IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 10 OF 2016**
BETWEEN:	**DIRECTOR ASHABHAI & COMPANY LIMITED** **1st APPELLANT**
AND:	**PERMANENT SECRETARY FOR EMPLOYMENT, PRODUCTIVITY & INDUSTRIAL RELATIONS** **2nd APPELLANT**
AND:	**BRIJMA WATI** **RESPONDENT**
Appearances:	*Ms. Buli, V. for the 1st Appellant.* *Ms. Ali, AG's Chambers, for the 2nd Appellant.* *Mr. A. Chand, Legal Aid Commission, for the Respondent.*
Date/Place of Judgment:	*Friday 4 October 2019 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

A. Catchwords:

Workmen's Compensation Claim ("WCC") – Permanent Secretary ("PS") for Employment, Productivity & Industrial Relations refused to institute WCC on behalf of the widow – Is the office of the PS duty bound to file all claims even though it is of the view that there is no prima facie case – Can the ERT review the administrative decision of the PS in a WCC- PS ought not to be a party in the WCC- Is the WCC statute barred- "Good cause" and failure by the employer to comply with the mandatory provision to give notice of death to the PS within the statutory time frame entitles the applicant to file the WCC within 6 years instead of 12 months from the date of the death.

B. *Cases:*

1. ***State v Permanent Secretary for Labour & Industrial Relations Ex-parte Foods (Pacific) Ltd. [1995] HBJ 1/94S.***

C. *Legislation:*

1. ***The Workmen's Compensation Act Cap.94 ("WCA"): ss. 2, 13 and 14.***

Cause

1. The 1st and the 2nd appellants are both appealing the decision of the Employment Relations Tribunal ***("ERT")*** of 18 July 2016. The decision arose in a workmen's compensation claim ***("WCC")*** filed by the wife on behalf of her husband who had died at work on 3 April 2007.

2. In its judgment, the ERT found that the claim of the wife was not barred under s. 13 of the Workmen's Compensation Act Cap. 94 ***("WCA")***, the applicable Act at the time, in that she had 6 years to bring the action as she had *"good cause"* why she could not bring the matter within 12 months from the date of the death.

3. The *"good cause"* was found to be the delay by the Permanent Secretary for Employment, Productivity & Industrial Relations ***("PS")*** in advising the widow that the office of the PS would not be instituting a claim on her behalf. The ERT therefore ordered that the substantive matter be heard.

4. The PS is also aggrieved at some remarks being made in the judgment against the office in not bringing an application on behalf of the wife and for the delay that was caused by the office of the PS giving rise to the employer to argue the issue of time limitation.

5. It is important that I state the background of this matter for clear understanding of the reasoning behind the ruling in the form it was delivered.

Background

6. The respondent Brijma Wati is the widow of the deceased Iswa Nand Ratilal who was employed by Ashabhai & Company Limited. The deceased was employed as a delivery boy who died at work. He was 61 years of age at the time of his death.

7. On 24 May 2007, the employer, through the required LD Form/C/1 gave to the PS, the notice of the death of the deceased. This notice was not given within the required statutory timeframe. I will deal with this in detail later when the time is apt.

8. It is not denied by the PS in its affidavit or its submissions to the ERT, that the widow had visited the office of the PS many times within months of the death of her husband. She had the intention to make a claim under the WCA.

9. Subsequently, the Ministry of Employment ***("Ministry")*** started its investigation into the matter. It proceeded to interview the other workmen of the employer and seek medical opinion on the cause of the death of the deceased. After compiling the information, the Ministry decided that it could not bring a claim under the WCA as the death of the deceased was not work related.

10. It therefore, on 20 July 2012, after 5 years and 3 months from the date of the death, wrote to the widow advising her that it will not bring a claim on her behalf and advised her to seek assistance of a private lawyer.

11. This letter was served on the widow and the contents of the same explained to her on the same day. She acknowledged on the copy of the letter that she received the same and that she was explained the contents.

12. It is important that I outline the main parts of the letter:

"I regret to inform you that appropriate investigation into your husband (sic) case has been completed and we have received a legal opinion from Solicitor General's Office stating that they are against any compensation claim relying on the grounds of:

a) *Dr. Sukafa Matanaicake, a specialist physician at CWM Hospital has stated in her report that the death of the workman is "not work related" and the workman died from a natural death. Furthermore, Dr. Matanaicake raised the risk factors which could have been associated with his death were his age, serum cholesterol and smoking habits.*

b) *The statement of the deceased workmate's and the investigation report by the Labour Officer all points to the fact that the workman worked normal working conditions, did not do any overtime work, was healthy and has a clean record of absenteeism.*

The Ministry has requested an opinion on which report to accept (Dr. Matanaicake or Dr. Maharaj) and whether to proceed on the second report from Dr. Maharaj. The second report from Dr. Maharaj has been obtained by the widow (yourself) hence any compensation claim she(you) want to pursue on the grounds of the second medical report, she(you) can do so with her(your) own private counsel.

As such, you may proceed with own private or own lawyer base (sic) on Dr. Maharaj's report and we will not proceed with your case as per legal opinion from SG's Office as they are the one representing us in court.

Enclosed is a medical opinion for your information".

13. On 9 August 2012, the widow wrote back to the Ministry appealing its decision in declining to file the claim on the reasons provided in its letter above.

14. After a month of appealing the decision to the PS, the results of which are unknown and irrelevant to the matter at hand, the wife, filed in person, a motion against the employer and the PS both.

15. The motion was filed on 26 September 2012, before the expiration of 6 years from the date of the death of the deceased. The motion sought different reliefs against each party.

16. Against the employer, the application was for workmen's compensation in the sum of $24,000 and against the PS, an order was sought to bring the claim against the employer under its statutory duty.

17. When the matter was listed before the ERT, the employer brought an application to strike out the matter on the grounds that it was not brought in a proper form. I gather from the judgment which is appealed that a different Tribunal struck out the matter on 9 April 2013 on the grounds that the claim was not brought in the proper form in that it ought to have been brought via Form 2 or Form 3 of the WCA. There are no records to this effect of the order made on 9 April 2013.

18. I also gather from the judgment appealed that in striking out the matter, the earlier Tribunal had then remarked that since the claim was not statute barred by then, the claim could be filed properly before the ERT.

19. The widow then had no option but to file an application through Form 4 on 6 May 2013. By then the 6 year limitation period had expired. In Form 4, the widow had once again sued the PS for failing to carry out its statutory duty in carrying out a fair investigation into the cause of death of the deceased and to bring a claim on her behalf.

20. In its claim by Form 4 the widow had also sought costs against the Ministry. The matter was defended by both the parties.

Proceedings/Findings in the ERT

21. The Ministry defended the proceedings in the ERT. It raised the following defence:

    1. *That the ERT does not have jurisdiction to review the decision of the PS not to bring the action under the WCA on behalf of the widow for the deceased. The proper application would be for judicial review to the High Court if the claimant is stating that fair investigation process was not undertaken by the PS.*

2. *That the employer had failed to give the required notice of death within the statutory time frame as mandated by s. 14 of the WCA.*

3. *The WCA provides for the PS to assist the claimants where due merit exists and since the PS was of the view that there was no merit, it declined to bring the action against the employer. That decision is within the powers of the PS to make. The legislation does not mandate that the PS brings an action in all work related injuries and death. S 2(4) of the WCA has vested the PS with the discretionary power of whether or not to bring a claim on behalf of the deceased.*

4. *There is no provision under the WCA which allows for the claimant to ask for compensation from the Ministry where it is felt that the Ministry has wrongfully declined to bring a claim against the employer or that the claimant is at a loss due to the failure to bring the action.*

5. *When the widow was advised of the PS's decision, she was at liberty to pursue the claim in person or through a legal counsel. The rights of the widow was not prejudiced.*

6. *The PS should be removed from the proceedings as no action can lie against it under the WCA.*

22. The employer's position was that the death was not work related and that the claim was time barred in that it was not brought within 12 months or 6 years as required by s. 13 of the WCA.

23. Due to the nature of the defence raised by the parties, the ERT properly decided to hear the preliminary points of law before deciding whether the substantive matter should be heard.

24. In respect of the Ministry's defence, the ERT found that the PS failed to perform its administrative function and was *"out of line" (the exact words used by the ERT)* in not bringing a claim on behalf of the widow as required by s. 2(4) of the WCA.

25. The ERT found that the PS had to, as per the judgment in ***State v Permanent Secretary for Labour & Industrial Relations Ex-parte Foods (Pacific) Ltd. [1995] HBJ 1/94S per Byrne, J;*** bring an action within 12 months of the date of the death of the deceased.

26. The ERT also found that there was more than enough evidence from the second medical report based on which a successful claim could be found. The ERT stated that the failure of the PS to perform its duties under s. 2(4) of the WCA tainted the Ministry's record in performing its administrative functions under the WCA.

27. The ERT remarked that by the looks of the way the matter was handled, it appeared that the PS acted for the employer and disregarded the interests of the widow who presented the second medical opinion which was more credible than the medical report which stated that the death was not work related as it was based on an unsigned and undated statement taken from a single worker.

28. In concluding that the claim was not barred under s. 13 of the WCA, the ERT found that the widow had initially filed a claim on 26 September 2012 which was struck out by a Tribunal on 9 April 2013. The ERT found that in striking out the claim, the first Tribunal had stated that the claim was not barred and could be brought through a proper process.

29. The ERT found that when the matter was struck out on 9 April 2013, the claim was time barred by then since the worker had died on 3 April 2013. The claim was barred on 3 April 2013 being 6 days before the decision to strike out the claim.

30. The ERT found that even though the application was not brought in the proper form, her application was within time and ought to have been heard. The ERT, in the interest of justice found that the time for bringing the claim should be counted from 26 September 2012 and using that date, the claim still stands within the statutory period of 6 years and therefore ought to be heard.

31. The ERT therefore ordered that the substantive matter be heard at a date and time to be determined.

Grounds of Appeal/ Law and Determination.

32. Since both the appellants are appealing the decision of the ERT, I think that it is prudent that their appeals be dealt with under separate heads. I will deal with the appeal by the PS first.

A. Appeal by the Permanent Secretary

33. The Ministry has filed 7 grounds of appeals and each ground overlaps with the other except for the ground on delay by the Ministry in bringing the proceedings.

34. The grounds of appeal can be collated and classed into three different issues to be determined as follows:

(i). ***Whether there was delay by the Ministry to inform the widow about its decision not to prosecute the claim and whether such a delay prejudiced the widow in bringing her claim on time? Could this delay by the Ministry constitute "good cause" as required by s. 13 (b) (i) to enable the widow to file her claim within 6 years instead of 12 months?***

(ii). ***Is the PS under a mandatory duty to prosecute all the claims lodged with it and if so whether there was any administrative failure by the Ministry in performance of its duties under the WCA?***

(iii) ***Should the PS remain as a party to the cause brought by the widow in the action under the WCA against the employer?***

35. I will deal with each issue in turn.

(i) Delay by the PS

36. The only evidence before the ERT and this court regarding when the widow was first advised that the PS cannot file a claim on her behalf is the letter dated the 20 July 2012 to the widow. I have mentioned the contents of the letter in my judgment above.

37. When the widow was advised of the PS's position, it was already 5 years 3 months post the death of the deceased. I think this is the prudent time for me to discuss the aspect of the time limitation for filing of claims under the WCA.

38. Without discussing this provision on time limitation, I cannot properly analyse the issue on appeal regarding the alleged delay by the PS in informing the widow of its decision not to bring a claim on her behalf. The relevant provision is s. 13 of the WCA as it applied to the widow in 2013. There have been subsequent amendments to the WCA which does not apply to her.

39. S. 13 the reads as follows *(there are some subsequent amendments which are not applicable to this case)*:

"13. Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given by or on behalf of the workman as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within twelve months from the occurrence of the accident causing the injury or, in the case of death, within twelve months from the time of death:

Provided that –

(a) The want of, or any defect or inaccuracy in, such notice shall not be a bar to the maintenance of such proceedings if it is proved that the employer had personal knowledge of the accident or had been given notice of the accident from any other source at or about the time of the accident, or of it found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect or inaccuracy, or that such want, defect or inaccuracy was occasioned by mistake or other reasonable cause;

(b) The failure to make a claim for compensation within the period above specified shall not be a bar to the maintenance of such proceedings if it is proved that –

(i) That the failure was occasioned by mistake or other good cause; or

(ii) The employer failed to comply with the provisions of subsection (1) or (2) of section 14,

so, however, that no proceedings for the recovery of compensation shall be maintainable unless the claim for compensation is made within a period of six years from the date of the accident".

40. I do not think that I would be presumptuous in saying that the Ministry ought to know of the above provisions because that is the core provision(s) in performance of its duties under the WCA.

41. The PS had 12 months to bring the action before the Tribunal. It therefore had to act very quickly in its investigation and advising the deceased that it cannot bring an action on her behalf. The PS did not write to the widow within 12 months or anytime soon.

42. In that regard there was substantial delay by the PS which precluded the widow from bringing a claim on her own or through private legal representation within 12 months. However, this finding cannot be made in isolation without seeing whether the employer had complied with the provisions of s. 14(1) or s. 14(2) of the WCA in giving to the PS notice of the death within time.

43. The relevant provision of s. 14 reads:

"14(1) Notice of an accident, causing injury to a workman of such a nature as would entitle him to compensation under the provisions of this Act shall be given in the prescribed form to the Permanent Secretary by the employer of such workman as soon as practicable, but in any event not later than fourteen days, after the happening thereof.

(2) When the death of a workman from any cause whatsoever is brought to the notice of, or comes to the knowledge of his employer, the employer shall, within one week thereafter, give notice thereof in the prescribed form to the Permanent Secretary. Such notice shall state the circumstances of the death of the workman if they are known to the employer.

44. The employer has certainty failed in complying with the above provisions. When that failure by the employer occurred, the Ministry then had 6 years to bring the claim as provided for under s. 13(b) (ii) of the WCA. That delay by the employer gave the PS more time to bring the claim.

45. It took good 5 years for the Ministry to investigate the matter and inform the widow of its decision. The widow was left with 9 months to find a private counsel or bring the action on her own.

46. I find that there was inexplicable delay by the PS in advising the widow of not being able to file the claim on her behalf. However there was still time left for the widow to bring a claim under the WCA within 6 years. Notwithstanding that, the PS cannot be exonerated for the delay.

47. The delay by the employer in not complying with the provisions of s. 14 and the delay by the PS in advising the widow of his intention not to prosecute the claim prejudiced the widow in not being able to file the claim within 12 months.

48. In that regard, the widow can invoke both section 13 (b) (i) in that she had good cause not to be able to file her claim within 12 months and s. 13 (b) (ii) being the failure of the employer to comply with the provisions of s. 14 to bring her claim outside the 12 months period.

49. The question of delay is relevant in deciding whether the widow should be allowed time to file her claim within 6 years and since I have found the answer in the affirmative, all that needs mentioning at this stage is that the ERT was correct in deciding that the widow could invoke s. 13 proviso to file her claim within 6 years.

(ii). Duty of the PS under s. 2(4) of the WCA

and

(iii) Whether PS should be a party to the claim under the WCA?

50. Section 2(4) of the Act reads as follows:-

"The Permanent Secretary and any labour officer or any labour inspector authorised by the Permanent Secretary in writing may institute or appear or both institute and appear on behalf of any workman or where the workman is dead on behalf of his or her dependants in any civil proceedings

by the workman or any dependants of his or her, as the case may be, in respect of any matter or thing or course of action arising out of or in the course of employment of such workman under any of the provisions of this Act"

51. The above provision, though authorises the PS and any labour officer or any labour inspector to institute proceedings and/or appear on behalf of the dependants of the deceasd, it does not make it compulsory or mandatory that all cases referred to it should be filed by the persons authorised in s. 2(4).

52. In this case the authority responsible for deciding whether or not a case should have been filed decided that it would not as it was their view, upon the investigation, that the death of the deceased did not arise out of or in the course of the employment.

53. The PS did not find that there was a prima facie case to institute the proceedings. Based on that finding, a decision was made. That does not mean that the PS was biased or favouring the employer. It was under a duty to make a correct assessment of whether or not the proceedings should be filed. The ERT's comment that in doing what the PS did, it favored the employer, is a loose comment and not based on the facts of the case.

54. The ERT's remarks that the Ministry was out of line and fell short of its responsibilities cannot be justified on the basis that it refused to bring an action under s. 2(4). If the duty was mandatory, such a remark may hold merit but where the Ministry has a discretion in deciding whether a case ought to be brought, and a decision is made, that decision cannot be impeached and challenged. The process in which the decision was arrived at can be looked into by the High Court via judicial review proceedings.

55. I do not find that the ERT has powers to investigate into the administrative acts of the Ministry and make findings against the Ministry. The widow does not have a cause of action against the Ministry in a WCC brought under the WCA. Her right to question the decision of the PS does not lie in the proceedings under the WCA. The Ministry cannot be made liable for the death of the husband in a WCC.

56. The ERT had relied on the judgment of ***Hon. Justice Byrne in State v. The Permanent Secretary for Labour (supra)*** This judgment does not in any way support the view that when a PS refuses to file proceedings under s. 2(4) of the WCA, it is conclusive of its failure to act properly and its actions deemed out of line in carrying out its administrative functions.

57. The excerpt of the judgment below basically indicates that the PS has the powers to decide whether or not it will file the proceedings. The matter before Justice Byrne was a Judicial Review matter, I must say, for clarity. Although the findings are made in respect of s. 8 of the Employment Act, it applies to the matter at hand because the gist of the findings relate to the powers of the PS to institute and bring proceedings in court.

"The powers and the duties of the Permanent Secretary are set out in various Acts namely the Employment Act Cap. 92, the Trade Disputes Act Cap. 97, the Trade Unions (Recognition) Act 96A and the Workmen's Compensation Act Cap. 94. Those functions are with two possible exceptions contained in Section 8 of the Employment Act permits the Permanent Secretary, any Labour Officer or any Labour Inspector authorized by the Permanent Secretary in writing to institute proceedings in respect of any offence committed by any person against the provisions of the Act and to prosecute and appear in such proceedings if he wishes. They also include the right to institute or appear on behalf of any employee in any civil proceedings by an employee against his employer in respect of any matter or thing arising out of or in the course of the employment of such employee.

That however does not mean that the Permanent Secretary can so to speak "take sides". It must be assumed that before he would exercise his powers under Section 8 he must have formed an honest opinion that the employee for whom he had been asked to act had at least a prima facie case against his employer. This is not to say that in deciding to institute any such proceedings or any prosecution the Permanent Secretary is showing partiality against an employer. His primary function as I understand it is and must be show no favour to either an employee or an employer or an organization of employees or employers…."

Underlining is mine.

58. I have echoed the same sentiments as Hon. Justice Byrne. Further, whether the decision to file the claim by the PS is correct or not, it is not a matter for the ERT to review, as any such review of the decision is outside the jurisdiction of the ERT.

59. The actions of the PS was relevant in making a finding whether the widow had a *"good cause"* to be allowed six years to maintain the claim. The ERT was not wrong in analyzing the facts to arrive at a conclusion on the requirement of *"good cause"* to be established.

60. The Permanent Secretary should not have been made a party to the cause as the WCC is not the proper proceedings in which the PS's decision could be reviewed or damages sought against it for failure to perform its duties. The ERT, however, could seek relevant information from the PS to make proper findings of fact either through issuance of a summons to assist the Tribunal or as a witness to the proceedings.

61. Be that as it may, since the PS was already a party to the cause, once the relevant information was at hand to assist in arriving at a finding, the PS ought to have been discharged from the proceedings. I find that ERT erred in law in not removing the PS as a party to the claim and that the appeal should be allowed in that respect. I now turn to the appeal by the employer.

B. The Employer's Appeal

62. The issues that arise from the employer's grounds of appeal can be summarized as follows:

    1. ***What is the limitation period within which the widow should have brought the claim against the employer? Is it 12 months as prescribed by s. 13 or is it 6 years under the proviso to s. 13?***

    2. ***If the answer to (1) above gives the widow the right to file the claim within 6 years, did she file the proceedings within 6 years?***

63. Under s. 13 the widow was supposed to file her claim within 12 months. However she can file her claim within 6 years if it can be established that the failure to file the proceedings was occasioned by mistake or other good cause or that the employer failed to comply with the provisions of section 14(1) or (2).

64. In this case I find that the facts of the case itself establishes that there was good cause why the widow did not bring her claim within 12 months and that the employer had failed to comply with s. 14(1) or (2).

65. The widow therefore could file her claim within 6 years as provided for under the proviso of s. 13. Did she do so? She filed her first claim on 26 September 2012 which was within 6 years. The ERT struck that matter out on 9 April 2013 when the limitation period had expired. This was done on the employer's application when it knew that the time has already expired. The employer was attempting a *"short cut"* from the claim.

66. The ERT which struck out the matter ought to have realized that the procedural defect could not nullify the proceedings. If there was additional information that was needed, the widow could have been asked to provide the same but striking out the matter based on incorrect form was a draconian power that ought to not have been exercised in a case where the widow needed access to justice.

67. After the employer was successful in getting the matter struck out, it very conveniently raised in the second matter filed on 6 May 2013 that the action is time barred. The claim filed on 6 May 2013 was time barred at the employer's instance of raising technical matters in court and should not be used against the widow.

68. The time period to calculate the limitation period should be the first time when the widow filed the case. Her claim filed on 26 September 2012 should be construed as her date for filing the claim and not 6 May 2013 when she was wrongly informed that she could file proper papers as she was within time.

69. The ERT, I find was correct in finding that the action was not time barred and that the substantive matter ought to be heard.

70. The employer's grounds of appeal has no merits and I dismiss the same.

Final Orders

71. In the final analysis, I find that the claim by the widow is not time barred and that she had a right to institute the claim within 6 years and that the date of her filing the claim should be counted from 26 September 2012.

72. I dismiss the employer's appeal and order that the substantive claim be heard. A hearing date ought to be fixed within 21 days given the time span from the date of the death.

73. The Registrar of the ERT must notify the parties in writing of the calling date of this matter in the ERT, that is, the widow and the employer. The PS is no longer a party to the cause as per my orders in para. 74 below.

74. I discharge the Permanent Secretary for Employment, Productivity & Industrial Relations as a party to the claim by the widow.

75. I find that it is proper that costs be awarded to the widow for the appeal by the employer. There shall be an order for costs in the sum of $3000 against the employer in favour of the widow and the said sum shall be paid within 14 days to the widow personally.

HIGH COURT OF FIJI
SUVA

Anjala Wati

Judge

4. 10.2019

To:

1. *AK Lawyers for the 1st Appellant.*
2. *AG's Chambers for the 2nd Appellant.*
3. *Legal Aid Commission for the Respondent.*
4. *File: ERCC 10 of 2016.*