IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER:	**ERCC 17 of 2017**
BETWEEN:	**FIJI RUGBY UNION**
	APPLICANT
AND:	**ALBERT SANDAY**
	RESPONDENT
Appearances:	*Mr. N. Lajendra for the Applicant.*
	Mr. J. Ulodole for the Respondent.
Date/Place of Judgment:	*Monday 02 September 2019 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

A. Catchwords:

Employment Law – Application for compliance of the orders of the ERT which was withdrawn by the employee – subsequently, application filed for leave to appeal the decision out of time- application for leave to appeal out of time does not qualify the test for determination of the application generally – since the matter was heard in absence of the employer, the proper procedure is to apply for a setting aside of the judgment and not to appeal the same -even if the application for compliance was not withdrawn, it would not have succeeded on the grounds that the ERC does not have jurisdiction to order compliance of the orders of the ERT – it has jurisdiction to punish for failure to comply with the compliance orders of the ERT.

B. Legislation:

1. *Magistrates Court Rules ("MCR") 1945: Order 30 Rule 5.*
2. *The Employment Relations Act 2007 ("ERA"): ss. 212; 221 and 238.*

Cause

1. The application before this Court is for an order for extension of time to appeal the decision of the Employment Relations Tribunal ***("ERT")*** delivered on 31 May 2017 in Employment Grievance Number 3 of 2009.

2. The ERT had found in the grievance filed by the employee that the employer had unlawfully and unfairly dismissed him from employment. As a result of its finding, the ERT had ordered that the employer reimburses the employee with all the lost wages as a result of the grievance for the period 4 August 2008 to 2 January 2009.

3. It was also ordered that the employer compensates the employee for causing him humiliation, loss of dignity and injury to his feelings, in the sum of $1,000. Costs of the proceedings in the sum of $500 was also awarded to the employee.

4. The proceeding in this Court was begun by the employee when he brought an application for compliance of the orders of the ERT. The application was filed on 22 August 2017. In response to that application, the employer had contended that it was never notified of the ruling date and it was not aware that the ruling was delivered. The contents of the judgment and the nature of the orders were made known to it through service of the compliance application.

5. The application for compliance was then withdrawn on 28 February 2018. After that, the employer did not take any action regarding that decision until 13 June 2018, when it filed this application for leave to appeal the decision out of time.

Law/Determination

6. I will need to deal with the application for leave to appeal out of time as that is the only issue before the Court. However, for the sake of clarity, I will also briefly touch on the aspect of the compliance application which was withdrawn by the employee.

7. There is no serious need for me to address the application that has been withdrawn but this is necessary for the employee to understand what it should do next in terms of the decision and compliance should the application for leave not be successful.

8. On the aspect of delay in filing the appeal or the application for extension of time to appeal the same, the employer contends that it could not have filed the appeal on time as it was never served with the decision. It only became aware of the same when the application for compliance was served on it.

9. The employer says that since the application for compliance was pending, it could not take any further steps in the matter. When the application was withdrawn on 28 February 2018, only then could the employer move the court to file the application for extension of time to appeal the said decision.

10. It proceeded to file the application on 13 June 2018. If the period is calculated from 1 March, which is the period after the application for compliance orders was withdrawn; the delay is effectively for 3 months. The delay is explainable, averts the employer.

11. It says that it was difficult for the employer to establish what material evidence has been adduced before the ERT on behalf of the employer. Over the years the matter had been handled by different lawyers acting for the employer. The employer therefore did not have all the material information that was filed on behalf of the employer.

12. Since the termination of the employee, the Board of the Fiji Rugby Union had changed 4 times and this affected the continuity of the knowledge and full circumstances of the matter. Once the full material was with the employer, it took time to decide the legal avenues open to the employer. Time was also consumed in obtaining the Board's approval to pursue the best option available to the employer.

13. On the question of whether the appeal has any merits, the employer maintains that the employee was terminated on the grounds of insubordination. The chances of the appeal

succeeding are very good and the employer should be allowed an opportunity to appeal the said decision.

14. The employer says that even though the prejudice to the employee will be there if leave to appeal is granted, there would be more prejudice to the employer if it is not allowed to appeal the said decision.

15. I will first of all deal with the question of delay in filing the appeal and the application for extension of time to appeal. I accept the applicant's explanation that it could not file the appeal within the time prescribed by the ERA because it was not aware of a decision being delivered in the proceedings before the ERT.

16. There is no record of the employer being notified of the decision or the contents of the same until the application for compliance was served on it.

17. What concerns me however is that when the application for compliance was served, I would have expected the employer to act immediately and applied for extension of time to appeal. It did not do so thinking that it had to first dispose or deal with the pending application for compliance.

18. There is no prohibition on a party to appeal a decision or to seek extension of time to appeal the same in view of a pending application for compliance before the Employment Relations Court ***("ERC")*** since a direct application for compliance to the ERC of the orders of the ERT is improper for want of jurisdiction. I will deal with the issue of jurisdiction in detail later.

19. Even if the application for compliance was pending in the ERT, a party can still always apply for a stay and appeal the same or seek extension of time to appeal. It is for the court to decide the pending application for stay and extension of time. It does not mean that an aggrieved party should wait for the compliance order application to be heard because if that was the procedure then the potential application for stay and extension of time will be rendered nugatory.

20. Even if I make allowances for the explanation that the application for extension of time could not be filed due to the pending application for compliance before the ERT, I cannot accept the explanation for the additional 3 months delay after the application for compliance was withdrawn.

21. The employer explains that it was not aware of what materials were adduced by the employer and the basis on which the decision was made. If a party does not know what had transpired in the hearing, it has the right to search the file and this employer could have done the same and made itself aware of the evidence and documents adduced. It already had the benefit of the judgment. It could have quickly, within a week at least, filed an application for leave to appeal out of time.

22. It does not matter that the employer had changed many solicitors during the pendency of the proceedings before the ERT and the Board had changed 4 times after the termination of the employee. What the current Board had to work on was the materials the employer had in its possession and the ones possessed by the ERT to bring a quick application for leave.

23. When an employee is terminated, he expects the courts to act quickly and swiftly so that he has an answer to his grievance within a short time frame. It has the same expectation from the employer. It is only fair that the decision to act expeditiously is required from the employer as well.

24. The employee also needs to make further decisions in his life about his career. Proceedings about his previous employment, if not finalized on time, can always have an impact on his personal and professional life. The employer should not be allowed the luxury of time to act in the manner it wishes. It should have acted quickly in this case but there was little zeal shown to act expeditiously.

25. I cannot accept the delay as normal and one that was beyond the control of the employer. I find the delay inordinate and the explanation unacceptable.

26. On the question of the merits of the appeal, I must say that the matter was heard undefended. In such cases, if the employer or a party to the proceedings is aggrieved with the decision, the

right to challenge the decision lies with the same court. The aggrieved party must apply for a setting aside of the application. The appeal or the extension of time to appeal is premature in this case. This is the procedure required by Order 30 Rule 5 of the MCR which states that ***"any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit"***. The MCR is applicable to the matters in the ERT by virtue of s. 238 (2) (a) of the ERA.

27. Further, the onus to prove that the dismissal was lawful and fair was on the employer. If it does not attend the hearing to justify the dismissal, the ERT cannot use any evidence not tendered in court to determine the question of the lawfulness and the fairness of the decision.

28. Evidence in any other form before the Tribunal, for example, through the submissions, is not tested and therefore immaterial to consider in assessing the lawfulness and fairness of the termination. I therefore find that the ERC is bereft of any evidence from the employer to arrive at a different conclusion to say that the appeal has merits.

29. This employee has been out of employment with this employer since 2008. It is now over a decade that he requires finality to the grievance that he had filed. The decision was delivered in 2017. It is now more than 2 years that he is waiting for the employer to comply with the decision. I find that it is prejudicial to the employee to wait for the decision to be complied with until the employer exhausts all its avenues in the period of time it wishes to. There has to be finality to proceedings and I find that if the leave to appeal out of time is allowed, the employee will suffer more prejudice than the employer.

30. It is the employer which chose not to defend the proceedings and now wishes to have the issue of the termination re-looked at. I find that in this exercise, the employee is suffering due to the time it has taken for the grievance to resolve and the decision complied with.

31. I do not find that any factor supports the grant of the application for extension of time to appeal the decision. The application ought to be refused.

32. As I had indicated, I will touch on the proper procedure to bring an application for compliance of the orders of the ERT.

33. Under. s. 221 (1) (a) and (b) of the ERA, the Employment Relations Court ***('ERC")*** only has powers to order compliance with the provision of the Act or an order, determination, direction, or requirement made or given under the Act by the ERC.

34. The ERC does not have powers to order compliance with the orders of the ERT. In fact, that power is specifically vested in the ERT itself: ***s. 212(1) (b) of the ERA.***

35. Once the ERT orders compliance of its orders under s. 212 (1) (b) of the ERA, any subsequent failures to comply, can result in an application to the ERC under s. 212 (6) of the ERA for punishment for failure to comply with the orders of the ERT.

36. A direct application to this Court for compliance of the orders of the ERT is premature and cannot be dealt with by the Court. The employee would not have succeeded in its application if it was before this court for determination and not withdrawn earlier.

Final Orders

37. In the final analysis, I do not find that the application for leave to appeal the decision out of time qualifies the test for the grant of the application generally. I also find that it is not proper for an appeal to be founded from a decision that has been heard and determined in absence of a party. The proper procedure is to set aside the decision in the same court which delivered the decision. I dismiss the application for leave to appeal the same out of time.

38. I order costs against the employer in the sum of $1,500 to be paid within 14 days.

Anjala Wati
Judge
02. 09.2019

HIGH COURT OF FIJI
SUVA

To:

1. *Lajendra Lawyers for the Applicant.*
2. *Mr. J. Ulodole for the Respondent.*
3. *File: ERCC 17 of 2017.*