

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 7 OF 2016

BETWEEN: **RITESH SINGH**

PLAINTIFF

AND: **FIJI REVENUE AND CUSTOMS AUTHORITY**

DEFENDANT

Appearances: Mr. V. Filipe for the Plaintiff.

Mr. S. Deo for the Defendant

Date/Place of Judgment: Tuesday 07 March 2023 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

RULING

(Leave to Appeal Interlocutory Decision)

A. Catchwords:

Employment Law –leave to appeal the decision to strike out the claim for being time barred – leave sought on the basis that the decision is interlocutory in nature – whether there is any merits in the appeal to grant leave to appeal – the grounds of appeal are not arguable and the grant of leave will be superfluous.

B. Legislation:

- 1. The Constitution of Fiji: s. 66.*
- 2. The Employment Relations Act 2007 (“ERA”): ss. 4, 188, 220 and s. 244.*

Cause/Background

1. The plaintiff has filed an application for leave to appeal my decision to strike out his claim on the grounds that it was not brought within 21 days from the day the claim first arose as required by s. 188 (4) of the ERA. It is important that I reiterate some background matters from my main judgment.
2. On 14 June 2016, the plaintiff filed a claim against its former employer, the defendant, claiming damages for unlawful and unfair termination carried out on 13 June 2014.
3. The matter was initially set for hearing on 29 October 2018. The hearing proceeded, however, in the middle of the trial, whilst the plaintiff was giving evidence; it became apparent that his claim needed an amendment. Mr. D. Sharma appearing for the defendant conceded that the plaintiff be allowed further time to amend his claim since he was unrepresented.
4. After the pleadings were amended, the matter was then set for hearing on 17 July 2019. The matter proceeded to hearing and again in the middle of the trial; Mr. D. Sharma realized that the claim was out of time in that it was not filed within 21 days as required by s. 188(4) of the ERA.
5. He therefore argued that since the claim was filed out of time; the matter cannot proceed any further and should be struck out. The plaintiff was given an opportunity to address the issue raised by the Mr. Sharma. I heard the claim and made a finding that the claim by the plaintiff was time barred.
6. I outline the essential parts of my earlier judgment:

“The issue therefore before the court is whether the claim by the plaintiff is filed out of time and as such cannot proceed.

Part 19 Division 2 is a provision that covers employment grievances against essential services and industries. The defendant undoubtedly is an essential service and industry since it is a

statutory body constituted under s. 3 of the Fiji Revenue and Customs Authority Act 1998. S. 185 of the ERA states that a statutory body is included as an essential service and industry.

Since the defendant is an essential service of the State, the provisions that apply to employment grievances against it, is Part 19 Division 2 of the ERA. To decide whether the claim has been brought within the time limit prescribed by the law, I have to cast my mind to s. 188(4) of the ERA which reads:

“Any employment grievance between a worker and an employee in essential services and industries ... shall be dealt with in accordance with Parts 13 and 20, provided however that any such employment grievance must be lodged or filed within 21 days from the date when the employment grievance first arose, and-...”

Underlining is Mine

The claim that is brought by the plaintiff is filed after two years from the date when the grievance first arose. The claim is clearly time barred under s. 188(4) of the ERA.

The plaintiff’s argument that it raised the grievance with the employer within 2 days does not assist his case as the term lodging and filing is in reference to lodging and filing the case in Court.

Further, the plaintiff’s argument that it has 6 months’ time under s. 111(2) of the ERA to submit the grievance to the employer is not applicable to this case nor does the provision for extension of time to file the claim.

S. 111(2) is for those employees who require the employer to resolve the grievance internally. The provision has no bearing on the time limitation within which a claim must be filed against an employer, being an essential service and industry, in a tribunal or a court.

This claim, I reiterate, is against an essential service. One of the purposes of Part 19 is to ensure that disputes against essential services and industries are filed and determined early so that the operation or functioning of the services and industries are not hindered by delays.

Under the specific provision covering employment grievances against essential services and industries, there is no provision for extension of time to bring a claim and as such I find that the general provisions for extension of time under any other provisions of the law in the ERA or any other written law does not assist the plaintiff....

I find that the claim is not filed within the time limitation prescribed by s. 188(4) of the ERA and as such it cannot proceed to continuation. The claim shall, and I so order it to be struck out..."

7. The plaintiff, aggrieved with the decision of the court, has filed an application for leave to appeal the decision of this court.

Law and Analysis

8. The application for leave to appeal is brought under s. 244 of the ERA which reads:

"A party who is dissatisfied with an interlocutory order of the Employment Court may, within 14 days, apply to that Court for leave to appeal to the Court of Appeal or if leave is refused by the Employment Court apply to the Court of Appeal for leave to appeal."

9. In considering the issue of whether or not to grant leave to appeal I will consider whether the grounds of appeal are arguable. If the grounds of appeal are patently unmeritorious or there are clearly no arguable points than there will not be substantial injustice done if leave were to be refused. It is for the plaintiff/appellant to satisfy me that my decision is wrong and the results that will flow from that erroneous judgment will cause substantial injustice to him.

10. I will consider the grounds of appeal in order to determine whether any one of it is arguable and whether substantial injustice will be done to the plaintiff if leave were to be refused. Ground 1 of the appeal states that the court erred in law and in fact in failing to consider that

- s. 188(4) of the ERA does not apply to the plaintiff's claim as the claim was not an employment grievance.
11. Mr. Valenitabua argued that the plaintiff's claim before this court was not an employment grievance but a claim or proceeding. He stated that there is a clear distinction between the term employment grievance and a claim. He argued that this distinction is stated in s. 188(4) (b).
12. I must very briefly state that the plaintiff's claim concerns his dismissal from work. Is the claim for dismissal included in the definition of "*employment grievance*"? Let me go to interpretation section of the ERA.
13. S. 4 of the ERA states that the term "*employment grievance*" means a grievance that a worker, may have against the worker's employer or former employer because of the worker's claim that –
- (a) the worker has been dismissed; ... "*
- underlining is mine*
14. The above definition of employment grievance clearly incorporates any claim regarding a worker's dismissal. The plaintiff's claim therefore clearly is an employment grievance and is time barred. The words "*employment grievance*" and "*claim*" are used interchangeably in the relevant provision for legal effect and not for the purposes of making a distinction between the two terms. Ground 1 is therefore without any merit.
15. Ground 2 of the appeal states that the court erred in law and in fact in failing to consider that the issue raised by the employer would be more appropriately dealt with post trial where the court will consider the evidence before it and conduct a weighting exercise between the plaintiff's constitutional right to have access to courts and tribunals with section 188 (4) of the ERA.
16. The issue before the court was whether the claim was time barred. This was a preliminary issue which needed to be dealt with in reference to the law only. There was no need for any evidence to be adduced to come to a decision whether the claim was time barred. There may be some

matters in which the facts of the cases become important to determine whether the claim is within the time limitation, however in this case, no such evidence or facts were necessary.

17. On the issue of the plaintiff's constitutional right to have access to the courts and tribunals, I must say that he was not deprived of his rights under the law. In this case, he had a right to come to court but within a certain time frame. He chose not to be diligent and expeditious in filing his claim. He therefore precluded his own self from being able to get access to the court.
18. Ground 3 of the appeal states that the court erred in law and in fact in terminating the plaintiff's claim on technicalities that were properly brought before the court and which was for trial.
19. The issue of time limitation is not a technicality in the proceedings which can be cured. The question of time limitation affects the jurisdiction of the court and goes to the root of the proceedings. If an action is not brought within time, unless there is provision in the law that allows for extension of time, the claim cannot be revived. This claim was clearly time barred. There was no point in exposing parties to costs to hear a claim which was not going to survive on the question of time limitation.
20. Ground 4 states that the court erred in law and in fact in failing to consider that the action filed in court was within the jurisdiction of the court and outside the jurisdiction of the tribunal which sets a monetary limitation on claims up to \$40,000.
21. The plaintiff was not precluded from filing the claim based on monetary jurisdiction. He was allowed to file the claim. His claim would have been heard if he had filed the same within the time limit. He did not file the claim within the time. I simply fail to understand why the question of monetary jurisdiction is being raised.
22. Even if he went to the tribunal to file his claim, he would not have been allowed to even file the same, let alone being able to be heard on the question of time limitation. I am fully aware that claims which are not in time, does not even get to the mediation unit for mediation and if it somehow does make it to the mediation unit, it gets terminated once the issue is brought to the attention of mediation unit.

23. Ground 5 states that the court erred in law and in fact in failing to consider that section 220 (1) (h) of the ERA allows the plaintiff to file proceedings with causes of action that are founded on his employment contract.
24. I repeat that the plaintiff was entitled to bring a claim under his contract but since he was a worker in the essential service and industry, the provisions of Part 19 of the ERA applied to him. Part 19 contains the provisions for filing of employment grievances against essential national industries. S. 220 (1) (h) does not stipulate the time limit for workers in the essential national industry, s. 188 (4) does. The latter provision is specific to the workers in an essential national industry, so that provision will apply to the plaintiff.
25. In ground 6 the plaintiff is repeating what he has asserted in grounds 1 to 5. I will therefore not deal with this ground.
26. Ground 7 asserts that the court erred in law and in fact in failing to consider that it was never the intention of the Parliament to stop workers from filing legitimate claims or proceedings in contract, and constitutional/statutory breaches by employers. This intention can be deduced from the clear differentiation by Parliament in s. 188 of the ERA by distinguishing between trade disputes, employment grievances and claims.
27. All the law has done is to set a time limit for workers in the essential national industry to bring their disputes within a certain time frame. The workers have not been precluded from filing a claim. My initial judgment states why the time limitation is set. I do not see a need to repeat that here.
28. The final ground 8 states that the court erred in law and in fact in failing to consider that if the employer's argument was to be upheld, then it ought to have upheld that the provisions setting the time limit is inconsistent with ss. 15 and 17 of the Constitution of the Republic of Fiji and thus is null and void and the court must respect the hierarchical supremacy of the Constitution.
29. The plaintiff's ground 8 is overlapping with other grounds. He is choosing to blame the law for his delay in not filing the claim on time. He fails to see that he did not act in time to ensure

that his claim survives. In every case, there is a time limit to bring cases to court. Even in Court of Disputed Returns, the Constitution of Fiji fixes a time limit of 21 days to bring claims: *s. 66 (3) (b)*. One cannot argue that their right has been deprived altogether if a time limit has been set to bring any claim (s).

30. I do not find that the grounds of appeal are arguable. There is no substantial injustice caused to the plaintiff if leave were to be refused because there is no error in law and in fact portrayed in the grounds of appeal that needs correction.

31. I will very briefly touch on the issue of costs. I had not given costs against the plaintiff when I struck out his claim on the basis that he was unemployed at the time. I still do not have any information on whether he is employed or not but since he is not able to have his claim determined due to his delay, I will not burden him with any order for costs. The order for costs may become oppressive for him.

Orders

32. I make the following orders:

1. *I dismiss the application for leave to appeal the decision.*
2. *Each party shall bear their own costs of the proceedings.*



Anjala Wati

Judge

07. 03.2023

To:

1. *Valenitabua & Associates for the Plaintiff.*
2. *R. Patel Lawyers for the Defendant.*
3. *File: ERCC 7 of 2016.*