would have or almost near to finalizing the main grievance case before the ERT as I had through the registry ordered that the main grievance be heard without waiting for a decision on this appeal which did not affect the continuation of the main cause.

36. Each party shall bear its own costs of the appeal proceedings.

HIGH COURT OF FIJI
SUVA

Anjala Wati

Judge

21.01.2016

To:

1. ***Mr. Damodar Nair for the Appellant.***
2. ***Respondent.***
3. ***File: Suva ERCA 7 of 2013.***