

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 17 of 2015

BETWEEN: FOOD FOR LESS (FIJI) LIMITED

APPLICANT

AND: LABOUR OFFICER for KEMUELI VAKATALAI, MANASA LOMALAGI and AJEET PRASAD

RESPONDENT

Appearances: Mr. Ritesh Naidu for the Applicant.

Ms. A. Raitivi for the Respondent.

Date/Place of Judgment: Wednesday 20 April 2016 at Suva.

Coram: Hon. Madam Justice A. Wati.

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Catchwords:

*Employment Law – Time for instituting proceedings for offences – whether the employer can take advantage of its own conduct of delaying with providing material information for accurate charges to be laid.*

Legislation:

1. *The Employment Relations Promulgation 2007 ("ERP"): s. 262.*

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**Cause**

1. The employer appeals against the decision of the Employment Relations Tribunal ("**ERT**") of 19 September 2015 when it refused to strike out the charges against it on the grounds that the same was statute barred under s. 262 of the ERP.

2. In its appeal, the employer seeks that the charges be struck out for not being brought within the timeframe stipulated in s. 262 of the ERP.
3. The appellant was charged on 1 October 2013 (*amended charges were filed on 11 December 2013*) for failing to pay arrears of wages upon demand in writing contrary to s. 247 (b) of the ERP. The particulars of offence reads as follows:

*" FOOD 4 LESS LIMITED being an employer in the Central Eastern Division, failed to pay arrears of wages for one Ajeet Prasad amounting to Seven Thousand Eight Hundred and Eleven Dollars (\$7, 811.00) for the period from 3/3/2009 to 20/7/2010 and for one Kemueli Vakatalai amounting to Nine Thousand Three Hundred and Sixty Four Dollars and Ninety Cents (\$9,364.90), for the period from 3/3/2009 to 26/10/2010 and for one Manasa Lomalagi amounting to Nine thousand Three Hundred and Sixty Four Dollars and Ninety Cents (\$9, 364.90) for the period from 3/3/2009 to 26/10/2010, inclusive within seven days of a written Demand Notice made by a Labour Inspector on 2 September 2013".*

#### ***ERT's Findings***

4. The ERT answered the issue of statute barred in reference to the appellant's inequitable conduct. It highlighted that the appellant was initially charged in Criminal Case Number 54 of 2011 for failing to produce on demand wages and time records contrary to section 45(2) of the ERP. The charges were filed on 9 September 2011.
5. In that criminal case, the ERT had made the following orders against the employer on 20 June 2012:
  1. ***to pay \$1,000 costs to the Ministry of Labour ("MOL");***
  2. ***to pay \$100 as fixed penalty to the MOL;***
  3. ***Parties undertaking to maintain confidentiality in all matters pertaining to the consent orders noted; and***

4. *to comply with the orders within 14 consecutive days of the receipt of the order.*
6. The ERT found that the charges were laid after the employer had defied with the MOL's instructions vide notices dated 17 August 2010 and 15 October 2010 to attend a meeting on 30 August 2010 and 20 October 2010 respectively. The notices also required that the employer brought along with it wages records and daily attendance register.
7. The notice dated 17 August 2010 was issued on behalf of Ajeet Prasad and the notice dated 15 October 2010 was issued on behalf of Kemueli Vakatalai and Manasa Lomalagi.
8. The ERT found that after the case number 54 of 2011 was disposed, the employer deliberately delayed the production of wages and time records and/ or disputed the amount claimed and the period of employment. Having done that, it successfully exceeded the time limitation of being charged within 18 months as required under s. 262 of the ERP. This act on the part of the employer brought the employees outside the time limitation period and to allow the employer to take advantage of its own conduct will not be justified.
9. In arriving at the conclusion that it is not justified to hold s. 262 time limitation against the MOL in a circumstance of this nature, the ERT also found that the employer had failed to practice good faith employment relationship.
10. The ERT found that when the employer failed to comply with the orders to produce the wages and time records, the MOL had to consult the three workers and work out their entitlements as per their version of what was due and owing. That was done on 5 September, 2012. A demand was served for arrears of wages for overtime work in the sum of \$55,727.68.
11. After having received the demand of 5 September 2012, the employer delayed the process by questioning the amounts involved, the hourly rates and calculations until it was served with a second demand on 2 September 2013 for an amount of \$26,540.80 being for overtime pay, notice pay, leave pay and outstanding wages for the 3 complainants. The demand was not complied with and the MOL, on 1 October 2013 filed the criminal charges being 29 of 2013 for failure to pay wages upon demand contrary to s. 247(b) of the ERP.

12. The ERT found that the employer by its conduct delayed the matter and cannot seek advantage of such delay.

### ***Submissions***

13. Mr. Naidu submitted that s. 262 of the ERP states that proceedings for an offence against the ERP 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.
14. Mr. Naidu argued that the particulars of the offence show that the alleged offences were committed between 03 March 2009 and 20 July 2010 in respect of Ajeet Prasad, and between 3 March 2009 to 26 October 2010 in respect of Kemueli Vakatalai and Manasa Lomalagi.
15. Using the above period from which the alleged offences were committed, the time to file the charges on behalf of Ajeet Prasad expired around 21 January 2012 and the time to file charges on behalf of Kemueli Vakatalai and Manasa Lomalagi expired around 26 April 2012. However, it was argued that the current charges were filed on 1 October 2013 which makes the charges time barred in that the maximum period allowed under s. 262, that is, 18 months had expired.
16. The MOL, it was argued, did not apply for any extension of time for filing of the charges and there cannot now be any application for extension as under s. 262 only a period of 6 months extension can be allowed when the original period of 12 months expires.
17. Ms. Raitivi submitted that the ERT is correct in ruling that the employer is seeking advantage under s. 262 after having successfully delayed the directions of the MOL to produce wages and time record. The employer only gave the wages and time record on 5 September 2012 which gave rise to a demand of 2 September 2013. When the demand of 2 September 2013 was not complied with, the MOL then charged the employer on 1 October 2013.
18. The MOL, it was argued by Ms. Raitivi, needs the wages and time records to accurately calculate the employee's entitlements and those records were delayed. When it was served, a demand was

raised for payment. The employer having delayed the production of the records cannot be justifiably and equitably allowed to seek advantage of s. 262 of the ERP.

**Law and Analysis**

19. The charge against the employer is for one count. The statement of offence reads "***failing to pay arrears of wages upon demand in writing contrary to s. 247(b) of the ERP 2007***".
20. The time period for the offence is stated in the particulars of offence to be from 3 March 2009 to 20 July 2010 for Ajeet Prasad and 3 March 2009 to 26 October 2010 for Kemueli Vakatalai and Manasa Lomalagi.
21. The question before the Court is the period from which the time starts running under s. 262 of the ERP. To answer that question, the Court has to accurately ascertain what the employer has been charged with. In this case, the employer has been charged with ***failing to pay arrears of wages upon demand in writing***. Since the charge is for not obeying the written demand for payment of wages, the 12 months' time period must begin from the date on which the demand was made for the payment.
22. Mr. Naidu says that the time period starts from the time within which it is alleged that the wages are not paid. I find that the argument is untenable. The charge is not for failure to pay wages. If it was so then definitely the time will run from the period it is alleged that the wages were not paid. The charge in this case is failure to pay arrears of wages upon written demand. How can there be a charge for failure to pay wages upon demand if the time period were to begin before the demand was made? It is natural that demand will be made after sometime from the date when the wages become due. The demand will be issued once the complaint is made to the MOL. MOL will first attempt to resolve the matter by mediation failing which it will require correct wages and time record to ascertain the validity of the claim. Upon assessment a demand is then issued. Sometimes the process may consume time depending on the clarity of the data and the time period over which it is alleged that wages have not been paid.
23. In no circumstances thus, could the time period run from the date the wages becomes due and owing in a charge of this nature.

24. It is not disputed that the demand was made on 2 September 2013. This was only possible because the employer had after much delay provided wages record on 5 September 2012. Since the demand for payment was made on 2 September 2013, and the charges laid on 1 October 2013, I find that the MOL is within the 12 months' time frame stipulated in s. 262 of the ERP to bring the charges of the nature described.
25. It will be against the spirit of s. 262 and inequitable to the workers if an employer, who is asked to produce the wages and time record of the employees to ascertain what is legitimately owed to them, does not provide the records and impeaches on the right of the employees to make a demand for an accurate sum to be paid, to raise the issue of limitation period once the employees or the MOL makes an actual demand for payment of the said monies after it makes its own calculation using some unreliable data from the employees.
26. This is what actually happened in the case. The employer was asked to produce the wages and time records. It slept on the request when a first demand for payment was issued on 5 September 2012 for a sum of \$55,727.68. Then on this day the record was produced which was used to calculate the accurate figure. After an accurate figure was calculated the demand for a correct sum was issued on 2 September 2013.
27. If I were to give this employer the benefit of its own misconduct then all the employers will successfully defy the law and not produce the wages and time records on demand and having done that for 18 months they would successfully escape the charge of failing to pay wages upon demand in writing. One must query as to how can a proper demand be issued if the employer does not produce the wages and time record? It is arguable that a demand can be raised from the calculation by the employees but that would be meaningless because not all employees keep an accurate data of their time and hours of work. I have never seen any employee having a record of the number of hours worked and the times taken off. That is not something that is required of the employees or is expected as it is an onerous task.
28. It thus follows that the employer must provide the wages and time record when asked to. If it does not, and is later issued a demand to pay wages, it cannot raise the issue that the charges are time barred from the day of non-payment or from the day the demand for the records was made.

29. There may be cases where the same rule above will not apply, for example if the employer provides the wages and time record as requested and the employees do not issue a demand for arrears of wages and lay charges for failure to comply with the written demand for payment of wages within the time limitation provided in s. 262. In that case the Court may arguably hold the time limitation against the employee.
30. Distinguishable from this state of affairs is the facts of this case. The wages and time records were provided on 5 September 2012. The MOL already had done its calculation for an amount twice as much as the amount it issued the demand for in the second notice. Upon receiving the correct record, it definitely took the MOL some time to reconcile the records and prepare an account of what is due and owing to the employees. It, having done so, issued a demand within the requisite time frame of 12 months from the date of the service of the record and then laid charges the following month.
31. Although the charges are not within the 12 months period from the date when the records were provided, I find it is within the time as the time should start running from the date of the demand for payment of the wages. The demand was not made unreasonably late. It was so done within the 12 months (*if I may use that period from s. 262 as a reasonable time frame*).

### ***Final Orders***

32. I find that the charges in ERT Criminal Case Number 29 of 2013 was not time barred and that the ERT was (*albeit for a different reason with which I also concur and affirm*) correct in holding that the same should not be struck out.
33. I find that the appeal does not have any basis and thus must be struck out.
34. I order that the appellant pays costs of the proceedings in the sum of \$1,500 to the MOL within 21 days.
35. The charges must now be heard and determined by the ERT.

36. A copy of this judgment is to be forwarded to the ERT so that the criminal matter can now be heard.



Anjala

Judge

20.04.2016

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To:

1. *Naidu Law for the Appellant.*
2. *Ministry of Labour for the Respondent.*
3. *File: Suva ERCA 17 of 2015.*