IN THE EMPLOYMENT RELATIONS COURT
AT LAUTOKA
APPELLATE JURISDICTION

ERCA No. 11 of 2019

BETWEEN : **HRF INVESTMENT**

APPELLANT

AND : **THE LABOUR OFFICER ON BEHALF OF MOHAMMED KALEEM**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Ms. J. Tunikula for the Appellant

Mr. S. Kant for the Respondent

Date of Hearing : 22 September 2022

Date of Judgment : 06 December 2023

JUDGMENT

WORKMEN'S COMPENSATION Workman – Whether accident arose within the course of employment – Intervention of appellate court – Sections 2 & 5 Workmen's Compensation Act 1964

The following cases are referred to in this judgment:

a. Benmax v Austin Motor Company Ltd [1955] 1 All ER 326

b. Watt v Thomas [1947] All ER 582

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1. The appellant has appealed the decision of the Employment Relations Tribunal dated 15 October 2019 by which the appellant was ordered to pay a sum of $10,400.00 as compensation to the respondent for personal injuries sustained in the course of employment.

2. The proceeding before the tribunal was instituted by the labour officer on behalf of the workman, Mohammed Kaleem, under the Workmen's Compensation Act 1964, for an injury sustained at work on 28 April 2011. The labour office gave the employer a notice of claim dated 10 May 2011.

3. The application filed in the tribunal is dated 6 October 2014. The appellant denied liability on the basis that he did not employ Mr. Kaleem and that the claim is statute barred. Formal proof was conducted on 12 March 2018 due to the employer's absence and an order for payment was made on 31 August 2018. An application to set aside the order appears to have been allowed, and a defended hearing began on 12 September 2019.

4. At the hearing before the tribunal, the assistant labour officer, the applicant and a former employee of the appellant gave evidence on behalf of the claimant. The proprietor of HRF Investments, Hazrat Begg, gave evidence on behalf of the appellant.

5. Mr. Kaleem told the tribunal that he commenced work for the employer on 6 April 2011, as a mechanic but without a written employment contract. He was previously employed with another firm. He was not professionally qualified. He

worked on a daily basis earning $25 each day. On 28 April 2011, the owner of HRF Investment, Hazrat Begg instructed him to repair a digger equipment (the medical report says the injury occurred when fixing the turn table of an excavator). The owner was related to him. While carrying out repairs, the digger fell upon him and he sustained injuries on both hands. The owner took him to the Lautoka hospital for treatment. He received in-house treatment in hospital. His right hand was fractured. He said his left hand could not be bent from the wrist, and he is unable to straighten the fingers of his left hand. He was 23 years at the time of the accident.

6. Setoke Nasovo, a former employee of the appellant, said Mr. Kaleem worked with him in 2011. The witness was employed by the appellant for about 6 months from January to June 2011. He was present when the accident happened. He gave a statement to the labour office. His statement says that he and Mr. Kaleem worked overtime to finish the task assigned by Mr. Begg.

7. The assistant labour officer, Razia Ramiza, gave evidence and produced the relevant documents, including what was filled out by the doctor. Ms. Ramiza was not the officer who investigated the incident. Her evidence was based on documents maintained by the labour office. The doctor at the Lautoka hospital assessed the workman's impairment at 40%, which is stated in the form signed by the doctor. The certificate by Dr. Mark Rokobuli, orthopaedic registrar of the Lautoka hospital, was tendered to the tribunal. The officer said that compensation was calculated on the statutory formula based on the workman's gross weekly earnings of $100.00. The weekly earnings were taken from the workman's statement to the labour office on 2 August 2013. The court notes that Mr. Kaleem's previous statement of 24 May 2011 mentions his daily earnings as $25.00.

8. Hazrat Begg said in his evidence that he has been carrying on the business of soil and gravel extraction from December 2006. He did not employ a full time mechanic. He said that Mr. Kaleem is related to him and that he helps him out. He denied employing him. On Mr. Kaleem's request, he was given work on

availability. Mr. Begg admitted the accident and said that he rushed the workman to the Lautoka Hospital after the incident.

9. After hearing the parties, the resident magistrate concluded that Mr. Kaleem was a workman within the definition of section 2 of the Workmen's Compensation Act. His finding was that the workman used tools that were provided by the appellant in carrying out the repair work. He concluded that the appellant is liable to pay compensation as the injury arose out of and within the course of employment.

10. The appellant raised the following grounds of appeal:

(1) "That the learned magistrate erred in law in holding that the respondent was a worker by virtue of Section 2 of the Workmen's Compensation Act where the Respondent neither has produced any employment wages slips nor any genuine ground for failing to provide them.

(2) That the learned magistrate erred in law in failing to satisfy all the elements of proving that a contract of service existed between the appellant and the respondent.

(3) That the learned magistrate erred in holding a judgment in favor of the respondent where there was sufficient and unreliable evidence namely, the absence of any proof of employment, the absence of an expert witness and the pertinent contradictions in the evidence of the respondent.

(4) That the learned magistrate erred in holding that the respondent had suffered 40% permanent incapacity where there was insufficient, unreliable and/or independent and/or reliable corroborative evidence to support such a finding.

(5) That the learned magistrate erred in proceeding in failing to caution the appellant that the medical report was merely hearsay as it was tendered in the absence of the medical practitioner that prepared it.

(6) That the learned magistrate erred in proceeding when he failed to consider the pertinent contradictions in the statements of the respondent pursuant to the formal proof hearing and the substantive hearing".

11. At the hearing of the appeal, the appellant submitted that the workman was a relative who lived with the appellant from 2009 and to whom he gave financial support from time to time. The appellant submitted that the tribunal had not properly evaluated the evidence in concluding that Mohammed Kaleem was a workman in terms of section 2 of the Workmen's Compensation Act. The appellant submitted that there was no contract of employment or evidence of wage slips, FNPF or leave records to establish Mr. Kaleem's contract of service.

12. The appellant submitted that Mr. Kaleem was employed at another establishment and took up work from the appellant occasionally. The appellant submitted that the work performed by Mr. Kaleem was of a casual nature, and that he was given occasional work in order to assist him as he was a relative.

13. The appellant submitted that the evidence given by the assistant labour officer is hearsay and must be excluded as she was not involved in the investigations or in computing the compensation. The appellant also submitted that the medical report provided to court is also hearsay evidence as it was not tendered through an expert witness.

14. The proceeding before the tribunal was for the purpose of recovering compensation. Such proceedings are instituted when an employer refuses to pay assessed compensation. The assistant labour officer was competent to give evidence from the records kept by the labour office, including the medical officer's certificate. Mr. Kaleem's injuries were examined by a medical doctor and his impairment was assessed at 40%. The doctor's assessment was not challenged by the appellant. Compensation was calculated according to the formula provided by the statute. The evidence given by the assistant labour officer was relevant and properly admitted by the tribunal. It is pertinent to note that the Civil Evidence Act 2002 makes provision for the reception of hearsay evidence in civil proceedings.

15. The resident magistrate has evaluated the evidence in his determination. He has considered the applicable provisions of the Workmen's Compensation Act. He chose to believe the evidence of the workman. He was well equipped to decide

on the primary facts of the case. He was in an advantageous position, which is not available to this court. Evaluation of the evidence includes a consideration of the inconsistencies in the testimony. The court hearing the evidence is in the best position to observe and decide on the materiality of inconsistencies in the testimony or the credibility of the witnesses giving evidence.

16. Unless the findings of the tribunal are perverse or where there is no evidence to support such findings, the appellate court will be reluctant to interfere. The appellant has not shown that the tribunal was plainly wrong in its findings to warrant the court's intervention.

17. In *Benmax v Austin Motor Company Ltd*[1], the house of Lords had this to say:

> "Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations".

18. The *Benmax* judgment referred to the earlier decision in *Watt v Thomas*[2], in which the House of Lords stated:

i. "Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of

[1] [1955] 1 All ER 326 at 328/ 329
[2] [1947] 1 All E R 582 at 587

having seen and heard the witness could not be sufficient to explain or justify the trial judge's conclusion.

ii. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

iii. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and hear the witnesses, and the matter will them become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

19. For the reasons stated above, the appeal does not succeed.

ORDER

A. The appeal is dismissed.

B. The appellant is to pay the respondent costs summarily assessed in the sum of 1,000.00 within 21 days.

Delivered at **Suva** *via skype* on this **6th** day of **December, 2023.**

HIGH COURT OF FIJI
SUVA

M. Javed Mansoor
Judge