

**IN THE EMPLOYMENT RELATIONS COURT OF FIJI
(WESTERN DIVISION) IN LAUTOKA
CIVIL JURISDICTION**

**ACTION NO- ERCA -03 of 2025
ERT GRIEVENCE No- G73 of 2023**

BETWEEN : **SHEIK SHAHEEM DEAN**, of Nawakai, Nadi, Stock Controller.
**APPLICANT
(ORIGINAL - GRIEVER)**

AND : **CAPTAIN COOK CRUISES MANAGEMENT PTE LIMITED**, a Limited Liability Company with its Registered Office at Denarau Marina, Nadi.
**RESPONDENT
(ORIGINAL EMPLOYER)**

BEFORE : Hon. A.M. Mohamed Mackie-J.

COUNSEL : Mr. Maharaj N. For the Applicant – Griever.
Ms. Muir M. For the Respondent- Employer.

HERAING : By way of written Submissions.

W. SUBMISSIONS : Filed by the Applicant on 28th May 2025.
Filed by the Respondent-Employer on 22nd May 2025.

RULING : Pronounced on 14th August 2025.

RULING
(ON LEAVE TO APPEAL OUT OF TIME)

1. Before me is an Application by the Applicant -Griever (“the Applicant”) seeking leave to Appeal out of Time the Order of His Worship Resident Magistrate (Sitting at ERT Lautoka) pronounced on 28th November 2024, sealed on 09th December 2024 and served on his then Solicitors on 10th December 2024.
2. This Application by way of his Summons was filed before this Court on 24th March 2025 pursuant to Sections 242 of the Employment Relations Act 2007.
3. The Application is supported by an Affidavit sworn by the Applicant on 6th March 2025 and filed together with annexures marked as “SSD-1” to “SSD-6”. I find that, out of these 6 annexures, the annexures “SSD-1” to “SSD-5” are in support of his position with regard to the delay occurred in filing this Application, and the annexure “SSD-6” contains 4 grounds of appeal that he intends to rely on for the purpose of his Appeal.

4. The Applicant, who was employed by the Respondent as Reservations Administrator and Inventory Controller, was terminated on 20th April 2023 on the allegations of sexual harassment alleged to have occurred in between 4th April 2023 to 7th April 2023.
5. Having exhausted the process of mediation, with no relief therefrom, the Applicant went before the ERT claiming a total sum of \$100,030.00 (one hundred thousand and thirty Fijian dollars) as damages, which is made of as follows;

1. Two Year's wages as a result of termination	-	\$ 28,080.00
2. Sales incentive	-	\$ 9,600.00
3. Damages for humiliation	-	\$ 20,000.00
4. Constant prejudice	-	\$ 30,000.00
5. 45 weeks loss of income	-	\$ 12,150.00
6. Travelling costs	-	\$ 200.00
TOTAL	-	\$ 100,030.00
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6. In response, the Respondent- Employer filed its submissions dated 31st January 2024 before the tribunal justifying the termination, supported by the contents of 7 annexures thereto. Both parties filed supplementary submissions as well and the Applicant finally replied the supplementary submission filed by the Respondent.
7. The circumstances under which his services were terminated are vigorously contested by the Applicant, while the Respondent was justifying its action against the Applicant. The Resident Magistrate, after hearing the Counsel for both parties on 27th November 2024, delivered the following Order dated 28th November 2024, which was sealed on 9th December 2024 and served on 10th December 2024 on the Applicant's former solicitors, who in turn notified the Applicant about it on 11th & 12th December 2024. The impugned Order reads as follows;

"IT IS HEREBY ORDERED THAT there is no jurisdiction as the claimant's claim is more than \$40,000.00, and therefore this matter is struck out. The parties are to bear their own costs"

8. Being aggrieved by the said Order, the Applicant seeks for the extension of time to file Notice and Grounds of Appeal. For this purpose, the Applicant has dedicated majority of the averments in his supporting Affidavit to explain and justify the delay caused in making the intended Appeal within the timeframe. He has annexed documents marked as "SSD- 1" to "SSD-5" to explain the delay and the reason for the length of delay. The annexure marked as "SSD-6" contains his intended Grounds of Appeal, which are enumerated below;
 1. Failing to provide an opportunity to the Appellant to amend his claim to fall within the Tribunal's jurisdictional limit under Order 14 Rule 1 of the Magistrates Court Rules 1945.
 2. Failing to order compliance pursuant to Section 212 of the Employment Relations Act 2007 ('the Act') by directing the Appellant amend their claim so that it may comply with Section 211(2)(a) of the Act.

3. Striking out the matter without considering the substantive matter and evidence, and in doing so, denying the Appellant natural justice and their constitutional right to have the matter determined by the Employment Relations Tribunal pursuant to Section 15(2) of the Constitution of the Republic of Fiji.
4. Failing to determine the matter within the Employment Relations Tribunal's jurisdictional limit as described by Section 211(2)(a) Act.
9. An appeal to the High Court must be made in the prescribed manner within 28 days from the date of the impugned Order by the Tribunal. The Appellant filed his Application in this Court on 24th March 2025 seeking the Leave of Court to file the Notice and the Grounds of Appeal out of time. The Affidavit in Support states the impugned order being served on his then Solicitors Messrs. Siddiq, Koya Lawyers only on 10th December 2024, the same was provided to him by two emails dated 11th & 12th December 2024 marked as "SSD-1".
10. He states further that, having retained his present Solicitors on 17th December 2024 as he could not afford the fees quoted by his former solicitors for the Appeal, he on 18th December 2024, through his new Solicitors requested in writing for his client files from his former Lawyers, but they did not provide the same as of the date of signing the Affidavit in support.
11. As a result, due to the lack of response from SKF Lawyers to return the file, though a file search was to be conducted in Lautoka Employment Tribunal, same did not eventuate as the relevant file had been dispatched to Suva. Accordingly, he was instructed to do a file search in Suva and did it on 7th January 2025 as substantiated by the file search payment receipt dated 7th January 2025 marked as "SSD-5".
12. The Applicant also draws the attention of the Court to the Christmas break and the adverse weather prevailed at the time material. However, the Applicant had filed his first Application seeking leave to appeal out of time before the Employment Tribunal itself on 14th January 2025 as substantiated by the copy record before me, which was dismissed citing that it was filed in the wrong forum.
13. Learned Counsel for the Respondent on 14th May 2025 (being the date of first call before me) did not opt to file any Affidavit in opposition. Instead, she moved only to file legal submission, and accordingly both parties have filed their respective written submissions.
14. For the time being, what the Applicant is expected to do before this Court is to justify his reasons for the delay, the length of delay and/ or to show that he has meritorious grounds of appeal to call upon this Court to exercise its Appellate jurisdiction.
15. The averments in the Applicant's Affidavit in support and the contents of the documents in relation to the delay and the length of delay hereof have remained unchallenged. The Tribunal delivered its impugned Order on 28th November 2024, but it was served on the Applicant's then Solicitors on 10th December 2024. It was communicated to the Applicant on 11th December 2024. There is no evidence to show that the Applicant and/ or his former

Solicitors were present in Court when the Order was delivered in Court on 28th November 2024, except for their appearance on 27th November 2024.

16. The reason adduced by the Applicant for the initial delay can be accepted as the Applicant could not have had control over what eventuated subsequent to the serving of the Order on his former Solicitors till the date of filing his first Application in the Tribunal. The facts that the Applicant changed his Solicitors, toiling to obtain the client's file from his former Solicitors, trying to do a file search at ERT Lautoka, which failed as the file had been remitted to Suva, and finally he had to do a file search in Suva should not be disregarded.
17. It is to be borne in mind that despite all above hindrances, he managed to file his first application at the Tribunal in Lautoka on 27th January 2025. Had the Tribunal accepted it without dismissing/ disregarding and dispatched it to the High court as normally done in Case of Magistrate's Court Appeals pursuant to Order 37 (2) of the Magistrate's court Rule 1945, the delay would have been minimized to some extent. However, he filed his 2nd Application only on 24th March 2025.
18. It is clear that an inordinate delay had **not** taken place after the expiry of the date for filing the Notice of Appeal and Grounds of Appeal, and that such delay was not solely due to the fault of the Applicant. He appears to have commenced rolling to file this Application from the point he was notified of the impugned Order of dismissal of his original Application to the Tribunal.
19. The time limit to file the Notice of Appeal is 28 days. However, Section 234 (1) (a)[2] permits Court to extend time to do anything not done within the required time limit if the matter is within its jurisdiction and on the application of an interested person.
20. In granting of Leave, as alluded to above, the Court would consider the following factors: the length of the delay and the reasons for it; the chances of the appeal succeeding; and, the prejudicial effect to the Respondent, if Leave is granted.
21. In **Gatti v Shoosmith**, the Court of Appeal in England considered the omission to appeal in time due to a mistake on the part of a legal adviser, and stated that it may be sufficient cause to justify the Court in exercising its discretion, though such discretion will not be adopted in every set of facts. This reasoning was adopted by the Supreme Court of Fiji in **McCaig v Manu**, though extension of time was not granted in that case.
22. In my view, the Applicant had acted diligently within his capacity. But, due to reasons beyond his control, he was prevented from filing his Notice and grounds of appeal in timely manner. The length of the delay itself is about 19 days between the lapsing of the time for appealing on 26th December 2024 till he filed his ill-fated 1st Application at ERT Lautoka on 14th January 2025. Since he has rightly or wrongly filed his 1st Application at ERT Lautoka, it could have been treated as his application for leave to Appeal out of time. The delay of 19 days cannot be classified as inordinate or inexcusable.

23. The Respondent's submission in relation to the Tribunal's monetary jurisdiction and on the proposed grounds of appeal do not warrant any deep scrutiny at this juncture as those submissions are best-suited for the argument of the appeal. The intended grounds of appeal, in my view, appear to be meritorious and this is an apt case in which the exercise of the discretion of this Court is warranted.
24. Whether there is any merit in the grounds of appeal urged by the Applicant is a matter that will need a fuller hearing to determine if the ERT was justified in arriving at its decision. What is clear is that there is a dispute as to whether the Applicant conducted himself in an unbecoming manner warranting his termination as alleged by the Respondent or, whether the allegations are unfounded.
25. The Court is of the view that the Applicant's claim needs to be inquired in full in the interests of justice by removing the time barrier.
26. There is no doubt that there will be some prejudice to the Respondent as a result of the delay due to these proceedings, and the appeal proceedings, if Leave is granted to the Applicant. The Court has the opportunity to obviate any such resulting prejudice to the Respondent at the stage of determining the appeal.
27. The Appellant has, however, satisfied the Court that in view of the extent and circumstances resulting in the delay in filing an appeal and the nature of the facts in dispute, granting Leave to the Applicant to file the Notice and grounds of Appeal out of time would be just.

Orders:

- a. The Applicant's Summons filed on 24th March 2024, seeking leave to appeal out of time, succeeds.
- b. Order in terms of paragraph 1 of the Summons granted.
- c. Costs in cause.


A.M. Mohamed Mackie
Judge



At the High Court of Lautoka on this 14th day of August, 2025.

SOLICITORS:

For the Applicant:

Arti Kumar & Associates, Barristers & Solicitors

For the Respondent:

Messrs. Siwaibau & Sloan, Barristers & Solicitors