IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	ERCA 2 of 2013
BETWEEN:	CARPENTERS FIJI LIMITED trading as CARPENTERS MOTORS APPELLANT
AND:	AJAY LAL RESPONDENT
Appearances:	*Mr. S. Sharma for the Appellant.* *Mr. S. Nandan for the Respondent.*
Date/Place of Judgment:	*Wednesday 02 November 2016 at Suva.*
Coram:	*Hon. Madam Justice A. Wati.*

Catchwords:

Employment Law – Practice and Procedure – Right of a party to seek leave to withdraw a cause which is beyond the jurisdictional limit of the ERT – Right to file fresh cause in the ERT- Powers to grant cost when granting leave to withdraw to allow room to file fresh cause in the ERC – the jurisdictional limit of the ERT is monetary jurisdiction and does not affect the order for reinstatement – the workings of s. 211(2) (a) [being the monetary ceiling on the remedies that can be awarded by the ERT] and s. 230 of the ERP.

Legislation:

1. ***The Employment Relations Promulgation 2007 ("ERP"): ss. 110(3); 216; 218.***
2. ***The Employment Relations (Administration) Regulations 2008 ("ERAR"): Regulation 9(3).***

Cause/Background

1. The employer appeals against the decision of the Employment Relations Tribunal ***("ERT")*** of 13 December 2012 wherein, upon the application of the employee's counsel, it granted leave to withdraw the employment grievance that the employee had filed on 4 August 2010 at the Mediation Unit ***("MU")***. The matter was referred by the MU to the ERT when mediation did not resolve the grievance.

2. In granting the employee leave to withdraw the matter, the ERT had refused to grant any costs to the employer.

3. The ERT had granted the employee leave to withdraw the matter under s. 216(6) of the ERP which states that ***"the applicant may not withdraw a matter before the Tribunal without the written consent of the other parties or prior leave of the Tribunal".***

4. It is not disputed that the employer had not provided consent to the employee to withdraw the matter but had agreed that the ERT had powers to grant leave to withdraw the matter. Even the application for leave to withdraw was not consented to and was disputed.

5. The need for the employee to make an application for withdrawal came about when his counsel realized on the day of the hearing that there exists a provision in the ERP which does not allow the ERT to hear claims in excess of 40,000. In other words there is a jurisdictional ceiling for monetary claims at $40,000.

6. The counsel for the employee Mr. Nandan quite boldly and candidly admitted that he was not aware of the jurisdictional ceiling and when this matter was raised in Court, the counsel appearing in Court had no other option but to withdraw the matter.

7. At the ERT, Mr. Sharma brought the issue of the employee's claim being in excess of the jurisdictional limit of the ERT based on the employee's response to his letter dated 11 December 2012. Mr. Sharma informs the Court that this letter was written to enable the

employer to prepare its case and for reasons of fair trial. The material parts of the letter reads:

" ...You may recall that at the last hearing on 29th and 30th August 2012 before the Tribunal, it was intimated to the tribunal on behalf of the Applicant that reinstatement was not being sought as the Applicant is now in the employment of the Vision Group.

Given the position as aforesaid and in order to assist the preparation for hearing, we request that you please provide to us full and precise particulars, with details of the claim that is now being pursued or will be pursued during the hearing commencing on 13th December 2012.

It is imperative that the claim be quantified with particulars and with some degree of precision and be made available prior to the hearing and in any event, we request by 3pm on Wednesday, 12th December 2012.

You would appreciate that such prior notification will obviate any surprises at the hearing as it directly impacts on fairness at the trial and will enable the respondent to prepare for the hearing, accordingly.

We respectfully request the urgent provision of the particulars in relation to the quantum of the claim. These can be provided in the form of a letter..."

8. In response to the letter, the employee's counsel provided the quantum claimed which showed a figure beyond $200,000.

Grounds of Appeal

9. The employer appeals the ERT's decision in granting leave to withdraw the matter and in not awarding any costs in doing so on the grounds that the ERT erred in law in fact in:

1. *granting the employee leave to withdraw the grievance in all circumstances and in particular given that:*

   (i) *The employee did not make any proper application or advance any valid or acceptable grounds or reasons for the application and if such grounds and/or reasons were advanced, they were untenable as a matter of law;*

   (ii) *The ERT failed to exercise its discretion judicially and/or on established legal principles pertaining to leave to withdraw the matter under section 216(6) of the ERP;*

   (iii) *The ERT erred in law in failing to take into account the potential prejudice caused to the employer and/or the deprivation of benefit that would have otherwise accrued to it; and*

   (iv) *The ERT in effect exercised its discretion in a manner enabling the employee to benefit from his own mistake and/or ignorance of the law and to the detriment of the employer.*

2. *in not directing the employee to proceed with the hearing of the employment grievance but limited to the jurisdiction of the Tribunal.*

3. *in refusing the employer's application for costs under s. 236 of the ERP and failed to apply the legal principles pertaining to costs.*

4. *in taking into account irrelevant considerations and failing to take into account relevant considerations in the exercise of its discretion to refuse the employer its application for costs.*

5. ***in not keeping proper records of the proceedings thus prejudicing the parties*** *[as argued although not specifically stated in the notice of appeal].*

Appellant's Submissions

10. In arguing ground 1, Mr. Sharma stated that s. 216(6) of the ERP does grant the ERT powers to give leave to withdraw the matter but that does not mean that leave can be granted on untenable basis. This is notwithstanding that the ERP does not set out the basis on which the question of leave is to be considered.

11. It was argued that the matter was set for hearing and the respondent should not have been allowed to escape the process because he had filed the claim in the wrong jurisdiction. He was let to avoid the contest and obtain the benefit of his own mistake by filing the cause in the wrong jurisdiction. He was no longer *Dominus litis* (*no longer the master of the suit)* and it is for the Court to say whether the action should be discontinued.

12. Mr. Sharma contended that since there was no formal application before the Court to withdraw the matter, there was no evidential or legal basis upon which leave to withdraw the matter could be granted. The ERT therefore did not consider the submissions of the employer when it granted the leave. The ERT failed to consider the aspects of prejudice to the employer and the need for timely resolution of employment disputes when granting the application for withdrawal.

13. In arguing ground 2, Mr. Sharma submitted that since the respondent had chosen to bring the proceedings in the ERT, he was bound by the jurisdiction of the ERT and the ERT could not grant an application to withdraw the matter and file the same in the Employment Relations Court ***("ERC").*** There was no impediment for the ERT to hear the matter. It should have heard the case and disposed the same off. By ordering that the case be filed in the ERC, the ERT circumvented its transfer powers enshrined in s. 218 of the ERP. S. 218 of the ERP only allows for transfer to the ERC if an important question of law is likely to arise or the case is of such a nature and of such urgency that it is in the public interest that it be transferred.

14. Mr. Sharma argued that the ERT should have put the respondent to elect between proceeding or not proceeding with the case. There was no justified reason why the matter should be withdrawn. The ERT also did not give the reasons why the matter was allowed to be withdrawn.

15. It was agreed that the MU had referred the matter to the ERT for hearing of the same, but the respondent could have asked the MU to refer the case to the ERC. It did not and therefore it submitted to the jurisdiction of the ERT.

16. Grounds 3 and 4 were addressed together. Mr. Sharma argued that the ERT erred in not granting any costs to the employer when the matter was withdrawn. Reference was made to s. 236 of the ERP and Order 62 Rule 10 of the HCR which empowered the ERT to order costs. Mr. Sharma said that the appellant incurred costs when it made various appearances, in filing affidavits and submissions, in preparing witnesses for the trial and bringing them to Court on the day of the hearing, and making arrangements for the hearing to take place by video conferencing and generally as well.

17. In respect of ground 5, it was submitted that in this case, the ERT has not kept the record of the proceedings that transpired and as a result, the employer is prejudiced. Mr. Sharma stated that there are no notes of what transpired in Court on 13 December 2012 when the matter was set for hearing.

Respondent's Submissions

18. Mr. Nandan responded by saying that it is agreed that there was ignorance on the part of the respondent and his counsel on the monetary limit of the jurisdiction of the ERT. Having said that he argued that the way the procedure works at the ERT level in cases of employment grievance led the matter automatically in the ERT.

19. All the employment grievances must first be listed in the MU. If mediation fails, the MU only has powers to refer the matter to the ERT for adjudication. At some point, a grievor has to stand in the ERT and inform it that his claim is not limited to the jurisdiction of the ERT and that he or she intends to file the action in the ERC. If a grievor is faced with that situation, the only way he or she can resolve the difficulty he finds himself in is to seek leave to withdraw the proceedings. He or she has no other option.

20. It was further argued by Mr. Nadan that it is not within his powers as to how he ended up in the ERT as that is the practice and procedure by virtue of how he ended up there. The grievor has exercised his right to mediation as that is the benefit that has been provided by the legislation and his ending up before the ERT was as a result of him exercising his right.

21. Mr. Nadan said that when a party realizes that his case is outside the jurisdiction of the Court, he can only make an application for withdrawal and it is preferred that an application for leave to withdraw the matter is done at an earliest possible date but in this case, even he did not know about the limitation so the matter was continually in ERT before he realized the jurisdictional limit imposed by the statute. Nevertheless, the situation would be the same if the counsel knew about the jurisdictional limit. He would have had to seek leave to withdraw at some point in time. The only difference would be that he would have made the application earlier had he known about the jurisdictional limit.

22. It was contended that when an application for leave to withdraw is made on the grounds that the claim is outside the jurisdiction of the Court, there are no other considerations to take into regard. There is no need for a formal application as such and no prejudice is caused to the other party in absence of a formal application. What was said orally was basically what would have been put in writing.

23. It was averred that if the ERT had started hearing the evidence, then the applicant could not have withdrawn the matter to file in the ERC but in this case, up until the hearing, it was open for the grievor to make such an application.

24. The only reason the ERT did not award costs was that it was not within its jurisdiction to award any costs. He could have either given leave to withdraw or struck out the matter on his own volition. Granting costs in a matter where he has no jurisdiction was to exercise jurisdiction.

25. Mr. Nadan said that once the ERT was told that the claim was outside the jurisdiction and counsel wished to withdraw and file a fresh action in the ERC, the ERT could not exercise jurisdiction to hear the matter. It would be prejudicial to the grievor otherwise and it is in error of law to exercise jurisdiction over a matter which is purportedly outside its powers.

26. It was averred that the delay in realizing that the claim is outside the jurisdiction of the Court is because unlike in the Magistrates' Court a statement of claim is not filed. The general basis of the dispute is outlined in a form and lodged. There is no need to quantify the claim like in the Magistrates Court. An open ended claim is allowed in the ERT so on that basis a lot of mistakes do happen. It is only late in the day that some realize that the claim is outside the jurisdiction of the ERT.

27. Mr. Nadan also argued that this Court, if it feels that the appellant is entitled to costs, can always make an order to that effect, which amount can be deducted from any award that is made by this Court in favour of the employee in the main cause before it.

Law and Analysis

28. It is not in dispute that the ERT had powers in this case to grant leave to withdraw the matter. It is agreed by the parties that that power exists in s. 216 (6) of the ERP.

29. The contentious issue is whether the ERT should have granted leave on the day of the hearing when the counsel for the grievor realized that his claim would fall outside the jurisdiction of the ERT without any formal application and outlining any evidentiary and legal basis for the said application. What follows from this issue is whether the ERT gave proper considerations when dealing with the issue of leave to withdraw. These issues cannot be answered if I do not deal with Mr. Nadan's argument that by provisions of s. 110(3) of the ERP and Regulation 9(3) of the ERAR he was sent to the ERT.

30. S. 110(3) of the ERP states that ***"all employment grievances must first be referred for mediation..."*** and Reg. 9(3) or the ERAR states that ***"if a mediator determines that the employment grievance or employment dispute is unlikely to be resolved through mediation, the Mediator may refer the case to the Employment Relations Tribunal..."***

31. Mr. Nadan says that since the grievor exercised his rights to have mediation, he ended up in the ERT. There was no other way for him to have had his cause listed before the ERC. I do not accept that submission because it is full of ignorance of law and lack of understanding of the procedures.

32. It is prudent that I spell out the procedure on when and where a litigant must file his case. Before filing a case, an applicant must always know what remedy they wish to seek against the employer. One cannot just blindly file the case and find the merits of it as they go along. That is not prudent of a good litigant and a counsel.

33. Even though a specific statement of claim is not required to be filed in the MU or the Permanent Secretary, one has to know the proposed remedies one intends to seek. I say this with appreciation that an employment grievance and an employment dispute can be initiated by lodging a form in the MU or with the Permanent Secretary This is important because like in the Magistrates' Court, there is a jurisdictional ceiling to monetary claims in the ERT.

34. The jurisdictional ceiling is $40,000 as per s. 211(2) of the ERP. If an employee's claim is going to exceed the jurisdictional limit of the ERT, then the next choice is for the proceedings to be filed in the ERC. The ERC can hear claims for an unlimited amount.

35. Mr. Sharma had asked me to cast my mind to s. 230 of the ERP which indicates that both the ERT and the ERC can order one or more of the remedies provided for in the subsections. It was argued that s. 230 does not place any limitations on the ERT's jurisdiction. The counsel questioned the Court as to what then happens to the provisions of s. 211(2) (a). Is it a mere useless provision?

36. It is correct that both the ERT and ERC can order one or more of the remedies provided for in s. 230 of the ERP. However, if a litigant knows that his monetary claim *(with or without the order for reinstatement)* would exceed $40,000 then his choice of forum should be the ERC. One must not forget that simultaneously other monetary benefits can be sought as well.

37. One must bear in mind that reinstatement is not always a remedy that the courts have preferably provided to the employees over the years on the basis that once a working relationship has broken down, it is undesirable for reinstatement to be ordered. Bearing that principle of law in mind, one has to, at the time of filing the claim; calculate the measure of damages in monetary sums, as if reinstatement were not to be ordered. Such an exercise is much needed because that will assist a party in deciding the proper forum to initiate the case.

38. In essence then, s. 211 (2) (a) is a limitation provision on s. 230 (1) (b) and (c). It can be said to be the overriding provision on monetary jurisdiction only otherwise it will not make sense if s. 230 of the ERP were to be interpreted as the overriding section. The enactment of s. 211(2) (a) would become redundant.

39. There is no procedural impediment in filing a cause in the ERC. If an employee is not sure of the final relief that he may get from the Court; the safest option is to choose the ERC over ERT. Such circumstances of uncertainty, I understand would be rare.

40. I appreciate that a party may get a lot of assistance from the MU and have his or her case finalized without having to go for court proceedings, but that it not a prudent procedure to follow based on the provisions of the ERP. The prudent procedure to follow is to file the matter in ERC and if mediation is desired, an application can be made for the same. The Court can always order mediation. The right to mediation would not be taken away from a party. The only difference would be that a party is then not under a statutory compulsion to have his matter mediated but will have to depend on court to order the same. If the same purpose can be achieved by a Court ordered mediation, there is no prejudice.

41. Having said what the procedure is and what should have been done, I cannot stop there. The issue is, when not knowing, the respondent and his counsel realized late in the day that the intended claim was outside the jurisdiction of the ERT, what could it have done and what could the ERT have done.

42. In that regard, I agree with Mr. Nadan that that the only option left for the grievor and his counsel was to seek leave to withdraw the matter. If that application was not made, the employee would have to limit his claim. This is prejudicial to the employee not to have his case fully ventilated.

43. The ERT had the powers to hear the application for leave to withdraw the matter because in the form the claim existed before it, it had jurisdiction over the grievance. There was no specific amount sought in monetary terms. The position would be different if the monetary claim before the ERT was specifically stated to be in excess of $40,000. In that situation, the ERT could not have heard the application for leave to withdraw the matter but to strike out the same. It then could not have even awarded any costs. If the matter was struck out for want of jurisdiction, the employee

had all the rights to file a fresh claim in the ERC provided that he was still within the limitation period.

44. Since the only basis to seek leave to withdraw was that the counsel and the employee did not know the jurisdictional limit of the ERT but that the case in fact was a claim for monetary limit beyond $40,000, there was no need for a formal application. The evidentiary and legal basis on which the application was withdrawn was quite clearly before the ERT and well within the knowledge of the appellant and his counsel to respond to.

45. Any such formal application would not have added any new strength to the appellant's argument. Even though the ERT does not record the arguments that was fully raised by the appellants and dealt with it, the same benefit was allowed to the appellant in this Court. Having heard the appellant, I find that in the larger interests of justice, the ERT was correct in allowing the employee leave to withdraw his cause.

46. If leave was not granted, the employee would have to limit his claim to the jurisdiction of the ERT and that would be more prejudicial to him than the employer who says that he has wasted time and resources in appearing and preparing for the cause in the ERT. The employer's concerns can be addressed by the issue of costs. On the other hand, the employee's concerns can only be addressed by granting leave as his loss may not be safely measured if he were forced to litigate his matter in the ERT.

47. I cannot understand why the employer is so vehemently objecting to having the cause argued in the ERC only on the basis that the employee cannot take the benefit of his own mistake. The larger obligation on the Court is to determine the real issue in dispute and not to punish parties for curable mistakes of this nature. In essence what the employer says is that the employee should not benefit from his own mistake but that the employer must be allowed to take advantage of that mistake. I find the argument in the context of this case strange to say the least.

48. The ERT may not have carefully outlined the basis on which the application for withdrawal is granted, but the entire reading of the judgment shows that the question of prejudice to the employee was the overriding consideration.

49. I do not accept Mr. Sharma's submission that since the matter was before the ERT, it ought to have heard and determined the same because the employee chose that forum. The Court cannot be so stringent and deny a litigant proper access to justice. When the ERT was informed that the employee seeks to claim relief for more than $40,000, proceeding in ignorance of that submission would be to deprive the employee a proper right to be heard on his claim fully. That is neither equitable nor justified by the fundamental principle of law that a party must have access to justice. The term access to justice means a meaningful access to justice and that will be curbed if a party is not allowed to litigate his matter in the proper forum without prejudice to the other person's rights.

50. It would be another matter, if the ERT had heard the evidence partly of fully. The applicant could still withdraw his case but there would be questions surrounding his right to file a fresh cause in the ERT. In this case, the matter was not heard and the application for withdrawal was made. The applicant is entitled to file a fresh cause in the ERC. He cannot be deprived of being heard. That would be most unjust. The employer cannot possibly ask that the employee be precluded from trying his cause. This is merely asking for an order by default.

51. Mr. Sharma also argued that the ERT circumvented its transfer powers by granting leave to withdraw the matter. I do not comprehend this submission nor do I find that any weight needs to be placed on it. S. 218 does give the ERT powers to transfer causes for specific reasons and none of the reasons allow transfer for lack of jurisdiction. Understandably so because transferring a matter for lack of jurisdiction means to exercise jurisdiction. Granting the leave application to withdraw was to simply allow fresh proceedings to be filed in the ERC. The transfer powers are not circumvented. If a matter is transferred, a party does not bear any further costs of filing fresh papers in the High Court to start off with unless the ERC orders so for specific reasons. Granting of leave to withdraw is at the expense of the employee because he or she has to undergo the exercise of filing fresh papers in the High Court and also having to pay for the costs of the proceedings.

52. The last matter that I need to deal with is the question of keeping records of the proceedings. Indeed no notes could be found of any parties' submissions or what transpired in Court on the day. The judgment to some extent outlines what transpired in Court on the day.

53. It is mandatory that records of proceedings be kept by the ERT and when requested for by a higher Court to determine the veracity of issues before it, must be supplied: ***s. 216(5) of the ERP.***

54. Be that as it may, I find that both the counsel were able to aptly state the background leading to the decision appealed and no such prejudice has been caused in arguing the appeal on a point of procedure.

55. The other question on appeal that needs to be addressed is the question of costs. Mr. Sharma said that he spent time and money in being in the ERT. I agree with Mr. Nadan that if the Court simply struck out the matter for want of jurisdiction, it could not have then exercised jurisdiction to award costs.

56. However, in this case, the Court chose another option which was to exercise jurisdiction to grant leave to withdraw on the basis that that leave would allow room for filing of a fresh action in the ERC. Since the ERT had already determined the question of leave, what then naturally followed was the issue of costs which the employer had to pay in having to retain a counsel and to attend to various matters in ERT before leave was granted. For that the employer was entitled to costs.

57. The employer was in the ERT for some 3 years and getting a private counsel to defend the matter is not a cheap exercise. The ERT stated that most of the work that has been done in the ERT can be useful to both parties in the ERC but one cannot lose sight of the fact that most costs are thrown away and cannot be compensated for in the ERC. These are appearances costs, preparation for trial, briefing witnesses, taking time out for correspondence and making relevant submissions in the ERT.

58. If I were to summarily assess the costs for these matters, the employer is entitled to cost not below $1,500 for all the appearances and work done in the ERT. With all that the employer has partly succeeded in appeal, at least on the question of costs. Collectively, I find that an award for a sum of $2,000 is justified.

59. Having dealt with the primary issues on appeal, I must make some remarks on the issue of the progress of the original action now pending in the ERC. The respondent has filed his affidavit verifying list of documents and I could not locate any filed by the appellants. I will make expeditious orders for discovery and pre-trial so that this matter can be tried expeditiously without any further waste of time.

Final Orders

60. In the final analysis, the orders are:

(a) I dismiss the appellant's appeal on the grounds that the ERT erred in granting the respondent leave to withdraw the matter.

(b) I allow the appeal on the grounds that the ERT erred in not granting costs to the employer upon granting the leave to the employee to withdraw the proceedings.

(c) The appellant shall have costs of the proceedings here and below in the sum of $2,000 payment of which sum is to be stayed until after the determination of ERCA 2 of 2013;

(d) The appellant must file its affidavit verifying list of documents within 14 days from today.

(e) The parties are to carry out the inspection of the documents within 14 days thereafter.

(f) After discovery of the documents, the parties are to have a pre-trial conference within 21 days within which time the minutes of the said conference shall be filed in Court.

(g) The mater will be listed for call over early next year to fix a hearing date. A specific date will be fixed upon consultation with the parties.

Anjala Wati
Judge
02.11.2016

HIGH COURT OF FIJI
SUVA

To:

1. *Patel Sharma Lawyers for the Appellant.*
2. *Reddy & Nandan Lawyers for the Respondent.*
3. *File: Suva ERCA 02 of 2013 and ERCC 3 of 2013.*