IN THE EMPLOYMENT RELATIONS COURT
AT LAUTOKA
APPELLATE JURISDICTION

ERCA No. 03 of 2018

BETWEEN : **THE LABOUR OFFICER**

APPELLANT

AND : **BLUE LAGOON BEACH RESORT**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. V. Chauhan for the Appellant
Ms. S. Salote and Ms. F. Malani for the Respondent

Date of Hearing : 17 March 2020

Date of Decision : 28 August 2023

DECISION

EMPLOYMENT LAW Workmen's compensation – Preliminary issue by employer – Employee's failure to give notice of accident to the employer – Whether claim barred – Sections 5, 13 and 14 of the Workmen's Compensation Act 1964.

The following cases are referred to in this decision:

1. *Carpenters Steel Company Ltd v Labour Officer [2012] FJHC 882; HBA 9.2003 (24 February 2012)*
2. *Sharma v Secretary for Labour [1975} FijiLawRr 26;[1975] 21 FLR 190 (26 November 1975)*

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1. The appellant has appealed the ruling of the Employment Relations Tribunal delivered on 31 August 2018. The ruling was in response to a preliminary issue raised by the respondent in proceedings filed by the appellant on behalf of a workman for recovery of compensation for injuries sustained in an accident during the course of employment.

2. The appellant filed proceedings in the tribunal on behalf of Dhavindra Dharam Raj ("workman") after he complained to the labour office that he was not compensated for injuries sustained at the respondent's work place. Proceedings were filed under the Workmen's Compensation Act 1964 ("Act"). Although repealed in 2018, the provisions of the repealed Act will be considered for the purpose of this appeal.

3. The respondent objected to the recovery proceeding, and wanted the tribunal to adjudicate upon a preliminary issue. The employer stated that the workman had not given notice of the accident as required by section 13 (1) of the Act. A further ground of objection was that the workman did not act within the course of employment when he sustained the purported injuries.

4. The tribunal upheld the preliminary issue on the basis that the workman's claim is statute barred. The tribunal was of the view that the claim is not one which is maintainable under section 13 (b) (ii) of the Act.

5. In appealing the ruling, the appellant raised the following grounds of appeal:

a. "The Employment Relations Tribunal erred in law and in fact in failing to correctly apply the exception to the delay in issuing a claim for compensation provided under section 13 (b) (ii) of the Workmen's Compensation Act 1964.

b. The Employment Relations Tribunal erred in law and in fact in failing to find that the Respondent's failure to comply with section 14 (1) of the Workmen's Compensation Act 1964 allowed the Appellant to rely on the exception provided under section 13 (b) (ii) for issuing a claim for compensation out of time.

c. The Employment Relations Tribunal erred in law when, in holding that section 14 (4) of the Workmen's Compensation Act 1964 did not prevent the Appellant from issuing a claim for compensation, proceeded to misapply section 14 (4) as a prohibition on the Appellant from relying on the exception provided under section 13 (b) (ii) for issuing a claim for compensation out of time".

6. In terms of section 5 of the Act, an employer is liable to pay compensation in accordance with the statutory provisions if any employment injury arises by accident and in the course of employment. The workman was injured on 29 March 2012. The claim for compensation for injury to the workman should have been made to the employer within 12 months from the occurrence of the accident. The workman did not do so. The claim was made much later, on 16 May 2014, more than two years after the accident. The labour office initiated steps for the recovery of compensation on 20 July 2015, which was within 6 years of the injury: the time prescribed under the Act to institute recovery proceedings.

7. The appellant submitted that the claim can be maintained even if it is made outside the 12 month period if the worker can prove either of the exceptions provided under section 13 (b) of the Act. The first exception is where the worker's failure to claim compensation is due to a mistake or other good cause. The second exception, it was submitted, is where the employer fails to comply with section 14 (1) and (2) of the Act.

8. Section 14 (1) of the Act requires the employer to give notice of an injury at employment to the permanent secretary. Notice under this provision must be

given in the prescribed form as soon as practicable, but not later than 14 days of the accident.

9. The appellant submitted that although the claim was filed outside the period of 12 months, recovery of compensation is not barred as recovery proceedings were filed within six years. In support, the appellant cited the decision in *Carpenters Steel Company Ltd v Labour Officer*[1]. The court stated:

> "Upon a careful reading of the section I have come to the conclusion that the six years period for bringing a claim for compensation under the Act only applies if an injured workman or the representative of a deceased workman can invoke one of the two provisos. It simply would make no sense to require a claim for compensation to be brought within twelve months of the date of the death as specified in section 13 only for the proviso to provide for an inconsistent time limit of 6 years. It is apparent that the legislature intended even a claim for compensation saved by one of the provisos could not be brought after six years from the date of the accident.
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> It is also clear that the legislature intended that a claim for compensation that was made after the twelve months limitation would be a valid claim if (1) it fell within one of the two provisos to section 13 (1) and (2) if it was made within six years from the date of the accident."

10. The respondent submitted that notice of the accident was given to the employer more than two years after the accident, contrary to the requirement that it must be done within 12 months in order to claim compensation.

11. The respondents submitted that under section 13 of the Act the onus is on the workman to notify the employer of the accident as soon as practicable after the accident, and before leaving employment. It was submitted that in order to trigger the respondent's obligation under section 14 (1) of the Act, the respondent must first be notified of the accident as required under section 13 of the Act. The respondent submitted that the appellant must prove that the respondent failed to comply with the provisions of section 14 (1) of the Act in order to invoke the proviso in section 13 (b) (ii) of the Act.

[1] [2012] FJHC 882; HBA 9.2003 (24 February 2012)

12. Section 13 of the Act is of assistance in resolving the issue before court. The section, which was amended in 1975, provides:

> "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 death:
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> Provided that –
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> (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;
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> (b) the failure to make a claim for compensation within the period above specified shall not be a bar to the maintenance of such proceedings if it is proved that –
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> (i) the failure was occasioned by mistake or other good cause; or
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> (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".

13. Section 13 requires the injured workman to give the employer notice of the accident as soon as practicable. The form in which such notice is to be given is not prescribed. The failure to give notice or any defect in it will not be a bar to

maintaining the 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. The onus is upon the workman to prove the matters set out in the proviso to the enactment.

14. Similarly, the enactment provides, if the employer would not be prejudiced in his defence by the want, defect or inaccuracy of the notice, or that such want, defect or inaccuracy was occasioned by mistake or other reasonable cause, for a notice or an amended notice to be given and for hearing to be postponed. This is a matter for the tribunal to decide.

15. A reading of section 13 of the Act shows that the requirement for an employee to give the employer notice of an accident is not mandatory in the sense that the failure to do so would be fatal to proceedings for the recovery of compensation. Section 13 does not require notice to the employer to be in writing, unlike section 14 (1) of the Act which refers to a prescribed form of the notice. The worker is not completely shut out even where he has been remiss. In such a situation, the magistrate is competent to make inquiry as he thinks fit and decide whether the employer received notice of the accident in the ways contemplated by the proviso to section 13 of the Act. Where notice has not been given to the employer, the magistrate may decide whether any prejudice would be caused by issuing notice of the accident to the employer and taking up the case on a subsequent date.

16. In this way, the proviso facilitates the recovery of compensation, even where the workman has not fully complied with the requirement of giving notice of the accident to the employer. Disputes related to social legislation may have to be considered in context in order to give effect to the purpose of such legislation. This is not to say that difficulties be placed in the employer's way in recovering compensation for employment injuries. *Sharma v Secretary for Labour*[2] – cited by the appellant in regard to the operation of sections 13 & 14 of the Workmen's Compensation Ordinance – was a case in which the employer delayed giving notice to the commissioner of labour under section 14 of the Ordinance. The Fiji

[2] [1975] FijiLawRp 26; [1975] 21 FLR 190 (26 November 1975)

Court of Appeal held that the delay in making a claim for compensation was for a "reasonable cause" under section 13 (b) of the Ordinance. The important point to note, however, is the court's following observation:

> "It seems probable, as counsel contends, that this piece of legislation was designed to ensure workmen suffering injuries which would entitle them to compensation, were not deprived of their remedies through their lack of education or similar considerations. In other words, the section was passed for the protection of the worker".[3]

On the same page, the Court of Appeal stated:

> "The objective the Legislature had in view in passing the Workmen's Compensation Ordinance, must have been in great measure the protection of the worker, and, in the appropriate circumstances, an assurance that he would receive the compensation properly payable to him in the case of accidental injuries. The rights and the interests of the employer are certainly not to be overlooked under the Ordinance; and I must not be held as saying that the interest of the workman are always, under the Ordinance, to be preferred to those of the employer".

17. Having surveyed the authorities, their Lordships were of the view that the court should interpret a statute such as the Workmen's Compensation Ordinance broadly and with due regard to "the substantive intention and meaning of the statute". In these circumstances, the right decision would be to set aside the magistrate's decision and remit the case to the Magistrates Court of Lautoka to be heard by another resident magistrate. The appeal is allowed with costs.

ORDER

A. The appeal is allowed.

B. The respondent is to pay the appellant costs summarily assessed in a sum of $1,500.00 within 21 days of this decision.

[3] Page 192 *ibid*

Delivered at **Suva** *via Skype* on this **28th** day of **August, 2023.**

M. Javed Mansoor
Judge