

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 01 of 2018

BETWEEN: **REWA RICE FIJI LIMITED**
APPELLANT

AND: **KESHWAN PRASAD**
RESPONDENT

Appearances: Mr. Liverpool for the Appellant.

Mr. A. Sen for the Respondent.

Date/Place of Judgment: Thursday 30 April 2020 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. *Catchwords:*

Employment Law – Appeal against an order refusing setting aside – setting aside based on the contention that the employer and/or his counsel were not aware of the hearing date – the court records indicate that the employer and/or his counsel were very much aware of the fixtures – the basis for setting aside not made out – the substantive decision also attacked on the grounds that the claim was initially beyond the jurisdiction of the court to hear and was struck out: the appellant’s position thus being that by hearing the same claim, the court not only became functus but also acted outside its powers since the claim was beyond its jurisdiction - the court records and initial claim examined - records do not reveal that the matter was ever struck out and the initial claim found to be within the jurisdiction of the ERT-

Cause

1. The employer appeals against the decision of the Employment Relations Tribunal ("**ERT**") of 30 August 2018 wherein it refused to set aside the judgment of the Chief Tribunal of 17 February 2017. The substantive matter was heard in the absence of the employer although the employer was represented on the day of the hearing by counsel Mr. Ratule.
2. The basis for seeking a setting aside in the ERT was that on 20 May 2016, the proceedings had been terminated because the matter was beyond the jurisdiction of the Court. When a hearing date was set in this matter, it was not made known to the employer and/or his counsel.

ERT's Findings

3. On the question of whether the employer was informed of the hearing date, the ERT made factual findings from the official record. It is pertinent that I note the conclusion arrived at in its exact terms:

"A perusal of the Court records shows that on 16.02.16 Mr. Amrit Sen appeared for the worker and one Shelwyn Lal appeared for the employer. The matter was then set for hearing on 20.04.2016. By a NOAH dated 15.04.2016 the matter was adjourned to 21.4.16. All parties were sent an email to notify of the same on 15.04.16 and the addresses for the employer is shown to be reception@reddynandan.com.fj; nitin@reddynandan.com.fj. On 21.4.16 Mr. Amrit Sen appeared for the worker and a Ratule appeared for the employer. The matter was then formally proved".

4. The ERT found that it was evident from the records that the employer was well and truly aware of the hearing date being set in the matter and also had a counsel appearing on its behalf in court. It therefore could not complain about its non-appearance when it was evident from the record that the employer was represented on the day of the formal proof.
5. The ERT also found that there was no delay in making the application for setting aside and no defence on merits presented to the court. It therefore refused the application to set aside the judgment.

The Appeal

6. The appellant contends that the ERT erred in law and in fact in refusing to set aside the decision of the ERT in view of the fact that:
 - a. *The grievance exceeded the jurisdiction of the ERT.*
 - b. *The grievance had been struck off on 20 July 2018 and the application had to be refiled. The employer had legitimate expectation that the grievance was closed and the employee had to file a fresh cause.*
 - c. *The calling of the same matter and hearing the same made the ERT functus officio as it had struck out the grievance and that the ERT acted ultra vires.*
 - d. *That the notice of a hearing was not properly effected on the employer.*

Law and Analysis

7. I will deal with the appeal in two parts. The first part is in respect of the contention that the matter was struck out on 20 July 2018 for want of jurisdiction and the hearing of the same grievance made the ERT functus and ultra vires.
8. I must first say that I have perused the original file and it does not show that this matter was ever struck out for want of jurisdiction. I cannot fathom how this contention is made. I believe that when this issue was raised with the ERT in the setting aside application, the ERT could not find evidence of this from the records. That is why the ERT did not cover that aspect in the judgment.
9. I do not accept that the matter was ever struck out on the grounds of jurisdiction. There is no evidence of that.
10. Secondly, if the appellant was concerned about the jurisdiction issue, it should have raised it before the ERT during the hearing or the setting aside application and required a ruling on that.

I find from the records that this is the first time that the matter of jurisdiction is raised in this Court.

11. The employer cannot assert that the ERT erred in refusing to set aside the decision on the grounds of lack of jurisdiction. The issue, if raised would have been dealt with. If the issue is not raised and not dealt with, there cannot be any error in the finding.
12. Be that as it may, I have taken it upon myself to examine the records on the question of jurisdiction. I have perused the Form ER 1 through which the appellant had lodged his claim. This is the prescribed form under the law.
13. In the form, the employee identified the circumstances of his termination and asked the ERT to investigate into the same. In legal terms this would mean that the ERT determines whether his termination was proper. The matter could not be mediated so was referred to the ERT for hearing of the same. The terms of reference to the ERT from the mediation was:

“The grievance is on unfair dismissal from employment of the grievor namely Keshwan Prasad, a Manager, on 1/5/2010 by the employer, Rewa Rice Limited.

The griever claims for compensation on unfair dismissal from employment.”
14. The ERT can hear claims up to \$40,000. Neither the Form ER 1 nor the terms of reference mentions or seeks compensation beyond \$40,000. In that regard the claim is not beyond the jurisdiction of the ERT. The ERT could proceed to hear the claim as per the terms of reference.
15. I now turn to the next issue which is the notice of hearing not being sent to the employer. The allegation is false as identified by the ERT. The notice was emailed to the counsel for the employer on the same addresses the previous notices were sent and acknowledged by the employer.

16. To add to that, the employer was represented by Mr. Ratule on the day but he did not take part in the hearing. The reasons are not noted but could obviously have been that he was not well instructed to carry out the hearing.
17. I will fail in my duty if I do not state my concerns at this stage. This employee was terminated from employment some 10 years ago. It is now almost a decade and he has not had a closure in his case. The employer should have been more vigilant in the proceedings and ensured that the matter is swiftly determined. These long delays may help the employer one way or the other but not the employee for sure. Delays of such nature and that too by the employer should be deplored.
18. I do not find that the employer was not aware of the hearing date and that in failing to take part in the proceedings, it has only itself to blame. No reasons have been forwarded why the employer took such a stance and therefore I cannot consider whether its absence from the proceedings was valid and should be excused.
19. I do not find that the ERT erred in refusing to set aside the judgment of the Chief Tribunal.

Final Orders

20. In the final analysis, I do not find any merits in the appeal and dismiss the same. I order the appellant to pay to the respondent costs of the appeal proceedings in the sum of \$3,000 within 21 days. I also order that the judgment of the Chief Tribunal be immediately complied with.

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Hon. Madam Justice Anjala Wati

Judge

30. 04.2020



To:

1. *Reddy & Nandan Lawyers for the Appellant.*
2. *Maqbool & Company for the Respondent.*
3. *File: ERCA 01 of 2018.*