IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 34 of 2019**
BETWEEN:	**AIR PACIFIC LIMITED** trading as **FIJI AIRWAYS** **APPELLANT**
AND:	**THE LABOUR OFFICER** for and on behalf of **VITILIA VUNIWAQA** **RESPONDENT**

Appearances:	*Mr. N. Prasad for the Appellant.* *Mr. V. Chauhan for the Respondent.*
Date/Place of Judgment:	*Friday 22 October 2021 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

JUDGMENT

A. Catchwords:

Workmen's Compensation Claim – worker suffered stroke at home when on annual leave – employer knew that worker is sick and suffered stroke - worker failed to comply with statutory obligation to notify the employer of the accident and bring claim within 12 months of suffering the stroke – worker's claim not maintainable as a result – worker cannot rely on the employer's failure to give notice to the Permanent Secretary of the accident under s. 14(1) of the WCA to rely on the exception and be able to bring the claim within 6 years instead – the employer's knowledge that the worker has suffered stroke is not the same as it having knowledge that the stroke was suffered out of and in the course of the employment as the incident occurred when the worker was at home – the employer will only be able to

know that the worker is treating the accident as one arising out of and in the course of the employment when it receives proper notice under s. 13 of the WCA.

B. Legislation:

1. Workmen's Compensation Act 1964 ("WCA"): ss. 13 and 14.

Cause/Background

1. The appeal before me is by the employer. It seeks to challenge the decision of the Employment Relations Tribunal ***("Tribunal")*** of 7 June 2019. The Tribunal had dismissed the employer's application that the employee's claim against it was time barred for failure to comply with s. 13 of the WCA.

2. Before I summarise the reasons for the Tribunal's findings, it is prudent that I outline the background to the claim.

3. The worker in this case was employed as a flight attendant. She suffered stroke on 17 February 2010. When the worker had a stroke, she was on annual leave. She was marked sick and absent for successive days when she suffered the stroke. She was unable to perform her duties as a flight attendant and by mutual agreement she was released from work. All her dues were paid to her. The parties signed a binding General Release and Severance Agreement.

4. The employer knew that the employee has suffered stroke, however, the worker has neither expressly nor impliedly notified the employer that she had considered that the stroke was considered as an accident arising out of and in the course of her employment.

5. On 15 February 2016, the worker filed a claim under the WCA claiming that she suffered personal injury by accident arising out of and in the course of her employment. She claimed that she had suffered 65 % permanent incapacity as a result and sought that she be paid a sum of $24,000 as compensation.

6. On 21 December 2017, the employer filed a response and amongst raising other defences, it also raised that the worker is time barred from bringing the action under s. 13 of the WCA. It

was averred that no notice of the claim was received from the worker and that there was also no explanation for the failure to do so.

7. The defendant raised s. 13 as a preliminary issue which was determined by the Tribunal and the same is now the subject of this appeal.

Employer's Position at the Tribunal

8. At the Tribunal, the employer stated that the worker has conceded that she has not satisfied the requirement to *"provide notice of the accident"* to the employer under s. 13 of the WCA and failed to make a claim within 12 months of the occurrence of the *"accident"*. The employer says that the worker has claimed to fall under the exception provided in s. 13 (b) (ii).

9. The employer had contended that there is an obligation on the worker to provide notice of accident to the employer as soon as practicable and there is also a form provided in the third schedule of the WCR. It is therefore evident that the legislature intended that the worker notifies the employer of the claim. If that is complied with then the employer can comply with its obligations under s. 14 of the WCA.

10. It was contended that there was another failure by the employee. It was the failure by the employee to bring a claim for compensation within 12 months from the occurrence of the accident causing injury.

11. The employer's contention was that the worker cannot rely on the exception provided in s. 13 (b) (ii). That exception does not apply when the worker fails in its obligation to give notice to the employer as soon as practicable. The employee cannot benefit from his or her own failure to comply with the requirement to provide notice of the claim. It was argued that the exception kicks in if the employer fails to comply with the provisions of s. 14(1) or s. 14(2) of the WCA.

12. S. 14(1) of the WCA requires the employer, to as soon practicable, but in any event not later than 14 days, after the happening of the event, give notice of an accident, causing injury to a workman of such nature as would entitle him or her to compensation under the provisions of

the WCA to the Permanent Secretary. The employer argued that for the employer to comply with s. 14(1), it must be notified of a claim by the employee.

13. For the worker to rely on s. 13(b) (ii), she must establish that the employer was aware of an injury by accident but failed to give notice required under section 14(1). The employer submitted that it can presumed that the reason why the employee did not provide the notice of the accident was because she suffered a stroke at home and that was not an accident arising out of and in the course of the employment.

Tribunal's Findings

14. The Tribunal found that under s. 13 of the WCA, the worker is required to give notice that the injuries she suffered was work related. The notice must be given as soon as practicable and before she leaves employment with that employer. It found that in certain situations where the injuries occurred at the employer's worksite or factory, this may absolve the applicant from this obligation since the employer would have been aware of the incident. In that case, the Tribunal said that s. 14(1) of the WCA would apply requiring the employer to provide notice to the Permanent Secretary.

15. In this case, the Tribunal found that the employer had no knowledge that the injuries were work related. The worker left work without informing the employer that the injuries were work related. S. 14 (1) of the WCA would only be invoked upon the applicant complying with s. 13 of the WCA. However, the Tribunal went to find that it was not disputed that the worker provided sick sheets and informed the employer that she had suffered a stroke.

16. The Tribunal then went onto find that providing the sick sheets stating that the worker has suffered stroke constitutes sufficient notice of the accident by the employee under s. 13. The Tribunal's reason for this was that at the time of the stroke, the applicant may or may not have all the facts that would point to a possible claim under the WCA.

17. In the context of the matter therefore, the Tribunal stated that once the employer knew of the injuries, it ought to have reported the matter to the Permanent Secretary under s. 14(1) of the WCA. The ERT stated that his views were fortified by s. 13(a) which stated that the ***"want of,***

or defect or inaccuracy in, such notices shall not be a bar to the maintenance of such proceedings if it is proven 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".

18. The Tribunal stated that once the employer reports the matter to the Permanent Secretary, an investigation will then be conducted to ascertain whether or not the injuries are work related. This would see a need for a medical report to determine whether a claim for compensation will be filed. If the employer fails to report the matter to the Permanent Secretary, the worker can do so as there is no legislative provision prohibiting such reports by the worker.

19. Upon the completion of the investigation, a notice of claim will then be issued on behalf of the worker. The particular form is L. D. Form C/2 which is only given to the employer after the investigation and when the applicant has all the facts that there are evidences to support a claim under the WCA.

20. The Tribunal further went onto find that the want of notice is not a bar since the employer admitted that they were informed that the worker had suffered a stroke.

Grounds of Appeal

21. There are 4 grounds of appeal as follows:

1. *That the learned Tribunal erred in law in not holding that the accident causing injury to the worker did not occur in the workplace on 17 February 2010 because the evidence showed that:*

   (i). on 17 February 2010, at Home, the worker suffered from a stroke"; paragraph 4 of the claim under the Act.

   (ii). the worker was on annual leave or was marked sick or absent for 5 consecutive days prior to 17 February 2010;

   (iii). the worker was placed on sick leave as she was unable to perform her duties; and

(iv). *the employer first became aware of the worker's alleged accident on 22 April 2015 when advised by the Permanent Secretary.*

And as such the worker has no right to claim compensation under the WCA.

2. *Having held that:*

"[20]...The employer had no knowledge that the injuries were work related. The applicant left the employment of the Respondent without informing them that the injuries were work related".

The learned Tribunal erred in law and in fact in surmising that because the respondent had provided sick sheets and informed the appellant that she had suffered a stroke the Appellant should have assumed that the respondent had an accident causing injury in the workplace on 17 February 2010. That supposition is not supported by the evidence.

3. *The learned Tribunal misunderstood the Appellant's written submissions at paragraph 1 (iv). Those submissions stated that merely because the Respondent gave sick sheets and informed the Appellant that she had a stroke did not prove that the Respondent had an accident causing injury in the workplace on 17 February 2010 or that such actions amounted to notice under s. 13 of an accident in the workplace on 17 February 2010.*

4. *The learned Tribunal failed to consider whether the Appellant as an employer was excused from complying with s. 14(1) of the WCA because it had a reasonable cause under s. 14(3), namely, it was not aware that the Respondent had suffered an accident causing injury in the workplace on 17 February 2010. The Appellant only became aware of the allegation on 2 February 2015 when informed by the Permanent Secretary for Labour.*

5. *The decision of the learned Tribunal is not supported by the evidence or by s. 14(1) & (3) and is wrong in law and in fact.*

Determination

22. The main issue in this matter is whether the Tribunal had correctly made a finding that since the employer knew that the employee had suffered a stroke, that knowledge can equate to notice of accident by the worker under s. 13 of the WCA and whether the employer should have then given the Permanent Secretary a notice of the accident under s. 14(1) of the WCA. It then follows whether the Tribunal correctly found that since the employer did not provide the requisite notice under s. 14(1) of the WCA, the employee is entitled to rely on the exception in s. 13(b) (ii) for not bringing the claim within 12 months from the date she suffered the stroke as prescribed and required by s. 13.

23. It is very necessary that I outline both sections in full. S. 13 reads:

" 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 the 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 if it is 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 specified shall not be a bar to the maintenance of such proceedings if it is proved that –

(i) 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".

24. Section 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.

(3) Any employer who, without reasonable cause, fails to comply with the provisions of subsections (1) and (2) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one hundred dollars.

(4) Nothing contained in this section shall prevent any person from making a claim for compensation under this Act".

25. Section 13 very clearly imposes on the worker two obligations. The first is to give the employer notice of the accident as soon as practicable after the happening thereof and before he or she voluntarily leaves work in which he or she is injured and secondly to make a claim for compensation with respect to such accident within 12 months.

26. There is no doubt in my mind that the term *"accident"* used in s. 13 means accident arising out of and in the course of the employment. This is because the worker can only bring a claim

against an employer if he suffers personal injury by accident arising out of and in the course of the employment. If the accident does not arise out of anc in the course of the employment, there will neither be a need for a notice as required by s. 13 nor a need to bring a claim for compensation against the employer.

27. What the Tribunal found was that the employer had no knowledge that the injuries were work related. The worker left work without informing the employer that the injuries were work related.

28. The Tribunal then went onto find that providing the sick sheets stating that the worker has suffered stroke constitutes sufficient notice of the accident by the employee under s. 13. The Tribunal's reason for this finding was that at the time of the stroke, the applicant may or may not have all the facts that would point to a possible claim under the WCA.

29. Indeed the employer knew about the stroke and the sickness of the employee but that does not mean that the employer knew that the stroke was an accident arising out of and in the course of the employment. The worker provided the sick sheets only for the purpose of informing the employer of her sickness by stroke and not that she gave the notice that she considers the stroke to be an accident arising out of and in the course of the employment.

30. The purpose of the notice in s. 13 is to inform the employer that a claim for compensation is intended and will be made. The purpose of the notice in s. 13 is not to only inform the employer that the worker is sick, had suffered stroke at home and will not be coming to work.

31. I find that the Tribunal erred when it found that the sick sheets constitute sufficient notice of the accident as required by s. 13 because in this case the worker was on annual leave and at home when she suffered the stroke. The employer had no knowledge and cannot be expected to assume that what happened to the employee was work related unless the employee asserts that and brings that assertion to the notice of the employer.

32. The need for the notice will in some instances not be a bar to the maintenance of a claim. The instances are spelt out in s. 13 (a):

1. *When it is proved that the employer had personal knowledge of the accident or that the employer had been given notice of the accident from any other source at or about the time of the accident; or*

2. *When it is 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; or*

3. *That such want was occasioned by mistake or other reasonable cause.*

33. None of the instances I have outlined above were met for the Tribunal to say that the failure to provide the notice shall not be a bar to the proceedings.

34. I find that the first limb of s. 13 was not complied with by the worker. Now to the second limb to bring the claim for compensation within 12 months of the occurrence of the accident, the worker did not comply with this time period and purported to rely on s. 13(b) (ii) of the WCA by saying that the employer has not fulfilled its obligation under s. 14(1) of the WCA which requires the employer to give to the Permanent Secretary notice of the accident as soon as practicable, but in any event not later than fourteen days, after the happening thereof.

35. The duty of the employer under s. 14(1) only starts when the employer has notice of the accident which will entitle the worker to claim compensation under the WCA. In this case the employer had no knowledge that the stroke that the employee had suffered would entitle her for compensation under the WCA as the worker had suffered the stroke at home during her leave period and as such it could not provide any notice as required under s. 14(1).

36. The employee cannot rely on s. 13(b) (ii) proviso that due to the employer's failure to act under s. 14(1), she can now bring a claim under the WCA within 6 years. The employer cannot be expected to act under s. 14(1) if it is not aware of the accident arising out of and in the course of the employment. If it was aware then it would have had to act under s. 14(1) within the stipulated timeframe and the Permanent Secretary then would have had to bring the claim

within 12 months of the accident. The employee cannot rely on s. 14(1) in this instance as she did not fulfill her obligations for s. 14(1) obligation on the employer to kick in.

37. The Tribunal also stated that once the employer reports the matter to the Permanent Secretary, an investigation will then be conducted to ascertain whether or not the injuries are work related. This would see a need for a medical report to determine whether a claim for compensation will be filed. If the employer fails to report the matter to the Permanent Secretary, the worker can do so as there is no legislative provision prohibiting such reports by the worker.

38. It went onto say that upon the completion of the investigation, a notice of claim will then be issued on behalf of the worker. The particular form is L.D. Form C/2 which is only given to the employer after the investigation and when the applicant has all the facts that there are evidences to support a claim under the WCA.

39. I must say that form L.D Form C/2 is not given to the employer to make a claim in court for compensation. It is a form that is used to give notice under s. 13. Once that form is given to the employer, the employer can start its own investigation on the claim and the accident. So can the Permanent Secretary, as the employer is expected to notify the Permanent Secretary of the accident under s. 14(1). If the Permanent Secretary finds that a claim ought to be made than Form 1 is used to make a claim.

40. Since the employee has not complied with the time period for filing the claim within 12 months and that the exceptions in the proviso does not apply to her, the claim is time barred.

Final Orders

41. In the final analysis, I find that the worker had failed to comply with s. 13 of the WCA and that the claim cannot be maintained. The appeal is allowed and the WCA claim by the worker is struck out.

42. I will not order any costs against the worker, given her health constraints and also given the fact that she is now unemployed.

43. The SCO of the Employment CourtDivision is directed to send a copy of this judgment to the Tribunal for the presiding officer to note the details for the purposes of completing the file.

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Hon. Madam Justice Anjala Wati

Judge

22. 10. 2021

To:

1. ***Mitchell Keil Lawyers for the Appellant.***
2. ***Attorney-General's Chambers for the Respondent.***
3. ***File: ERCA 34 of 2019.***