IN THE EMPLOYMENT RELATIONS COURT
AT LAUTOKA
APPELLATE JURISDICTION

ERCA No. 01 of 2018

On Appeal from the decision of the Employment Relations Tribunal at Lautoka in ERT Grievance No.15 of 2017

BETWEEN : **CON-FORM HARDWARE SUPPLIES LTD**

APPELLANT

AND : **LABOUR OFFICER**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. D. Nair for the appellant
: Mr. V. Chauhan for the respondent

Date of Hearing : 17 March 2020

Date of Judgment : 25 August 2022

DECISION

WORKMENS COMPENSATION Whether refusal to grant adjournment application justified – Application to have second medical examination on day of hearing – Whether costs order excessive.

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1. The appellant has appealed the decision of the Employment Relations Tribunal delivered on 7 February 2018, by which it ordered the employer to pay the worker compensation for a work related injury together with costs.

2. The decision concerns an application dated 28 March 2017 by the labour officer on behalf Hazrat Nabi of Nadi seeking to enforce compensation payable to him under the Workmen's Compensation Act. Mr. Nabi was employed as a sales representative by Con – form Hardware Supplies Limited of Nadi. During the course of his employment, Mr. Nabi suffered a personal injury by accident on 18 October 2013. The accident was caused by timber falling on his left arm. The employer was made a respondent, and an order was sought to make it pay a sum of $1,404.00 as compensation.

3. The compensation amount was based on a 4% permanent partial incapacity sustained by the workman, according to the medical report relied upon by the labour officer. The application stated that compensation was computed in accordance with section 8 of the Act, which is concerned with the amount of compensation in the case of permanent partial incapacity.

4. The appellant resisted the labour officer's application for enforcement by filing an answer in the tribunal through its lawyers on 30 August 2017. The appellant stated that it had paid the worker's salary upon a direction from the labour department. Upon discovering that the applicant's condition was better, the employer took him for a medical examination to the Lautoka hospital on 14 January 2014. The appellant said that Dr. Joeli Mareko, had recommended that the worker commence light duties. According to the appellant, the worker had

approached another medical officer on the following day and obtained a medical certificate. The appellant stated that Dr. Mareko expressed the opinion that the medical certificate obtained by the worker was unacceptable and should be nullified. The appellant stated that it had arranged another medical examination on 26 April 2014 at Zens Medical Center and communicated the medical appointment to the worker through a law firm, but the worker had not turned up for the examination.

5. The grievance against the tribunal is that it declined an application for adjournment by counsel for the appellant on the day of hearing. The tribunal initially fixed the matter for hearing on 29 January 2018, and, thereafter, its registry vacated and re-fixed the hearing to 7 February 2018.

6. The appellant says that hearing was re-fixed by the tribunal through notices, without the presence of counsel and without ascertaining the suitability of the hearing date to the parties. As a result, the appellant claimed, the tribunal had reached a decision on the dispute between the parties without hearing the evidence on behalf of the employer. The appellant also complained that there was no basis upon which to support the costs ordered by the tribunal.

7. The resident magistrate's decision was made extempore on 7 February 2018, after hearing was taken up on the same day. The tribunal made a finding that the employer has no evidence to contradict the medical assessment provided to the labour officer, and ordered the employer to pay a sum of $1,404.00 as compensation and costs in a sum of $750.00. The resident magistrate pointed out that counsel for the employer had conceded that the worker suffered injury as a result of undertaking work in the course of employment.

8. The appellant's grounds of appeal are stated below:

i. "That the Learned Tribunal misdirected itself in law when it failed to vacate the hearing dated 7 February 2018 as this date was set without the presence of counsels and without consulting the counsels on their availability and suitable dates.

ii. That the Learned Tribunal erred in Law and was unfair on the Employer when it determined this matter without hearing the Employer's evidence.

iii. That the Learned Tribunal erred in fact and/or misdirected itself in law in evaluating the costs as there were no evidence produced to support the claim of cost".

9. At the hearing of the appeal, both parties submitted that the tribunal registry by its notice of postponement issued on 11 January 2018 informed them that the hearing set for 29 January 2018 would be vacated and moved to 7 February 2018. The notice re-fixing the hearing to 7 February was not a part of the record, but was tendered to court at the hearing by counsel for the appellant.

10. The appellant submitted that it was ready with witnesses to give evidence on 29 January 2018, but was unable to lead evidence on 7 February 2018. Mr. Nair submitted that the medical report filed on behalf of the worker was in dispute, and that the appellant's witnesses would have been able to controvert the report. He submitted that the doctor summoned by the appellant was not available to give evidence on 7 February 2018, as he was not well. He submitted that his client had to go overseas at short notice. Mr. Nair conceded that evidence as to why his client had to leave the country was not provided to the tribunal.

11. Mr. Nair submitted that the resident magistrate could have granted costs to the respondent and granted an adjournment of the hearing, saying that this was done previously, on 20 October 2017, when hearing was vacated on the respondent's application.

12. Mr. Chauhan, counsel for the respondent, submitted that if the date of inquiry was not convenient, the appellant could have made a prior application to change the hearing date. He submitted that the tribunal's notice was sent by email and would have been received immediately by the appellant. The respondent submitted that a letter was written to the appellant on 30 January 2018 – which was a day after the matter was originally scheduled for hearing – with a proposal to settle the matter. He said that discussions were held between the parties in order to reach a settlement on 30 January 2018. Mr. Chauhan submitted that the

appellant wished to proceed to inquiry, but had not taken steps to vacate the hearing.

13. Mr. Chauhan submitted that the employer had liability. He submitted that the doctor's opinion in the medical report stated the worker's incapacity as 4%, and that this evidence was not challenged before the tribunal. In response to Mr. Nair's assertion that the doctor did not give evidence in regard to his medical report, Mr. Chauhan said that the medical report was filed prior to the tribunal's hearing, and that this was in accordance with section 231 of the Act. He submitted that the doctor's opinion could not be disputed, unless another expert gives evidence before the tribunal.

14. The following matters from the record reveal what happened on the day of the hearing.

15. On 7 February 2018, Mr. Nair, appeared for the appellant and submitted that he was faced with a difficulty, as his client had to urgently leave for Australia. Although arrangements were made to send another person to give evidence, he told the tribunal, the witness to be summoned was not properly updated for the purpose of giving evidence. He had tried until the previous day to arrange witnesses. However, the tribunal took the case up for hearing. The resident magistrate posed questions to the worker. Questions were also put to Ms. Faktaufon, who appeared for the labour officer, and to Mr. Nair. Although counsel for both parties were present, they did not lead the evidence of witnesses. A doctor was present to give evidence concerning the worker's impairment. His evidence was not led. Mr. Nair said the employer did not dispute the injury. He disputed the sum claimed as $1,400.00. He said his client was agreeable to pay $400.00.

16. Upon questioning by the tribunal, Mr. Nair said that the company's director, was in Fiji, but was not feeling well. His son, who was familiar with this case, went to Australia the previous week. Mr. Nair conceded that he did not want to proceed with the inquiry on that day. He told the resident magistrate he did not have any evidence in relation to the degree of impairment. However, his client, he said,

did not agree with the 4% impairment stated in the medical report. The employer, he said, disputed that there was a fracture to the worker's left wrist, as stated in the medical report. When questioned by the tribunal, Mr. Nair agreed that timber had fallen on the worker's wrist. He also agreed that the incident was work related.

17. The resident magistrate said he would give the employer 10 minutes to settle the matter or he would make a determination. The matter was adjourned and taken up later. On resumption, Mr. Nair told the tribunal that his client did not wish to settle the matter at that point. The employer asked for a second medical report to be obtained, and wanted an adjournment to give evidence. Mr. Nair said he intended to call Dr. Joeli Mareko to give evidence countering the contents of the medical report. However, the doctor did not attend the hearing, apparently due to feeling unwell on that day. Mr. Nair said that the basis for his application to adjourn was the unavailability of the doctor as well as the witness from the company to give evidence. Ms. Faktaufon objected to an adjournment as well as to the request for another medical report. The tribunal agreed with the objections raised on behalf of the labour office, and proceeded to deal with the matter saying that the employer had not taken steps for four years to have a further medical examination of the worker, and that the application to have another medical examination at that stage would not be allowed.

18. The record reveals the resident magistrate's active intervention in the proceedings. This is not the usual practice when matters are set for hearing. When witnesses and counsel are in attendance, facts are ascertained at the hearing on an adversarial footing. In this instance, proceedings were begun by an application as provided by the Workman's Compensation Act. The tribunal's jurisdiction to hear and determine any matter under the Workman's Compensation Act is in terms of section 211 (1) (p) of the Employment Relations Act. Applications follow forms set out under the Workman's Compensation Regulations. Where a workman is injured as a result of an accident, the Act and the regulations permit an application to be filed to recover compensation. The method of calculating the compensation is provided by law. Where the employer is in agreement with the assessed compensation, he may pay the sum and that is

the end of the matter. In this case the employer took exception to the computed sum. The compensation to the worker was assessed upon a statutory formula based on the opinion expressed by Dr. R. Tikoinayau in his medical report.

19. The record shows a letter dated 14 April 2015 from the Ministry of Employment, Productivity & Industrial Relations, addressed to the employer and stating that the worker's medical report has been received from Dr. R. Tikoniyau, and that permanent incapacity suffered by the worker has been assessed at four per cent. The letter stated the compensation payable and the basis of its calculation, and said that if the claim was disputed to state the grounds in writing. The record does not show a reply from the appellant to this letter.

20. The application dated 28 March 2017 for recovery of compensation was filed by a senior labour officer on behalf of the worker. There is no evidence before court that compensation was disputed when the labour office initially sent a notice to the appellant seeking payment. When the matter was fixed for hearing, it was important for the appellant to have been ready with its evidence. The appellant did not move to have the inquiry date changed due to difficulties in leading evidence. Mr. Nair told the tribunal that he made an attempt until the previous day to arrange a witness. Dr. Joeli Mareko, the doctor who is said to have been able to counter the medical report was not present in court. Nor was the person from the company who was aware of the case, as he had left for Australia the previous week. The nature of the urgency in going overseas was not intimated to the tribunal.

21. I am of the view that the resident magistrate was within his powers to decide whether or not to grant a postponement in the circumstances. The tribunal's case management is an affair entirely within the resident magistrate's purview. He was unhappy that the appellant was making an application to have a second medical examination on the day of hearing, having failed to take that step earlier. The appellant was not ready to lead evidence. Mr. Nair confirmed as much. This court will not interfere with the resident magistrate's decision to refuse postponement of the hearing. The medical report was before the tribunal. The resident magistrate acted within his jurisdiction to admit the medical report as

evidence and to grant relief in terms of the application made by the labour officer to recover the compensation assessed in terms of section 8 of the Workman's Compensation Act.

22. The appellant submitted that costs ordered by the resident magistrate was excessive. The respondent had sought costs of $600.00 for transport and accommodation of the medical expert witness, Dr. R. Tikoinayau, and a further $200.00 to transport the worker and the labour officer. The tribunal ordered the payment of $750.00 within 21 days. The assessment of costs was a matter for the resident magistrate to decide having regard to the circumstances of the case. The resident magistrate was in an informed position to make the decision on costs. The court sitting in appeal will not interfere with the exercise of that discretion, unless something plainly wrong with the exercise of that discretion can be shown. The appellant has not shown any reason to warrant this court's interference with the resident's magistrate's order for costs.

23. The appeal is dismissed. No order is made for costs in this court.

ORDER

A. The appellant's appeal is dismissed.

Delivered at **Lautoka** this **25th** day of **August, 2022**

M. Javed Mansoor
Judge