IN THE EMPLOYMENT RELATIONS COURT
AT LAUTOKA

ERCC No. 02 of 2019

BETWEEN : **SALIM BUKSH**

PLAINTIFF

AND : **BRED BANK (FIJI) LTD**

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Ms. L. Jackson for the Plaintiff

: Mr. J. Apted for the Defendant

Date of Hearing : 26 August 2022

Date of Decision : 25 October 2023

DECISION

APPEAL Interlocutory decision – Leave to appeal – Extension of appeal – Whether appealable when orders are in favour of applicant – Jurisdiction of the Employment Relations Court – Sections 230, 234 & 244 of the Employment Relations Act 2007

The following cases are referred to in this decision:

a. *Native Land Trust Board v Khan [2013] FJSC 1; CBV 0002.2013 (15 March 2013)*
b. *Beedell v West Ferry Printers Ltd [2001] EWCA Civ. 400; [2001] ICR 962*
c. *Pacific Agencies (Fiji) Ltd v Spurling [2008] FJSC 27; CBV 0007.2008S (17 October 2008)*
d. *Secretary of State for Work and Pensions v Morina 2007 EWCA 749; [2007] 1 WLR 3033*
e. *Sukh Deo Prasad & another v The Attorney General [1997] FJCA 23; ABU 29D.1997S (13 August 1997)*

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1. The plaintiff's employment was summarily terminated on 15 March 2019. On 5 April 2019, he filed action in the Employment Relations Court alleging that his employment was unlawfully and unfairly terminated. The defendant filed an application to strike out the claim on 2 May 2019 on the basis that the court did not have jurisdiction under the Employment Relations Act 2007 to hear the case. The plaintiff filed a summons on 16 August 2019 to amend the statement of claim.

2. The court heard counsel on the strike out as well as the amendment applications. On 27 August 2021, the court delivered an interlocutory decision dismissing the defendant's summons to strike out the action. The plaintiff was granted leave to amend the statement of claim. The decision was delivered electronically during the pandemic, with special protocols put in place by the authorities.

3. Thereafter, the plaintiff filed a summons on 13 December 2021 asking for leave to appeal the interlocutory decision delivered on 27 August 2021 and for extension of time to make the application. The summons was supported by the affidavit of the plaintiff, Salim Buksh.

4. In asking for an extension of time to apply for leave to appeal to the Court of Appeal, the plaintiff says that his former counsel was in Australia at the time the

decision was delivered and that the courts were closed due to the pandemic. On 24 September 2021, he instructed another firm to represent him as he could not contact his former solicitors. As he continued to have difficulties in receiving updates from that firm, the plaintiff said he appointed his current solicitors, Jackson Bale Lawyers.

5. The plaintiff's current solicitors filed their notice of appointment on 16 November 2021. By then, he said, the time for appealing had lapsed, and that meetings with solicitors and the uplifting of court documents from the registry took time.

6. The defendant opposed leave and extension of time to apply for leave. The bank's head of human resources and training, Ranjeeta Devi, filed an affidavit on 17 February 2022 opposing leave. The defendant stated that the plaintiff had 14 days in which to apply for leave to appeal the interlocutory order under section 244 of the Act, and that the application should have been made by 10 September 2021. The defendant also stated that the court's interlocutory decision was given in favour of the plaintiff and, therefore, it is not possible to appeal only against the reasoning of the decision. The plaintiff replied by affidavit filed on 2 March 2022.

7. At the hearing into the leave application, the plaintiff submitted that he is desirous of filing a claim for unjust, unfair and unlawful dismissal in the original jurisdiction of the Employment Relations Court. The plaintiff submitted that the court has been hearing, determining and awarding remedies for employment grievances under its original jurisdiction since 2009.

8. The plaintiff concedes that the time for filing an application for leave to appeal is 14 days, and that the application should have been filed by 10 September 2021. The plaintiff filed its application on 13 December 2021, about 2 ½ months out of time.

9. The principles concerning the grant of an extension of time are laid down by the Fiji Supreme Court judgment of Gates P in *Native Land Trust Board v Khan*[1].

[1] [2013] FJSC 1 at 3

10. The plaintiff submitted he had difficulty in contacting his solicitors during the pandemic. Therefore, he changed solicitors on two occasions. He submitted that he took all possible steps to file the application in a timely manner. The plaintiff submitted that a delay of 2 ½ months is not substantial and that, in any event, he has grounds that can succeed in the Court of Appeal. The plaintiff also submitted that the defendant will not suffer prejudice if time is enlarged to apply for leave.

11. Section 245 (1) of the Act provides that an appeal from the court lies to the Court of Appeal. Section 244 of the Act provides that a party who is dissatisfied with an interlocutory order of the court may, within 14 days, apply for leave to appeal to the Court of Appeal or if leave to appeal is refused by the court apply to the Court of Appeal for leave to appeal. Section 234 (1) of the Act makes provision for the court to give an extension of time.

12. The plaintiff filed the application on 13 December 2021. The plaintiff has explained the reasons for the delay. His inability to file the application in time could be considered in the context of the difficulties he faced due to the pandemic and the administrative measures that were in place at the time. Even if the delay could be excused for this reason, the court must consider whether it should exercise its discretion to grant leave to appeal the interlocutory decision.

13. The plaintiff raised the following grounds of appeal:

1. That Learned Judge erred in law when he held that the Employment Relations Court does not have the jurisdiction to hear an employment grievance when:

(a) The Employment Relations Act 2007 2007 does not expressly exclude the Employment Relations Court from determining employment grievance in its original jurisdiction;

(b) Section 230(1) of the Employment Relations Act 2007 gives the Employment Relations Court the power to award remedies if it determines that a worker has an employment grievance.

(c) Section 220(1) (h) of the Employment Relations Act 2007 allows the Employment Relations Court to hear matters founded on an employment contract which includes an employment grievance.

2. The Learned Judge erred in law when he held at paragraph 25 that awards for employment grievances are subject to the limitation in value of the Employment Tribunal's jurisdiction when:

(a) Section 230(1) of the Employment Relations Act 2007 places no such limit on the reimbursement that may be awarded by the Employment Relations Court as a result of an employment grievance;

(b) There is no express provision in the Employment Relations Act 2007 that states that any reimbursement awarded by the Employment Relations Court as a result of an employment grievance is to be capped at $40,000.00

14. The plaintiff submitted that the Employment Relations Act does not expressly exclude the court from determining employment grievances under its original jurisdiction. It was submitted that section 230 (1) of the Act gives power to the court to award remedies if it determines that a worker has an employment grievance.

15. Section 230 (1) of the Act states:

"(1) If the Tribunal or the Court determines that a worker has an employment grievance, it may, in settling the grievance, order one or more of the following remedies:

(a) Reinstatement of the worker in the worker's former position or a position no less advantageous to the worker;

(b) The reimbursement to the worker of a worker of a sum equal to the whole or part of the wages or other money lost by the worker as a result of the grievance;

(c) The payment to the worker of compensation by the worker's employer, including compensation for –

(i) Humiliation, loss of dignity and injury to the feelings of the worker;

(ii) Loss of any benefit, whether or not a monetary kind, which the worker might reasonably expect to obtain if the employment grievance had not occurred; or

(iii) Loss of any personal property".

16. The plaintiff says that there appears to be a conflict between what is stated in section 220 (1) and 230 (1) of the Act, and that this conflict needs to be clarified by the Court of Appeal. It was submitted that if Parliament intended to oust the jurisdiction of the court from hearing an employment grievance, this would have been expressly stated in the statute.

17. The plaintiff cited the decision in *Beedell v West Ferry Printers Ltd*[2], and submitted that the English Court of Appeal has said that even hopeless appeals may be allowed to proceed where the area of law in question is the subject of considerable controversy.

18. In reply, the defendant submitted that the court granted the plaintiff leave to amend his statement of claim, and dismissed the defendant's strike out application. Both orders made by court, the defendant pointed out, were in favor of the plaintiff. Costs were also awarded in the plaintiff's favor.

19. The defendant submitted that the plaintiff's application is entirely misconceived because the plaintiff has succeeded in both summonses before the court, and that the proposed grounds of appeal show that he is not appealing the orders made by court. The appeal, the defendant says, is against some of the court's findings and its reasons for making the orders. The defendant submitted that although section 244 makes provision to appeal an interlocutory order, no appeal is available against the reasons for such order.

[2] [2001] EWCA Civ. 400; [2001] ICR 962

20. The defendant made references to the decisions in *Lake v Lake*, *Pacific Agencies (Fiji) Ltd v Spurling and Sukh Deo Prasad.* In *Lake v Lake*[3] the English Court of Appeal said:

> "A party's right of appeal (which is, of course, a statutory right) is now regulated by the terms of R.S.C., Ord. 58, r. 1. That states that the appellant, may, pursuant to s. 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, appeal from the "whole or any part of any judgment order". Counsel for the wife strongly argued that the judgment, for the purposes of the present matter, is not the formal document which I have already read, drawn up and signed by the district registrar, but is the statement of his reasons given by the commissioner at the end of the trial and from the transcript of which I have read certain short extracts……..In my view, however, that argument cannot be sustained. Nothing from the cases brought to our attention by counsel for the wife persuades me that by the words "judgment or order" in the rule or in the sub-section is meant anything other than the formal judgment or order which is drawn up and disposes of the proceedings and which, in appropriate cases, the successful party is entitled to enforce or execute."

21. In *Pacific Agencies (Fiji) Ltd v Spurling*[4] the Supreme Court stated:

> "While it is commonplace with published reasons to head the entire document "judgment", it is in truth a statement of reasons explaining the judgment or order that is pronounced, usually in the concluding paragraph. That concluding order may be interlocutory or final. It takes effect from its date, being the date on which it is pronounced, given or made, unless the Court orders otherwise (see Order 42 r 4). In the case of an injunctive order, it will immediately bind those to whom it is addressed and who have notice of it."

22. *In Sukh Deo Prasad and another v The Attorney General*[5]*, the Court of Appeal* stated:

> "The reasons given for judgment or order may show that it is wrong or not the result of proper judicial consideration of the facts or the law or both; but it is only the judgment or order itself which has legal effect. For that reason it is only the judgment or order against which appeal can lie to this court".

[3] [1955] 2 All ER 538 at 541
[4] [2008] FJSC 27; CBV 0007.2008S (17 October 2008)
[5] [1997] FJCA 23; ABU 29D.1997S (13 August 1997)

23. The plaintiff replied by stating that the decision in *Lake v Lake* was not followed in later decisions, and relied on the English Court of Appeal decision of *Secretary for State for Work and Pensions v Morina*[6] in seeking leave to appeal the interlocutory decision. The plaintiff also cited several other decisions on this point. In *Morina* the Court of Appeal held there were good reasons to decide the jurisdictional points raised in appeal although the appellant was the overall victor in the original court. The defendant submitted that in *Morina's* case the jurisdictional issue was decided against the appellant, while in the present matter the orders were in favor of the plaintiff and decided against the defendant. The defendant submitted that at the time of the court's ruling, the plaintiff was no longer asserting a right to bring an employment grievance to this court, but was seeking to bring a breach of contract claim by amending the statement of claim.

24. Court agrees that the interlocutory decision was in favour of the plaintiff, and there is no cause to appeal the reasoning of that decision.

The court's original jurisdiction to hear an employment grievance

25. In considering the strike out application, the interlocutory decision of 27 August 2021 dealt at some length on the question of whether this court has original jurisdiction to hear an employment grievance.

26. Section 211 (1) (a) confers the Employment Relations Tribunal with jurisdiction to adjudicate on employment grievances. Section 110 (3) of the Act requires all employment grievances to be first referred for mediation services. Section 194 (5) of the Act states that if a mediator fails to resolve an employment grievance or an employment dispute, the mediator shall refer the grievance or dispute to the Employment Tribunal. Parliament has mandated mediation procedures and vested the tribunal with features that are meant to assist in the effective resolution of or adjudication of grievances. Mediation services, the tribunal and the court have been established to carry out their different powers, functions and duties. The statutory scheme is such that an employment grievance must be referred for mediation and adjudicated in the tribunal in the first instance.

[6] [2007] EWCA 749; [2007] 1 WLR 3033

27. The court's original jurisdiction is set out in sections 220 (1) (h), (k), (l) and (m) of the Act. Proceedings can also be transferred from the tribunal to the court under section 218 and section 221 allows the court to order compliance. The Act does not confer on this court the original jurisdiction to hear an employment grievance excepting in the way allowed by the Act. The monetary limitation placed on the tribunal will not of itself permit the court to hear an employment grievance. The court, however, is not impeded by the monetary limit.

28. The plaintiff referred to section 230 (1) of the Act in saying that the remedies specified by that enactment show that the court has original jurisdiction. The provision must be read to mean that a court can grant those remedies where a matter is properly brought before the court under the Act.

Conclusion

29. The plaintiff acknowledges that he was the successful party in the decision given by court. His grounds of appeal are not in respect of the orders made by court. Those orders have caused him no prejudice. The court is also of the view that even if leave to appeal the interlocutory decision is granted, the plaintiff has no prospects of success in the appeal. The application is, therefore, declined with costs.

ORDER

A. The plaintiff's summons for leave to appeal is struck out

B. The plaintiff is to pay the defendant costs summarily assessed in a sum of $500.00 within 21 days of this decision.

Delivered at **Suva** this **25th** day of **October, 2023.**

HIGH COURT OF FIJI
SUVA

M. Javed Mansoor
Judge