

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 09 of 2017

BETWEEN: **ASHOK TRANSPORT LIMITED**
APPLICANT

AND: **SEMI CAKAUNITAVUKI**
RESPONDENT

Appearances: Mr. A. Shamil for the Appellant.
Ms. L. Mataigusu for the Respondent.

Date/Place of Judgment: Friday 24 January 2020 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

A. Catchwords:

Employment Law –application for leave to appeal out of time – applicant does not satisfy the test for leave to be granted.

B. Legislation:

- 1. The Employment Relations Act 2007 (“ERA”): s. 28(2).*
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Cause/Background.

- 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 9 March 2017. An order for stay of execution of the said decision is also sought.*

2. The employee worked as a truck driver for Ashok Transport Limited. On 6 November 2014, he was alleged to have assaulted a delivery staff of CJ Patel. The victim reported the matter to the police and a medical report was issued confirming the injuries.
3. On 7 November 2014, the employee was asked by the employer about the incident. He denied it in writing. According to the employee, he had only questioned the staff of CJ Patel as to who had opened his bag. The CJ Patel staff had got scared. He ran to the police and reported the matter.
4. The employee was asked by the employer to sort out the matter with CJ Patel. He did not go to CJ Patel as his position was that he did not assault the staff.
5. The employer's evidence was that an email was received from CJ Patel that the employee Semi had assaulted one of their staffs and that they did not want him in their yard anymore. The employer then decided that the best way forward was for the employee to apologize to the victim.
6. It was the employer's evidence that the employee did not wish to apologize as his position was that he did not assault the victim. The employer says that the employee then left the workplace and did not return to work thereafter.
7. The employee's position at the trial was that the matter should have been handled by the employer when he denied that he had assaulted the alleged victim. He should not have been forced to apologize given his position on the incident.
8. He further stated in evidence that he had returned to work on Monday 10 November 2014 but he was told that there was no work for him until the matter was sorted out with CJ Patel.

ERT's Findings

9. The ERT found that the employer ought to have informed the employee the contents of the email it had received from CJ Patel. If this information was told to him, the ERT found that the employee would have apologized to the victim to save his employment.

10. The ERT also accepted the evidence of the employee that he reported to work on 10 November 2014 and was told that there was no work for him until he sorted out the matter with CJ Patel. This action constituted unjustified and unfair action on part of the employer and the employee was liable for compensation. The ERT awarded the employee 6 month's lost wages.

Grounds for Leave and Analysis.

11. The judgment of the ERT was delivered on 9 March 2017. Under s. 28(2) of the ERA, the appeal should have been filed within 28 days from the date of the decision. The application for leave to appeal out of time was filed on 2 May 2017. The appellant is therefore almost 1 month out of time in filing the application for leave.
12. The affidavit in support of the application does not endeavor to explain why the appeal was not filed within time and the reasons for the delay. The affidavit only states that the worker failed to turn up to work and therefore he was not dismissed.
13. I am surprised that the applicant's counsel presumed that he was entitled to leave as of right. During the hearing of the matter, the question of delay, the reasons for the delay and the issue of prejudice was totally ignored and not addressed to any extent.
14. Normally the Court must be explained the delay in filing the appeal, the reasons for the delay, whether any party will be prejudiced if the application is granted or refused and the merits of the appeal.
15. The Court has to be satisfied that the delay was not inordinate and that the same was excusable. It also has to look at the question of prejudice and the issues raised in the appeal. I am not in a position to find that the delay was excusable as no reasons have been tendered for the delay.
16. On the question of prejudice, I must say that this employee has been waiting to realize the fruits of the judgment since 2017 and it is highly unfair that the delay by the employer should cause him further agony.

17. Every litigant has a right to have their matter dealt with quickly and delays which cannot be explained should not be used against a litigant who has conducted him/herself in a manner that has not protracted the proceedings.
18. On the question of the merits of the appeal, I am of the finding that it was open to the ERT to accept the evidence of the employee on the grounds of credibility. It had the advantage of hearing and seeing all the witnesses. I have no material upon which I find I can exercise my discretion to say that there is an error of law or fact in arriving at the finding.

Final Orders

19. I am not satisfied that the application for leave to appeal out of time has been made out. I therefore dismiss the application for leave and stay both and order the employer to pay to the employee costs in the sum of \$1,500 within 14 days.
20. I also affirm the judgment of the ERT and order that the 6 months' salary that has been ordered to be paid be complied with in the next 21 days.


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Hon. Madam Justice Anjala Wati

Judge

24. 01.2020

To:

- 1. M. A. Khan Esquire for the Appellant.***
- 2. Ministry of Employment, Productivity and Industrial Relations for the Respondent.***
- 3. File: ERCA 09 of 2017.***