IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 99 OF 2023
[Suva High Court Case No. ERCA 01 of 2020]
[Employment Tribunal Case No. ERT 26 of 2020]

BETWEEN	**:**	**PROFESSIONAL SECURITY SERVICVES LIMITED**
		Appellant
AND	**:**	**THE LABOUR OFFICER ON BEHALF OF ILAISA MOMO**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Qetaki, JA** **Clark, JA**
Counsel	**:**	**Ms. S. D. Prasad for the Appellant** **Respondent absent and unrepresented.**
Date of Hearing	**:**	**04 November 2024**
Date of Judgment	**:**	**28 November 2024**

JUDGMENT

Prematilaka, RJA

Background to the appeal

[1] The appellant had been charged with two counts under the Employment Relations Act 2007 ('ERA'). Under the first count the appellant is alleged to have committed an offence contrary to section 45(4) of the ERA by failing to produce wages and times records after demands were made by Demand Notice dated 30 July 2019 to produce the same for the purpose of calculating arrears of wages due to Ilaisa Momo for the period February 2015 to June 2016. Count 2 alleged that the appellant failed to comply with a written Demand Notice on 23 December 2019 made by a Labour Inspector in respect of

arrears of wages for the said Ilaisa Momo amounting to $4,853.00 earned from February 2015 to June 2016 thereby committing an offence contrary to section 247(b) of the ERA.

[2] The appellant had pleaded not guilty and the matter proceeded to trial before the Employment Relations Tribunal. The respondent had called 03 witnesses and the appellant had summoned two witnesses. All witnesses as part of their examination-in-chief had filed affidavits. The appellant had been convicted of both counts. For the first count and the second count, the appellant was fined in a sum of $1500.00 respectively. The appellant's appeal grounds relate to both conviction and sentence.

[3] Grounds of appeal are:

> Ground 1 - The learned judge made an error and/or failed to elucidate her decision during the judgement.
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> Ground 2 - The learned judge erred in law and in fact in citing, "An Appellant court will be slow to interfere with a factual findings of an original court unless they are plainly wrong or drew wrong inferences from the facts and the Appellant court need not exercise jurisdiction to interfere with the Tribunal's decision only because it exercised its discretion in another way."
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> Ground 3 - The learned judge erred and/or misdirected herself in law and in fact by not considering section 45 (4) under the Employment Relations Act whereby the order made by the learned trial magistrate was made in excess, as the act specifies a fixed penalty of $100.00, and the learned trial magistrate ordered $1,500.00 for breach of section 45 (4).
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> Ground 4 - The learned judge erred and/or failed to take into account the grounds of appeal presented by the Appellant. Instead, she relied on different material and extra case, forming her decision based on it rather than the arguments put forth by the Appellant.
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> Ground 5 - The learned judge introduced and included a new argument on her own accord, which was not part of the original submission by the Appellant. The Appellant had initially presented only eight grounds, whereas the Judge independently introduced a ninth ground.
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> Ground 6 - The learned judge erred and/or failed to consider and/or give proper weight to the Appellant's submission, and that neither the Respondent nor his Counsels had made any appearance on 7 June 2023 for hearing. This strongly

suggests that the learned Judge referred to a different case in rendering her judgement, rather than focusing on the particulars of the present case.

Ground 7 - The learned judge erred in law and in fact by awarding the Respondent costs in the sum of $500.00.

[4] Ms. Apolonia Tuitakali (PW1), the Assistant Labour Officer who had investigated Ilaisa Momo's complaint on the non-payment of wages, annual holiday pay, overtime pay and meal claim had said *inter alia* that a Demand Notice served on the appellant on 30 July 2019 to produce wages and time records, leave records and copy of employment contract in respect of Ilaisa Momo was for the period from February 2015 to June 2016. There was no dispute that the appellant had received the Demand Notice. There could not be any dispute that such a Demand Notice could have been issued. The Demand Notice required the appellant to comply with it within 14 days.

[5] Vikash Narayan, Manager Administration of the appellant company had responded by email sent to PW1 only on 07 November 2019 which was 03 months and a week after the Demand Notice. No evidence was produced to show that at least the appellant had sought an extension of time to provide the details demanded. Mr. Vijay Prakash, the director of the appellant company (DW1) had said in his evidence that they intended to resolve the matter by offering a sum of $500.00 in full settlement. PW1 also had confirmed that the appellant company had participated in some discussion with the Labour Department with a view to resolving the matter. It also appears from the email and the evidence of DW1 that out of 11 labour cases faced by the company some complaints had been withdrawn, one to be withdrawn and some still under negotiation. The appellant had attached wages summary record of Ilaisa Momo to the email because 'he was paid according to the days he worked'. None of the above is indicative of any legitimate reason or provides any genuine excuse for non-compliance with the Demand Notice within the required time. A question arises whether the so-called good faith negotiations were in fact done in good faith or to cover up non-compliance with the ERA. I shall elaborate this aspect further in the coming paragraphs.

[6] What has been submitted by Vikash Narayan to Ms. Apolonia Tuitakali with the email on 07 November 2019 quite belatedly is a 'summary' of wages of Ilaisa Momo purportedly from 09 October 2015 to 19 February 2016. However, Vijay Prakash's evidence was that

Ilaisa Momo was employed from September 2015 to February 2016 for a period of three months. The contract of service had been signed on 21 September 2015 but no end-date to the contract had been given. Ilaisa Momo being a totally new comer (according to the appellant) it is strange that his job application, his application for police clearance and contract of service were signed on the same day i.e. 21 September 2015 and he commenced his work. Why has Vijay Prakash failed to attach Part 11 of the contract of service to his affidavit as he did with regard to Vatiliai Warai whose contract of service under Part II states that the duration of his contract was for 03 months? Why does Ilaisa Momo's wages summary record indicate that he had been paid from 09 October 2015 if he was appointed as patrol officer (security guard) on 21 September 2015. Why does the appellant insist that Ilaisa Momo was employed for 03 months when its own wages summary record shows that he had been paid for more than 05 months?

[7] Moreover, why did the respondent, in response to the Demand Notice, fail to submit actual records of payment of wages to Ilaisa Momo but chose to submit only a summary record of wages? If all employees were issued with pay slips as stated by Vijay Prakash (though contradicted by Shabnam Kiran, who said that not all workers received pay slips unless requested), why did the appellant fail to submit the same or duplicates of those so issued to Ilaisa Momo?

[8] These unanswered questions cast a serious doubt on the credibility of the appellant's position that Ilaisa Momo was employed only for three months from September 2015 and his payments are truly reflected in the summary record of wages submitted quite belatedly in response to the Demand Notice. On the contrary, I tend to believe Ilaisa Momo's position that he was employed from February 2015 to June 2016 from Monday to Saturday on a 12 hours' shift for 72 hours per week as opposed to a 48 hours' week (08 hours per day shift) as stated by him though he had signed a formal contract only in September 2015.

[9] In any event, the Demand Notice required the appellant to submit not only the wages records but also time records, leave records and copy of employment contract. No time records, leave records or the employment contract in full seem to have been submitted at any stage including the Employment Relations Tribunal proceedings.

[10] The importance of keeping records required by section 45(1)(a)– (j) of ERA is underscored by the dispute here as to how many hours he worked, what he should have been paid, and what he was paid and method of calculation. Thus, this obligation cannot be overemphasized. Section 45 (1) to (4) of ERA states that

> *"An employer who employs a worker whose wages or rates of wages are prescribed or paid under an employment contract or under this Promulgation must keep a record (called the wages and time record) showing, for each worker—*
>
> *(a) the name of the worker;*
> *(b) the date of birth;*
> *(c) the worker's address;*
> *(d) the kind of work on which the worker is usually employed;*
> *(e) the employment contract under which the worker is employed;*
> *(f) the classification or designation of the worker according to which the worker is paid;*
> *(g) a daily attendance register incorporating the hours between which the worker is employed on each day, and the days of the worker's employment during each week;*
> *(h) the wages paid to the worker each week and the method of calculation;*
> *(i) any payment made under Part 11; and*
> *(j) other prescribed particulars.*
>
> *(2) An employer must, upon request made at any reasonable time by a labour officer or labour inspector, produce for inspection by that officer or inspector every wages and time record that is, or at any time during the preceding 6 years was, in use under this Promulgation in respect of a worker employed by that employer at any time in those 6 years.*
>
> *(3) If an employer keeps a wages and time record in accordance with any other written law, the employer is not required to keep a wages and time record under this section in respect of the same matters.*
>
> *(4) An employer that contravenes subsection (1) or (2) commits an offence."*

[11] The appellant's counsel submitted at the hearing that the appellant tried to produce purported FNPF records of wages paid to Ilaisa Momo when the appellant's last witness was being cross-examined by the respondent's counsel but the same was disallowed by the Employment Relations Tribunal upon objection by the latter. According to the appellant's witnesses, the wages used to be deposited in Westpac Bank and distributed to individual employees. If that is the case, there could not have been any difficulty on the part of the appellant to get them and produce at the trial which it failed to do. Similarly,

the appellant would have been well aware of FNPF records relating to Ilaisa Momo and should have obtained them in preparation of the trial on 19 May 2020. The appellant had time from July 2019 to collect time records, wages records and complete employment contract. The respondent had issued a request *inter alia* for these documents and asked the appellant to come for a good faith meeting on 23 July 2019. If the appellant managed to submit the same, there would not have been a need to issue the Demand Notice on 30 July 2019. Thus, the appellant was either totally remiss or it did not have those documents as it had not kept them as required by section 41 of ERA. In any event, if the FNPF records, belatedly obtained, were going to assist the appellant in its defense, it could have made an application to lead fresh evidence of them in the High Court. The appellant had not resorted to that either.

[12] Therefore, I do not think that the appellant's defense that it had provided the documents requested by the Demand Notice as an attachment to its email on 07 November 2019 can be considered a plausible defense to the first charge under section 45(4) of the ERA. Firstly, the Demand Notice was not complied with within 07 days as provided (or within an extended time which the appellant had not asked for or a reasonable time). Secondly, what was provided even belatedly was only a summary of wages records which was not even a substantial compliance with the Demand Notice.

[13] The appellant submits that the Employment Relations Tribunal had not considered the fact that the appellant had indeed submitted a summary of wages record along with its email on 07 November 2019 in its decision on 15 July 2020. I cannot totally agree. Although, there is no reference to the email, the Employment Relations Tribunal had referred to the fact that the appellant had produced only a summary of wages which is obviously a reference to the attachment to the email. The Employment Relations Tribunal was right in stating further that 'no proper time and wages records were produced before the Tribunal'. Thus, even at the trial, the appellant failed to produce the documents as demanded by the Demand Notice.

Is section 45(4) creates a strict liability offence?

[14] The offence described under section 45(4) of the Employment Relations Act appears to align with the characteristics of a strict liability offence. Strict liability offences do not

require proof of fault element (mens rea/guilty mind); rather, the mere commission of the prohibited act (physical element/actus reus) is sufficient for liability, unless a valid defense can be raised. Section 45(4) penalizes employers who fail to comply with record-keeping obligations or the requirement to produce records upon request. The statute does not expressly mention intent, knowledge, recklessness, suggesting that it is a strict liability offence. Strict liability is common in regulatory contexts (like employment law), where the goal is to ensure compliance with prescribed duties that protect workers' rights. The emphasis is typically on ensuring adherence rather than punishing intentional misconduct.

Possible defenses

[15] Under strict liability offences, the range of defenses is limited. However, the following defenses may be possible:

1. *Reasonable steps defense (due diligence):*
   The employer may argue that they took all reasonable steps to comply with the law. For example:
   - *Demonstrating that proper record-keeping systems were in place.*
   - *Showing evidence of training or hiring staff to ensure compliance.*
   - *Proving that any omission or error was due to an unforeseeable event, such as a natural disaster or a technological failure.*
2. *Mistake of fact:*
   The employer could claim they made a genuine mistake of fact, not law. For instance:
   - *Misclassification of a worker's designation based on information provided by the worker.*
   - *Believing in good faith that another law's compliance fulfilled the requirements under section 45(3).*
3. *Lack of notice or request (for subsection (2):*
   The employer might argue they were never notified or requested by a labor officer to produce records. Without such a request, they could not be in breach of subsection (2).
4. *Compliance under other laws (subsection (3):*
   If the employer kept records under another applicable law, they might argue that the requirements of section 45 were already fulfilled.
5. *Acts beyond control (force majeure):*
   The employer could contend that unforeseen or uncontrollable circumstances, such as theft, fire, or misplacement of records, rendered compliance impossible.

[16] In strict liability offences, the prosecution must prove the physical element/*actus reus* (failure to keep records or produce them on request). The employer may need to demonstrate any affirmative defenses, like the ones discussed above to avoid criminal liability. The prosecution in this case has proved its case beyond reasonable doubt. The appellant in this case has not succeeding in demonstrating any of those defenses with any degree of credibility.

Second count

[17] The second count alleges an offence contrary to section 247(b) of the ERA which is as follows.

> *'247. **An employer who—***
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> *(a) fails to pay wages in accordance with the worker's contract of service except where the employer proves that he acted in good faith or took reasonable steps to pay the wages;*
>
> ***(b) upon demand in writing by the Permanent Secretary, a labour officer or a labour inspector, fails within 7 days of the demand to pay any wages due to a worker;***
>
> *(c) if the employment contract—*
>
> > *(i) provides for the payment of wages at the end of the contract period; or*
> >
> > *(ii) where a worker's employment is being terminated under this Promulgation, fails to pay all wages due to a worker after a demand has been made within 24 hours of the termination of the contract or after expiry of the notice required under this Promulgation;*
>
> *(d) pays or agrees to pay the wages of a worker other than in the currency which is legal tender at the place where the wages are paid;*
>
> *(e) makes a deduction from the wages of a worker in the nature of a fine, or due to poor or negligent work;*
>
> *(f) imposes conditions upon the expenditure of the worker's wages;*
>
> *(g) except where expressly permitted by this Promulgation or any other law, makes a deduction or makes an agreement or contract with a worker for a deduction from the wages to be paid by the employer to the worker, or for a payment to the employer by the worker;*
>
> *(h) pays a worker on a piece-work basis which results in the worker receiving less*

than the rate of wages prescribed in the applicable employment contract, ***commits an offence and is liable on conviction—***

(i) for an individual, to a fine not exceeding $20,000 or to a term of imprisonment not exceeding 5 years or both; or

(ii) for a corporation to a fine not exceeding $100,000.

[18] The respondent had issued a Demand Notice on 23 December 2019 on the appellant to pay $4,853.20 being the amount due and owing to Ilaisa Memo in respect of the outstanding wages, overtime claims and meal allowances from February 2015 to June 2016. This notice under section 247(b) of the ERA was issued after the appellant had failed to comply with the earlier Demand Notice under section 45(2) of the ERA. Section 45(2) Demand Notice was issued following the unsuccessful good faith meeting on 23 July 2019 where Ilaisa Memo did not want to settle the matter on the terms (i.e. payment of $500.00) proposed by the appellant.

[19] Once an employer fails to comply with record-keeping obligations or the requirement to produce records upon request, the only option left for the respondent is to calculate what is due and owing to the employee on the available evidence. Section 247(b) of the Employment Relations Act likely qualifies is a strict liability offence, and similar principles as those applicable to other strict liability provisions would apply

[20] Section 247(b) penalizes an employer who fails to pay wages within 7 days after a demand has been made by the Permanent Secretary, a labor officer, or a labor inspector. There is no explicit requirement to fault element (*mens rea*) or bad faith; the offence focuses on the act (or omission) itself—the failure to comply with the demand for wages. Employment law provisions like Section 247(b) aim to protect workers' fundamental rights (such as timely payment of wages) and ensure prompt compliance. Strict liability provisions are common in such regulatory frameworks to encourage diligence and deter noncompliance. Under section 247(a), the employer has a clear statutory defense of acting in good faith or taking reasonable steps to pay wages. This suggests that Section 247(b), by not explicitly including such a defense, imposes liability primarily on the physical element (*actus reus*-failing to pay wages after the demand).

Defenses under strict liability for section 247(b)

[21] If the employer can demonstrate that it was impossible to comply within the 7-day period due to circumstances beyond their control (e.g., banking errors, system failures, or emergencies), this may mitigate liability. The employer might argue they genuinely believed that the wages had already been paid or that the demand for wages was invalid due to a factual misunderstanding (e.g., misunderstanding the owed amount). While not explicitly provided for in section 247(b), courts may accept that the employer took reasonable steps to comply with the demand but was unable to do so for reasons outside their control.

[22] The penalties for noncompliance under section 247 are severe (fines and potential imprisonment for individuals, substantial fines for corporations), reflecting the importance of these obligations. Employers should ensure systems are in place to promptly handle wage payments, especially after formal demands by labor authorities.

[23] In most cases, the employer will have the burden of proof on the balance of probabilities (civil standard) to establish their defense. This means they must show that it is more likely than not that the defense applies. This applies when raising defenses such as reasonable steps or due diligence (e.g., taking all necessary steps to ensure timely payment), mistake of fact (e.g., the demand for wages was based on incorrect calculations or inapplicable amounts) and impossibility of compliance due to external circumstances (e.g., banking system failure). However, the employer must first discharge an evidentiary burden to provide enough evidence to raise a plausible defense. For example, producing records or correspondence showing they disputed the wage calculations with labor authorities in good faith, demonstrating payment receipts or evidence of attempts to transfer wages on time. Once this evidentiary burden is met, the court evaluates the defense based on the balance of probabilities. For example if the employer claims the wages demanded were incorrectly calculated, they must provide supporting documentation, such as payroll records, contracts, or calculations, to substantiate their claim.

[24] Labour authorities, as part of their prosecution, must initially establish that wages were due to the worker and the employer failed to pay the demanded wages within the required 7-day period. If the employer disputes the calculation of wages, they take on the evidentiary and legal burden to prove their contention. This could include challenging the classification of the worker and showing discrepancies in hours worked or deductions that were lawful under the Employment Relations Act. If the employer can cast significant doubt on the accuracy of the calculations (e.g., through pay slips, attendance records, or employment contracts), the prosecution might struggle to meet its burden of proving the underlying offence beyond reasonable doubt. Courts should adopt a balanced approach when reviewing defenses by prioritizing timely payment of wages to prevent abuse but allowing the employer to challenge calculations with reasonable and substantiated evidence. Courts often hold that disputes over calculations should have been raised during the demand period (before prosecution). If the employer failed to contest the calculation during this time, their challenge might face stricter scrutiny.

[25] It is clear that the appellant did not respond to the second Demand Notice requesting for payment of $4,853.20 until the respondent instituted the prosecution. The calculation sheet submitted to court by Apolonia Tuitakali shows that the respondent had done a detailed calculation of total arrears of wages comprising of several subheads. No doubt, that the calculation was based on the information provided by Ilaisa Memo, co-worker Vatiliai Warai and the investigation conducted by Apolonia Tuitakali. Her Statement Form disclosed to the appellant before the trial shows that in addition to the Demand Notice dated 23 August 2019, another Demand Notice had been served on the appellant subsequently with an expiry date of 30 December 2019. The appellant had neither complied with the two notices for payment nor submitted any concrete material to challenge the calculation of $4,853.20 as arrears of wages. This is explained by the appellant's assertion made during the good faith meeting on 30 July 2019 that if Ilaisa Memo was not prepared settle the matter they would fight the case in the Employment Tribunal. However, the appellant had totally relied on the summary of wages record, which is not reliable, for among other things the figures therein are not substantiated by original source documents, to challenge the calculation of $4,853.20.

[26] When an employer fails to respond to a Demand Notice for records in respect of an employee under section 45(2) of ERA, in addition to filing criminal proceedings against

the employer for having committed an offence under section 45(4), the inevitable step available to labour authorities is to do their own calculations as to the arrears of wages and serve a Demand Notice under section 247(b) of ERA for payment on the employer. If the employer has any good faith, he should either comply with the demand as it is or produce proper records even at that stage to show that it had already settled all dues to the employee or in light of such records the calculation made by the labour authorities was inaccurate and should be amended or modified accordingly. If the employer simply keeps silent throughout this process, the calculation made by the labour authorities becomes prima facie evidence of arrears of wages due and owing to the employee by the employer and the non-payment results in the employer committing an offence. When the labour authorities proceeds to charge the employer, the employer has the last opportunity to challenge the calculation in the Demand Notice, which is prima facie evidence of default of payment of arrears of wages by the employer, by producing genuine records to the contrary during the trial.

[27] In this trial, the appellant had failed to succeed in bringing up any of the defenses discussed earlier nor had it successfully challenged the calculation made by the respondent as to the arrears of wages due to Ilaisa Memo. Thus, the appellant had failed in both respects in that it had not discharged the evidential burden of having to produce records to the contrary nor proved any of the defenses affirmatively on balance of probabilities to discredit the calculation made by the respondent. Thus, I see no error in the Employment Tribunal entering a conviction against the appellant on the second count as well.

Grounds of appeal

[28] The appellant complains under the 01st ground of appeal that the High Court has failed to provide clear and cogent reasons for its decision. I think there is some merit in this complaint. However, the matter does not end there. I shall examine this aspect in greater detail as inadequacy of reasons by the lower courts is becoming too common a complaint in appeals before this court. The following discussion is focused more on the trial court judgments and decisions but could *mutatis mutandis* apply to the first tier appellate judgments as well.

[29] In **Abdel Naser Qushair v Naji Raffoul** [2009] NSWCA 329 Sackville AJA (Campbell JA and Bergin CJ in Eq agreeing) it was held at [52]:

> *[52] The principles relating to the obligation of a trial judge to give adequate reasons for making findings of fact, including findings said to be demeanour based, were summarised by McColl JA (with whom Ipp JA and Bryson AJA agreed) in Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110. Her Honour's statement of the principles was accompanied by detailed citation of authority. The following is a summary, with reference only to some of the leading authorities:*
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> > *(i) The giving of adequate reasons lies at the heart of the judicial process, since a failure to provide sufficient reasons can lead to a real sense of grievance because the losing party cannot understand why he or she lost (at [57]): see Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430, at 442, per Meagher JA.*
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> > *(ii) While lengthy and elaborate reasons are not required, at a minimum the trial judge's reasons should be adequate for the exercise of a facility of appeal, where that facility is available (at [56]): see Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, at 260, per Kirby P; at 269, per Mahoney JA.*
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> > *(iii) The extent and content of the reasons will depend on the particular case and the issues under consideration, but it is essential to expose the reasoning on a point critical to the contest between the parties (at [58]): see Soulemezis v Dudley, at 259, per Kirby P; at 280, per McHugh JA. This may require the judge to refer to evidence which is critical to the proper determination of the issue in dispute (at [62]): Beale v GIO, at 443, per Meagher JA.*
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> > *(iv) Where credit issues are involved, it is necessary to explain why one witness is preferred to another. Consequently, bald findings on credit, where substantial factual issues have to be addressed, may not comply with the common law duty to give reasons (at [65]): Palmer v Clarke (1989) 19 NSWLR 158, at 170, per Kirby P (with whom Samuels JA agreed).*
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> > *(v) Where an appellate court concludes that the trial judge has failed to give adequate reasons, the court has a discretion whether or not to direct a new trial. If, despite the inadequate reasons, only one conclusion is available, a new trial may not be necessary (at [67]).'*

[30] Harrison AsJ in **Zeait v Insurance Australia Limited t/as NRMA Insurance** [2016] NSWSC 587 said:

> *'[28] It is trite law that if a court fails to give sufficient reasons for its decision it constitutes an error of law: see Wang v Yamamoto [2015] NSWSC 942; and Jung v Son [1998] NSWCA 120.*

[29] In Wang v Yamamoto at [35]-[38], I stated:

> *"[35] It is not in dispute that a Magistrate is obliged to provide adequate reasons and not to do so constitutes an error of law: see Stoker v Adecco Gemvale Constructions Pty Ltd [2004] NSWCA 449 at [41] per Santow JA.*
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> *[36] In Beale v Government Insurance Office of NSW (1997) 48 NSWLR 340 Meagher JA at 422 stated:*
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> *A failure to provide sufficient reasons can and often does lead to a real sense of grievance that a party does not know or understand why the decision was made: Re Poyser and Mills Arbitration [1964] 2 QB 467 at 478. This court has previously accepted the proposition that a judge is bound to expose his reasoning in sufficient detail to enable a losing party to understand why it lost.*
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> *[37] In Stoker, Santow JA at [41] said that "It is sufficient if the reasons adequately reveal the basis of the decision, expressing the specific findings that are critical to the determination of the proceedings." However, "the extent and the content of reasons will depend upon the particular case under consideration and the matters in issue. While a judge is not obliged to spell out every detail of the process of reasoning to a finding, it is essential to expose the reasons for resolving a point critical to the contest between the parties": see Pollard v RRR Corporation Pty Limited [2009] NSWCA 110, McColl JA at [58] (with whom Ipp JA and Bryson AJA agreed).*
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> *[38] In Soulemezis v Dudley (Holdings) Pty Ltd (1987) NSWLR 247, McHugh JA at 281 stated:*
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> > *"In a case where a right of appeal is given only in respect of a question of law, different considerations apply from the case where there is a full appeal. An ultimate finding of fact, which is not subject to appeal and which is in no way dependent upon the application of a legal standard, can be treated less elaborately than an issue involving a question of mixed fact and law. If no right of appeal is given against findings of fact, a failure to state the basis of even a crucial finding of fact, if it involves no legal standard, will only constitute an error of law if the failure can be characterised as a breach of the principle that justice must be seen to be done. If, for example, the only issue before a court is whether the plaintiff sustained injury by falling over, a simple finding that he fell or sustained injury would be enough if the decision simply turned on the plaintiff's credibility. But, if, in addition to the issue of credibility, other*

matters were relied on as going to the probability or improbability of the plaintiff's case, such a simple finding would not be enough."

[31] In **Jung v Son** (supra), Stein JA stated (at 6):

"While a judge does not have to state reasons for every aspect of the case, his reasons must be sufficient to satisfy the requirements of Pettittv Dunkley [1971] 1 NSWLR 376. The reasons must be sufficient to enable an appellate tribunal to gain a proper understanding of the basis of the verdict. Not to do so is an error of law (Asprey JA at 382 and Moffitt JA at 388). Failure to give reasons also makes it impossible for an appellate tribunal to give effect to a plaintiff's right of appeal. Issues critical to the case, as these were, must be dealt with by reasons (Samuels JA in Mifsud v Campbell (1991) 21 NSWLR 725 at 728)."

In short, the judicial officer should make it clear what he or she is deciding and why.'

[32] The Supreme Court of Canada in **R. v. Sheppard** 2002 SCC 26; [2002] 1 SCR 869 (2002-03-21) made very pertinent pronouncements on the duty of a trial judge to give reasons.

'Held: ……. The trial judge erred in law in failing to provide reasons that were sufficiently intelligible to permit appellate review of the correctness of his decision.

The requirement of reasons is tied to their purpose and the purpose varies with the context. The present state of the law on the duty of a trial judge to give reasons, in the context of appellate intervention in a criminal case, can be summarized in the following helpful but not exhaustive propositions:

1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.

2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.

3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other

hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.

4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.

5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(a) of the Criminal Code, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.

6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.

10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial. Such an error of law at the trial level, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso.

In the circumstances of this case, the majority of the Court of Appeal correctly concluded that the reasoning of the trial judge was unintelligible and therefore

incapable of proper judicial scrutiny on appeal. There were significant inconsistencies or conflicts in the evidence. The trial judge's reasons were so "generic" as to be no reasons at all. The absence of reasons prevented the Court of Appeal from properly reviewing the correctness of the unknown, unexpressed pathway taken by the trial judge in reaching his conclusion and from properly assessing whether he had properly addressed the principal issues in the case. The trial judge's failure to deliver meaningful reasons for his decision was an error of law within the meaning of s. 686(1)(a)(ii) of the Criminal Code.'

[33] Binnie, J also said

'1. In this case, the Newfoundland Court of Appeal overturned the conviction of the respondent because the trial judge failed to deliver reasons in circumstances which "crie[d] out for some explanatory analysis". Put another way, the trial judge can be said to have erred in law in failing to provide an explanation of his decision that was sufficiently intelligible to permit appellate review. I agree with this conclusion.....

5 At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges. The question before us is how this broad principle of governance translates into specific rules of appellate review.'

[34] Section 686 of Criminal Code referred to in ***Sheppard*** on 'Powers of the Court of Appeal' is similar to section 23 of the Court of Appeal Act including the proviso in Fiji.

'Criminal Code, R.S.C. 1985, c. C-46

Powers of the Court of Appeal

686. *(1) [Powers] On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal*

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

. . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; or

. . .

(2) [Order to be made] Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered; or
(b) order a new trial.

[35] Binnie, J continued as to the test applicable:

'25. ……..If deficiencies in the reasons do not, in a particular case, foreclose meaningful appellate review, but allow for its full exercise, the deficiency will not justify intervention under s. 686 of the Criminal Code. That provision limits the power of the appellate court to intervene to situations where it is of the opinion that (i) the verdict is unreasonable, (ii) the judgment is vitiated by an error of law and it cannot be said that no substantial wrong or miscarriage of justice has occurred, or (iii) on any ground where there has been a miscarriage of justice.'

26 The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself.

28 It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (i) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. <u>The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed</u>. (emphasis added)

[36] Similar observations have been made by Hon Stock VP in **<u>Hksar v Okafor Peter Eric Nwabunwanne</u>** [2012] 1 HKLRD 1041 (27 January 2012) speaking for the Court of

Appeal (Hong Kong) where it was held that *'....where reasons are required, how much needs to be said is as long as a piece of string; ....., sufficient for particular purpose, ... that it depends on all the circumstances..'.*

[37] In **Flannery v Halifax Estate Agencies Ltd** [1999] EWCA Civ J0218-13; [1999] EWCA Civ 811 the Court of Appeal (Civil Division) (England & Wales) (18 February 1999) applied **Eckersley v Binnie** [1998] 18 Con LR 44, CA [1998] and held

> *''That today's professional judge owes a general duty to give reasons is clear ... although there are some exceptions ... It is not a useful task to attempt to make absolute rules as to the requirement for the judge to give reasons ... For instance, when the court, in a case without documents, depending on eye-witness accounts, is faced with two irreconcilable accounts, there may be little to say other than that the witnesses for one side were more credible ... But with expert evidence, it should usually be possible to be more explicit in giving reasons ...' (emphasis added)*

Summary of the legal principles on 'inadequate reasons'

[38] Therefore, while it goes without saying that the giving of adequate reasons lies at the heart of the judicial process and therefore a duty to give reasons exists, the scope of that duty is not to be determined by any hard and fast rules. Broadly speaking, reasons should be sufficiently intelligible to permit appellate review of the correctness of the decision and the requirement of reasons is tied to their purpose and the purpose varies with the context. A judge's reasons should not be so 'generic' as to be no reasons at all but they need not be the equivalent of a jury instruction or summing-up to the assessors. Not every failure or deficiency in the reasons provides a ground of appeal, for the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial.

[39] If in the opinion of the appeal court, the deficiencies in the reasons prevent or foreclose meaningful appellate review of the correctness of the decision or if the trial judge's reasons are not sufficient to carry out the mandate of the appellate court *i.e.* to determine the correctness of the trial decision (functional test), the trial judge's failure to deliver meaningful reasons for his decision constitutes an error of law within the meaning

of section 23 of the Court of Appeal Act. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of section 23 of the Court of Appeal Act. However, if no substantial miscarriage of justice has occurred as a result, the deficiency will not justify intervention under section 23 and will not vitiate the conviction or acquittal, for such an error of law at the trial level, if it is so found, would be cured under the proviso to section 23 of the Court of Appeal Act.

[40] While both the Employment Relations Tribunal's decision and the High Court judgment may suffer from the deficiency of inadequate reasons, it did not prevent this court from scrutinizing the material and engage in a meaningful appellate review of the correctness of the decisions of the courts below. As could be seen, I have already engaged in that exercise independently on all material available and come to the conclusion that both convictions are sustainable and should be upheld.

Ground 2

[41] The grievance here is that the appellate judge in the High Court had refused to interfere with the decision of the Employment Relations Tribunal on the premise that an appellate court will be slow to interfere with a factual findings of an original court unless they are plainly wrong or drew wrong inferences from the facts and the appellate court need not exercise jurisdiction to interfere with the Tribunal's decision only because it exercised its discretion in another way. The High Court judge had made this statement based on **Tuckers Employees and Staff Union v Goodman Fielder International (Fiji) Limited** ERCA No. 28 of 2018).

[42] In **Watt (or Thomas) v Thomas** [1947] 1 All ER 582 at 587, [1947] AC 484 at 487-488, Lord Thankerton 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 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 a 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 mistakenly so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'

In that case, Viscount Simon and Lord du Parcq ([1947] 1 All ER 582 at 584 and 591, [1947] AC 484 at 486 and 493 respectively) both cited with approval the dictum of Lord Greene MR in ***Yuill v Yuill*** *[1945] 1 All ER 183 at 188, [1945] para 15 at p. 19:*

> *'It can, of course, only be on the rarest occasions and in circumstances where the appellate court is convinced by the plainest considerations that it would be justified in finding that the trial judge had formed a wrong opinion.'*

[43] In **In re B (a child)(care order: criterion for review)**[2013] UKSC 33, [2013] 3 All ER 929, [2013] 1 WLR 1911(at 53), Lord Neuberger explained the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. He stated:

> *"[T]his is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it […]."*

[44] There are further grounds for appellate caution. In **McGraddie v McGraddie** [2013] UKSC 58, [2013] 1 WLR 2477 (at [4]), Lord Reed cited observations adopted by the majority of the Canadian Supreme Court in **Housen v Nikolaisen** [2002] 2 SCR 23, (at para 14):

> *'The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence … The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged […].'*

[45] In **Lepere v Lepere** (Civil Appeal SCA 11/2020 [2022] SCCA 44 which has exhaustively analysed the approach of an appellate court in appeals, the Court of Appeal of Seychelles said

> *"[17] Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. In **Re B (a child)** (above) Lord Neuberger (at [60]) acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary facts and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in **Whitehouse v Jordan** [1981] 1 All ER 267 at 286, [1981] 1 WLR 246 at 269–270:*
>
> > *'[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'*
>
> *See also Lord Fraser of **Tullybelton** ([1981] 1 All ER 267 at 281, [1981] 1 WLR 246 at 263); **Saunders v Adderley** [1998] 4 LRC 485 at 49 (Sir John Balcombe); and **Assicurazioni Generali SpA v Arab Insurance Group** [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] 1 WLR 577 (at [12]–[17] per Clarke LJ). Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."*

[46] As Lord Reed remarked in **Benmax v Austin Motors Co Ltd** [1955] ALL ER 376, in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inferences to be drawn from proved facts, an appeal court is generally in as good a position in evaluating the evidence as the trial judge, and ought not to shrink from that task, though it ought of course to give weight to his opinion.

[47] Pathik J in **Fiji Sugar Corporation Ltd v Labour Officer** [1995] FJHC 27; Hba0004j.93b (3 February 1995) adopted the dicta of Lord Shaw in **Clarke v Edinburgh Tramways Corporation** [1919] UKHL 303; (1919) S.C. (H.L) 35

"...In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case - in a position, not having those privileges, to come clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment".

[48] It is quite clear that the case before the Employment Relations Tribunal was not decided on the credibility of individual witnesses whose credibility, if at all, played a not so significant role. The entire prosecution and the defense was based largely on the reliability and credibility of documents. Thus, in this matter the appellate court is in just as good a position as the Employment Relations Tribunal to make the decision. While there is no error of the legal principle highlighted by the High Court judge which is the basis of this ground of appeal and despite the High Court judgment being not as explanatory in terms of factual details as it could have been, I have thoroughly examined the facts before the Employment Relations Tribunal and come to an independent opinion that both convictions should be upheld.

Ground 3

[49] The appellant challenges the fine imposed on count 01. The Employment Tribunal imposed a fine of $1500.00 to be paid within 21 days after considering a fine of $2000.00. Section 45 of ERA does not set out the penal sanctions. Section 256 of ERA on General Penalty seems to apply where no particular penalty is provided for an offence. Then, one has to turn to section 263 of ERA for penalties, which is as follows.

*263.—(1) The offences and the fixed penalties for which fixed penalty notices may be issued are set out in **Schedule 8**.*

(2) A labour officer or other public officer authorised in writing by the Permanent Secretary may issue a fixed penalty notice for the purpose of this Promulgation.

(3) The fixed penalty notice must be issued in the prescribed form and contain the prescribed matters.

(4) The penalties prescribed in fixed penalty notices shall not exceed one-fifth of the maximum penalty prescribed for that offence.

[50] Schedule 8 of ERA is as follows.

‘**SCHEDULE 8**
(Section 263)

FIXED PENALTY OFFENCES

Section	**Fixed penalty**
4 4 (3)	$ 100
4 5 (4)	**$ 100**
4 9 (2)	$ 100
5 5 (2)	$ 100
5 6 (2)	$ 100
7 0 (3)	$ 100
9 6 (2)	$ 100
9 9 (3)	$ 100
1 0 5(2)	$ 100
1 2 9(4)	$ 100
1 3 2(4)	$ 100
2 0 1(2)	$ 100
2 4 7	$ 1000 for individuals $ 5000 for corporations
2 4 8	$ 100
2 4 9	$ 100

[51] Therefore, the Employment Relations Tribunal should have imposed a fine of $100.00 on count 01. Thus, the appellant succeeds on this ground of appeal.

Ground 4

[52] The High Court had considered 1-3 grounds of appeal raised by the appellant including the Employment Relations Tribunal not having taken into account the email on 07 November 2019 and the wages summary record attached therein. However, as the appellant has correctly submitted, there is no consideration given to the email and the wages summary record in considering whether there was compliance with the first Demand Notice for records.

[53] Nevertheless, I have undertaken a detailed analysis of both matters in this judgment and held that the email and the so-called wages summary record submitted on 07 November 2019 was not in compliance with the Demand Notice.

Ground 5 & 6

[54] The High Court judge had then considered 4-6 grounds of appeal urged by the appellant. The judge does not seem to have considered appeal grounds 7 & 8 but had set out an additional ground not raised by the appellant. The last ground of appeal does not arise from the facts of this case and most likely may have been taken from another appeal. The High Court judge had also referred to the date of hearing of this appeal as 07 June 2023 and recorded the presence of counsel. However, neither counsel had appeared on that day for a hearing. This is also a clear mistake and that date may have been a hearing date in respect of another appeal. Needless to say, the judges should take utmost care not to make this type of obvious mistakes which could only bring disrepute to the whole process of administration of justice and result in loss of confidence in the system of justice.

[55] I have already addressed the issue on the fine of $1500.00 imposed on the first count. I do not think that anything significant turns on the fact that the employee had made the first complaint after 03 years. In any event, this should have been canvassed as a trial issue and not an appellate point. Since the case turns mostly on documents rather than the oral testimony of the witnesses, this delay has no material impact on the convictions for both strict offences.

Ground 7

[56] The appellant challenges the cost of $500.00 ordered by the High Court. Put it plainly, I do not think that the cost is unreasonable or excessive to attract any intervention by this court. The discretion exercised by the High Court has not miscarried.

[57] Thus, the Decision of the Employment Tribunal and the Judgment of the High Court are affirmed subject only to the Orders of Court.

Qetaki, JA

[58] I have considered in draft the judgment of Honourable Justice Prematilaka, RJA and I agree with it, the reasoning and proposed orders.

Clark, JA

[59] I agree with the judgment of Honourable Prematilaka, RJA and the orders proposed.

Orders of Court:

1. Appeal against conviction on both counts is dismissed.

2. Appeal against sentence *i.e.* the fine of $1500.00 on count 01 is allowed.

3. A fine of $100.00 is imposed on the appellant on count 01 to be paid within 21 days of this judgment.

4. Appellant is directed to pay the fine of $1500.00 imposed on count 2 within 21 days of this judgment.

5. Appeal against cost of $500.00 ordered by the High Court is dismissed.

6. Appellant is directed to pay cost of $500.00 ordered by the High Court and cost of $1000.00 ordered by the Employment Relations Tribunal within 21 days of this judgment.

7. Appellant is directed to pay $4,853.00 as arrears of wages of the employee Ilaisa Memo to the Ministry of Employment within 21 days of this judgment to be paid to Ilaisa Memo.

8. No order for cost.

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Hon. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Justice A. Qetaki, JA
JUSTICE OF APPEAL

.....
Hon. Justice C. Clark
JUSTICE OF APPEAL

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