(259)

IN THE EMPLOYMENT RELATIONS TRIBUNAL
AT SUVA

ERT Grievance No. 95 of 2011

BETWEEN : **TOMASI TABANIDALO**

GRIEVOR

AND : **HANGTON PACIFIC COMPANY LIMITED**

EMPLOYER

Mr. A. Rayawa for Grievor

Mr.V. Kapadia for the Employer

Date of hearing: 4th July 2012

Date of Judgment: 18th July 2012

RULING ON PRELIMINARY ISSUE OF LAW

1.0 Background to the Preliminary Application Before the Employment Relations Tribunal (or "the ERT")

1.1 The above matter was set down for a preliminary application Hearing on 4th July 2012 brought forward by the Employer on an issue of law pertaining to time allocated to the grievor to file an employment grievance under the ERT's jurisdiction.

1.2 On this day, the Counsel for the Grievor, who had just received instructions to act by the grievor had requested for an adjournment to allow him to peruse the grievor's case and thereafter properly make representation on the issues before the ERT in relation to this grievance matter. Before this, the grievor had in fact elected to represent *in person* after the Labour Officer representing him made an application to withdraw from further representation.

1.3 As expected, Mr Kapadia objected to any adjournment on the grounds that the grievor had ample time and opportunity to seek legal representation once the matter had proceeded in the ERT since 8th June 2011. Further he informed the ERT that the grievor had already requested a deferment at the last hearing date set down to hear the employer's preliminary application which was scheduled for 31st October 2001.

1.4 On this day, the ERT had awarded $300.00 of wasted hearing cost in favour of the employer as the grievor was adamant he had a valid defence to pursue his claim and thus requested the ERT that he should be given an opportunity to be heard despite he had no legal representation or proper preliminary submissions filed then.

1.5 The grievor has further stated and I note directly from his Submissions filed thereafter on 17th November 2011 that:-

"On Monday 31st October 2011, being appearing in person with no legal background I was told that I had wasted a hearing date because I had not been able to secure a lawyer to run my case for me. My understanding was that I was told to bring a lawyer to show the Court that lawyer would now run my case after the Labour lawyers had withdrawn following SG's office advice. Due to my ignorance of the law and processes I was told to pay $300.00 costs being wasted hearing cost and to file submissions for my case. This is that submission and with all due respect to the Tribunal I apologize for my ignorance and ask humbly if my case could be heard".

1.6 My Order dated 31st October 2011 for cost against the grievor was simply considered on the basis of 5th October 2011 (Mention) call where it appears that the Labour Officer who was initially representing the grievor's matter had received a legal opinion from the Solicitor-General's Office that there was no legitimate claim to proceed before the ERT given that a Deed of Settlement was signed, executed and thus deemed final and binding, that compelled the Labour Officer henceforth to apply formally to the ERT to withdraw from representing the grievor. Leave was granted to the Labour Officer to withdraw but the grievor continued to plead with the ERT that regardless of the prevailing situation, he should be allowed to represent "in person" and at this point, the ERT very clearly directed him that he had a final opportunity to get proper legal advice and representation including filing valid defence of duress to show a reasonable cause of action as he continued to allege that he was forced into signing the said Deed of Settlement.

1.7 When the case was called on 31st October 2011, the grievor was not ready to proceed with the hearing of the preliminary application by the employer; hence my Order dated 31st October 2011. The greivor subsequently paid $300.00 to the employer and filed his submissions. He was still appearing in person.

1.8 At this juncture, I wish to also supplement further matters from the file notes that no preliminary submissions were filed by the grievor in the early stages of the proceedings as directed by the Tribunal, as the Labour Officer was in the process of obtaining an opinion from the SG's Office. The employer had requested submissions from the grievor to properly understand the allegations to frame their defence accordingly as they continued to maintain that a Deed of Settlement was signed between the parties. The employer subsequently filed a preliminary submission in response dated 14th December 2011 that was in reply to the grievor's submissions dated 17th November 2011. I have carefully read this and noted that the preliminary issue of law that is before me for determination is also reflected therein in various clauses, more specifically under clauses 1.9, 1.10, 3.1 and 3.2.

1.9 Therefore this issue of law is not new to the grievor as stated by Mr Kapadia which proves that the employer had put the grievor on adequate notice as to a preliminary issue that has to be resolved and decided first to invoke powers and jurisdiction of the ERT to even proceeding to hear any substantive grievance matter alleged by the greivor. To that end, I had duly noted Mr Kapadia's grounds for objecting any further adjournment to be granted to the grievor to hear the preliminary issue of law unless the grievor was prepared to pay cost to the employer for yet another wasted hearing. I was also reminded that there have been more than 10 sittings with the ERT in dealing with the preliminary issue so far and thus cost is inescapable for another delay caused by the grievor.

1.10 The grievor's counsel responded by saying that he could not prejudice his client with cost and that he would proceed with the hearing on the basis of all the submission and responses framed and submitted by the grievor in person. This is after the Tribunal had given Mr Rayawa an opportunity to consider whether it would prejudice his client's case in the event he was instructed just before the hearing. It appears the counsel elected to proceed to the hearing as he did not wish to allow his client to incur any cost for wasted hearing.

1.11 As I had noted earlier, the grievor had filed his submissions on the substantive allegations on 17th November 2011 which the employer regards to be *"vague and bare allegations of economic duress, unspecified undue influence and fraud"* as the employer stated that none of the allegations was supported with any evidence to substantiate its merits or truth.

1.12 Whilst these would be matters to be tested and properly heard in a hearing process in any given grievance matter, it cannot be completely disregarded given the unconventional circumstances that has eventuated here that has resulted in bringing this matter before the ERT in the first place. In any claims before the ERT there must be reasonable merits to justify it being heard in the first place to avoid frivolous and vexatious matters making its way for the sake of the systems and processes in place amounting to abuse of process, while I cannot overlook the law making it a requirement that all matters must be properly brought under the ERT"s jurisdiction to be heard.

2.0 Facts of the Case & Relevance to the Issue of Law

2.1 The issue of law that needs determination arises by virtue of sections 111(2) and 111(3) of the Employment Relations Promulgation 2007 (or "the ERP"). It is the employer's position that the grievor is out of time by coming to the ERT after more than 2 years when the alleged substantive grievance (that is, any allegation pertaining to unfair or unlawful termination) would have arisen.

2.2 I have noted that the griveor has given details of his employment grievance in the Form ER1 as:-

- *Unfair dismissal (termination)*
- *Being used as a company shareholder without the knowledge of...compensation.*

2.3 No doubt, understanding the backgrounds facts is crucial to understanding why this grievance matter was reported late and whether there are any merits in the substantive matter to allow this grievance to stand under the provisions of the ERP 2007. This would be largely in relation to the grievor's substantive allegation of being under duress when he and the employer entered into a Deed of Settlement on 11 March 2009 that was also witnessed by a solicitor (the said document was unmarked and attached to grievor's submissions dated 17th November 2011).

2.4 It is justified by the employer in their Preliminary Submissions dated 14th December 2011 and thereafter through their Submissions dated 9th March 2012 that the grievor's termination from his then position as an Operations Supervisor with the Employer that took place on or about 28th January 2009 had in fact taken place well before the above Deed of Settlement was signed and executed that would have ultimately resolved issues of contention by the parties, if any.

2.5 The grievor's position is contradictory. He is maintaining that he was terminated by the company when he had asked for monies due to him as a shareholder in the company, whereby he wrote to the employer to raise his concerns and issues which saw him being terminated. It appears that the issue of unfair termination in this case arises not so much through the fact of the grievor being an "employee" of Hangton Pacific Company Limited (the employer) through his then position as an Operations Supervisor, but rather, there is an additional issue of him also being a "shareholder" of the said company, which was clearly a separate function from his role and duties as an employee. The grevior is saying his termination was effected under duress and any settlement that was done was to be regarded in the same light.

2.6 However, I am convinced by the letter of termination dated 28th January 2009 that the grievor had been put on notice why he was being terminated and the reasons for this. He was also offered one month's pay in lieu of notice including his leave pay, which appeared to be in line with his contract of service dated 7th July 2001 (under the termination clause). The said letter is part of Employee's submissions appearing as the first document as part of the attachments.

2.7 In response, it would appear that the grievor wrote to the employer sometime on 4th February 2009 in relation to the reasons provided by the employer for his termination and this was largely to do with his shareholding interests in the company.

2.8 I also noted therein that he had put the employer on notice that will pursue the matter with Ministry of Labour, FICAC and other legal avenues. There is no evidence before me that he had contacted Ministry of Labour at the material except when he finally lodged a formal claim in February 2011, some 2 years later.

2.9 It appears that the grievor also had a loan agreement with the company dated 22nd January 2002 which became payable after he was allegedly terminated. In his response to the employer's letter of termination, the grievor wrote on 4th February 2009 where he has, at length, discussed the same with a view to denying owing any monies to the company where he states and I quote: *"... if you have made me a shareholder, then I think it was through dubious means as I had signed a document saying it was for my bonus at the end of the year.* ***I shall get legal advice on this*** *and therefore I have nothing to transfer back to you as I did not take any money from you..."* unquote. (Bold is my emphasis).

2.10 What I then understand from the grievor's submissions is that he is alleging that first he was forced to resign with a package offered by the employer which he had declined that then led to his termination. Duress arose because of his loan commitment being suddenly invoked for payment which he alleges was forced onto him after he was terminated. Hereafter, it is his position that he was compelled to concede to the employer's demands and thus agreed to enter and sign the Deed of Settlement, **under duress.**

2.11 The employer states that the Deed of Settlement in fact absolved the grievor of the loan commitment in tune of $75,000.00, and this appears to be a condition in the Deed, regardless of its validity and/or legality. It appears that the grievor also received a certain payout (about $6,458.33) from the employer in full and final settlement whereby it is alleged by the employer that he had discharged both his rights to the shareholding with the company as well as given up all his rights and obligations in the company as an "employee" in lieu of a payment made in the sum of $6,458.33.

2.12 The Grievor's own documents attached to his submission allude to an email dated 25th February 2009. It seems that he had accepted a proposal and proceeded to sign the said Deed of Settlement where he is stating:-

"Good Morning Jiten,

Thank you very much for the change in option which is very much appreciated. I shall very much ***be willing to return the shares and receive the six month pay****. I shall be available to sign off my shareholding. You're assistance is very much appreciated* ***given the fact that I am in dire need for financial assistance due to my termination"***

Sincerely,

Tomasi Rokotuirara Tabanidalo.

2.13 I am in no doubt that the grievor played two separate and distinct roles with the company: one, as an "employee" with the position or job description pertaining to Operations Supervisor; and the other role clearly pertained to him being a "shareholder".

2.14 From my reading of his submissions, when he was terminated on 28th January 2009, the grievor did not raise any effective or valid grounds of objection for any alleged unlawful or unfair termination with the employer. For example, he failed to raise with the employer that the termination from his position as an Operations Supervisor be justified within a written contract of service based on the reasons (or cause) and/or where termination is without cause, be fulfilled by an agreed written or verbal notice period or payment in lieu of notice. There is a contract of service dated 7th July 2001 before the ERT but there is no breach of the same pleaded by the grievor to link any allegations of unlawful or unjustified termination.

2.15 In his submission dated 17th November 2011 on the second page, it appears that the grievor had raised certain general dissatisfaction with the employer in March 2009 that had relevance to his loan repayment, his financial hardships and so on but he also states that this was resolved (albeit under allegations of duress) by way of a Deed of Settlement.

2.16 In my assessment, it seems that when the grievor did raise any issues regarding his terminations in February 2009 (and not March 2009 as the proof here is the letter of 4th February 2009 and email dated 25th February 2009) this subsequently saw both parties converging and signing a Deed of Settlement on 11 March 2009.

2.17 But, where allegations pertaining to unfair termination is concerned, it appears that at no time after termination or before signing the Deed of Settlement, the grievor had made any specific allegations of unfair and unlawful termination (or of duress) and thus sought the employer's justification based on the contractual terms and conditions (implied or express) upon which he was appointed to his position.

2.18 He had in essence failed to allude the employer that the company's actions were unconscionable and unfair as his termination being tied to his loan commitment or shareholding rights and obligations were two separate issues where any termination should be properly justified in terms of him performing his duties and responsibilities only in his capacity as an Operations Supervisor. Or he should have demanded proper reasons for termination and upon seeking the same, sought redress and remedies under the ERP 2007 if he was not satisfied with the justification provided by the employer. After all, he was aware of the Ministry of Labour's existence at this point in time as reflected in his letter of 4th February 2009.

2.19 Further when the grievor was terminated he had a right to seek legal advice and representation (which he had said in his letter of 4th February 2009 that he would) as I am of the view that he was well informed on the laws of Fiji and had basic education to know and appreciate when he was intimidated or coerced. Even if he did not do this, he should have sought independent legal advice before signing any Deed of Settlement. In fact, it appears that he had signed the Deed of Settlement under the pretext of obtaining legal advice or in fact had sought legal advice as per Clause 6 of the document.

2.20 While, it may seem that his adverse financial standing aggravated by a loan agreement of $75,000.00 at the time he was terminated may have left him no choice but to sign over his rights and obligations in the company in whatever form, where he also received additional monetary relief for this, there is no evidence before this ERT of duress that created a situation, forcing the grievor to sign the Deed to release him from his loan commitment or forcing him to take the additional payout. I have no evidence from the grievor to show he did not accept any monetary pay-out (apart from what he had received for his termination notice) or he objected to writing off the loan agreement if he did not owe the company as he had initially maintained. How he was under duress to accept all these payouts and benefits is beyond any reasonable Tribunal's comprehension.

2.21 In his letter dated 4th February 2009, the grievor had also put the employer on notice that he will seek legal advice before engaging with them, especially where his loan commitment was concerned. This would give some basis to believe the employer that the grievor was well informed as to what he was doing.

2.22 Further, I did not have any information but it would be correct to assume that after signing the Deed of Settlement in March 2009, the grievor did not seek any legal advice whatsoever although he is quite educated, held a senior position in the company and understood shareholding obligations. If he had felt or suspected he had done all this under duress at the material time, why is there no evidence of him pursuing the claim of duress immediately after it had allegedly transpired?

2.23 He also did not seek the assistance of the Ministry of Labour as stated by him in his letter to the employer although it is the grievor's position that he has been knocking on the doors of various authorities, including the office of FTIB, Labour, FICAC, military, etc, to seek some form of redress, failing which, he says, he finally came to the Ministry of Labour after being referred by the Prime Minister's Office.

2.24 This was in fact after a lapse of more than 2 years but again I have no evidence before me that he put the employer on notice that he was aggrieved thus pursuing redress with how his termination and subsequent forced signing of the Deed had transpired. Neither I have any shred of evidence that proves that he was running around seeking redress from the various authorities he has named without first checking with the Ministry of Labour as to how he could seek redress (if any) under the protection of ERP 2007.

2.25 A delay of more than 2 years is indeed questionable and requires good proof to substantiate the delay in the interest of natural justice and fairness to both sides.

2.26 That said, when the grievor did manage to lodge a claim with the Ministry of Labour under its systems and process for redress and remedies that is accorded by way of a statutory protection to employees and workers generally in Fiji, here pursuant to the rights and protection enshrined in the ERP 2007, it is the employer's position that the grievor has failed to comply with s112(3) to properly invoke the ERT's jurisdiction.

2.27 The employer is stating that the grievor has failed to make a formal application to the ERT to seek leave to have his matter heard pursuant to the ERT's jurisdiction under s211 of the ERP.

2.28 The employer is further stating that even if he had applied to the ERT, the grievor is required to demonstrate and prove to the satisfaction of the ERT that he had *"good reasons for the delay"* in coming to the ERT to have his matter heard out of time limitation under s112(2) of the ERP.

2.29 The employer further asserts that there is no reasonable cause of action shown by the grievor to justify a successful claim because the grievor, apart from a vague recount of his side of the story, has not presented an iota of documentary or any concrete evidence of duress to substantiate his claims or indeed any claims of unfair or unlawful termination.

3.0 The Law

3.1 For ease of reference I am going to lay out Section 112 in its entirety which states that:

Right to use procedures

"111.–(1) A worker who believes that he or she has an employment grievance may pursue the grievance procedure in person, and may be assisted by a representative.

(2) A worker who wishes to submit an employment grievance to that worker's employer in accordance with the applicable employment grievance must, subject to subsections (3) and (4), submit the grievance to that worker's employer within the period of 6 months from the date on which the action alleged occurred unless the employer consents to extend that period.

(3) If consent is not given under subsection (2), the Tribunal may, upon application extend the period, if it is satisfied that there are good reasons for the delay.

(4) Upon granting an application under subsection (3), the Tribunal may hear the grievance or refer the grievance to the Mediation Services." (Bold and underlining is my emphasis of the relevant parts of the provision).

3.2 The above provision invoked by the employer to make this application has merits in my view. ERP 2007 has set out legal parameters how and when grievances can be "submitted" or lodged with the Ministry of Labour and what are the statutory redress and remedies provided accordingly.

3.3 For example, the whole essence of s111(2) of the ERP is to merely give the employer and employee a good faith opportunity to resolve and settle any matters relating to a grievance by way of an agreed, internal grievance procedure. Hence, raising the grievance first with the employer within the six month period from the date it arises. This is reflected in **section 110 and Schedule 4 of the ERP** where he could have come directly to the Mediation Unit if the grievance pertained to a dismissal.

3.4 I do not wish to go into an in-depth explanation of the above two provisions of the ERP as it is self-explanatory, other than state that when the grievor was aggrieved with his termination that took place on 28th January 2009, he was entitled to raise his dissatisfaction to the employer under s111(2) within the six month period, regardless of his status in the company. Or come to Mediation Unit who would have attempted to seek redress on his behalf from the employer. Indeed, section 4 of the ERP allows a dismissal to be included in the definition of "employment grievance" which states:-

- "**employment grievance**" means a grievance that a **worker**, may have against the worker's employer or **former employer** because of the worker's claim that–
  (a) **the worker has been dismissed;**
  (b) .....

- "**worker**" means a person who is employed under a contract of service, and includes an apprentice, learner, domestic worker, part-time worker or casual worker;

3.5 The grievor, being an employee or worker in his capacity as an Operations Supervisor, was entitled to seek justification from the employer for any ensuing unlawful and/or unfair termination, where he had six months to do that. If the grievor in that six month period on his free will met with the employer and both parties attempted to resolve the grievance in ways mutually agreeable to both parties within a good faith settlement talks, then clearly there was no need for any external arbitration or intervention of the Mediation Unit as per the grievance process of the ERP 2007.

3.6 If, however the grievor was still not satisfied with the talks of good faith settlement or reaching any resolution with the employer and he was under tremendous strain and pressure to agree to terms and conditions that he deemed "unfair treatment"; "duress"; undue influence; and/or "trickery/fraud" on the part of the employer, he was free to come to the Mediation Unit immediately or even entitled to seek legal advice.

3.7 But he did not do this at all. And, I am not going to treat this grievor as one who lacks basic education and information on law as I have seen his submissions prepared in "in person". Even if they are prepared with the guidance of a legal person, this grievor can be reasonably assumed to have access to good working knowledge of laws of this land and mechanisms that provide protection to workers, despite he is saying that he only came to know of the Ministry of Labour's system and processes after lapse of two years. His one particular letter (4 February 2009) to the employer straight after his termination proves this adequately.

3.8 Clearly in terms of the grievor's assertion that the employer forced him to sign the Deed of Settlement when any right thinking person, who was a holder of a substantial position with the company and one who appears to have education would and should have sought proper legal advice or simply approached the Ministry of Labour for consultation and protection. Failing this, he can only bring a legitimate application to have his matter heard properly by the ERT under s11(3) of the ERP, assuming that the grievor would not be reasonably expected to get an extension of time from an employer whom he alleges to have forced him to enter into a deal he evidently did not approve of. Further, there is no evidence whatsoever that he sought any extension of time from the employer.

3.9 When and if he had properly and directly come to the ERT with an application under s111(3) of the ERP, there is still an additional legal requirement to be satisfied. He has to show and prove "good reasons for the delay". But, he did not come to the ERT directly and neither he has made an application at any time. I will come to the later part of assessing whether the requirement of "good reasons for the delay" was satisfied by the grievor, as I wish to deal now with how he in fact came to the ERT and whether the systems and processes that sent him to the ERT eventually can be justified in lieu of satisfying s111(3) of the ERP.

4.0 What is the Position of the Employment Relations Promulgation?

4.1 This matter was referred to the ERT by the Mediation Unit on 18th April 2011. **Section 211(k) of the ERP** states that the Tribunal has jurisdiction to adjudicate "matters" referred to it by the Mediation Services or any party to the mediation. Clearly a proper grievance matter will go through the process of claims being submitted with the Chief Mediator's Office by virtue of section 110(3) where it states:-

> **"s110 (3) All employment grievances must first be referred for mediation services set out in Division 1 of Part 20".**

4.2 Part 20 of the ERP has an objective to establish institutions where Mediation Unit and ERT are two of those institutions set up pursuant to section 192 – see below

192. The objects of this Part are to establish institutions and procedures that–

(a) support successful employment relationships and the obligations of good faith;
(b) recognise that employment relationships are more likely to be successful if differences in those relationships are resolved promptly by the parties themselves;
(c) recognise that if differences in employment relationships are to be resolved promptly, information and assistance need to be available at short notice to the parties to the employment relationships;
(d) recognise that the procedures for problem solving need to be flexible;
(e) recognise that there will always be some cases that require judicial intervention;
(f) recognise that judicial intervention needs to be that of a decision making body that is not inhibited by strict procedural requirements; and
(g) **where the parties are unable to resolve differences, provide for mediation and adjudication to be invoked to resolve such matters in a timely manner.**

(Bold and underlining above is my emphasis)

4.3 **Section 211(k) of the ERP** allows the Mediation Unit to refer cases to the ERT that they cannot resolve within their powers and services offered [under 193 (4)] pursuant to section 194(5) of the ERP.

4.4 Therefore, does this process in the statute invoke the powers and jurisdiction of the ERT to automatically hear grievances that is referred to the ERT? In one particular case, the Employment Relations Court of Fiji (or "the ERC") has held that once the referral has been made by the Permanent Secretary to either the Mediation Unit or ERT, it becomes compulsory for both the mechanisms in place to resolve the dispute by either attempting mediation or adjudication respectively. In the ***Dispute No. 35 of 2008: Fiji Bank &Finance Sector Employees Union and ANZ Bank [2010] FJHC 450; ERCA of 01 of 2009 (12 October 2010) [referred to as the "ANZ Case"],*** Wati J stated that:

"If the Permanent Secretary submits a dispute for resolution to the ERT, the ERT then is under a statutory duty to consider the dispute. Such a reference by the Permanent Secretary gives rise to the Tribunal's jurisdiction".

4.5 While the above case referred to a "dispute" that was referred to the ERT for adjudication via a process of mediation referral, I do not see that grievances referred by the Mediation Unit would be regarded any different under section 221(k) of the ERP. There is no power of the Mediator to reject any claim (say, on grounds that it may be frivolous, vexatious, out of time, etc) as the ERP 2007 is silent on this and the usual cause of action or process entitles the mediator to refer cases to the ERT when it is unable to successfully resolve the same under section 194(5) of ERP where it states that:-

194(5) 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.

4.6 The wording of the s194(5) in terms of "shall" alludes to a flexible or lighter application in comparison to any mandatory application. It does not state "must", yet all grievance cases that fail at the mediation unit find its way to the ERT's doorsteps.

4.7 Further, the counsel for the grievor alluded the ERT some interesting observations; he stated:-

i. That the processes in terms of the Mediation Unit accepting the grievor's claim as a "grievance" and then referring the same to the ERT, has in fact put in motion, the jurisdiction of the ERT automatically that has come into play since the matter was first called in the ERT and which is now of unfavourable consequence against the employer's right to defend its position under s111(3) of the ERP.

ii. He is suggesting that these processes invoked by the Mediation Unit would somewhat seem to override the legal requirements contained under s111(4) of the ERP, in particular where ERT has the power to refer the grievance for Mediation Services if the grievor had made any application directly to the ERT.

iii. He was basically saying that instead of originating a (late) claim and seeking extension of time in the ERT pursuant to s111(3) of the ERP, because this process was used by no fault of the grievor, the whole basis and essence of s111(4) was thus lost or no longer meaningful.

4.8 The question that is now fundamental to be determined is whether the grievor can retain any right to have his matter heard and determined which Mr Kapadia has described aptly and which Mr Rayawa suggested to be something of *"an implied consent or acquiescence because he went though the mediation process"*. Mr Kapadia's position was that it is not applicable here because mediation is purely administrative in nature which does not have the powers and mandate to determine the legality or jurisdictional issues. Such powers are only vested into the Tribunal which is a separate jurisdiction from the mediation unit.

4.9 The counsel for the grievor is somewhat right that his client or the grievor is at no fault when his claim went through the usual process of accepting a grievance matter by the Mediation Unit when in fact they had no jurisdiction to accept the same under s111(3) of the ERP.

4.10 Here, it seems the Mediation Unit had failed to consider that late reporting of claims has to be brought under s111(3) of the ERP 2007 directly to the ERT through a formal application and that there is no exception in the statute for any other way such late claims can be entertained under the provisions of the ERP 2007. On the other hand, the Mediation Unit may argue that they have no right to reject a claim or grievance even one that is not in compliance with s111(3) of the ERP as the statute is silent on this issue and that they are also mandatorily required to accept grievances under **s110 (3) of the ERP.**

4.11 In my opinion, under the law, the Mediation Unit has still fallen foul of an explicit provision in the ERP 2007 where powers accorded to the Mediation Unit cannot be substituted with that of the powers vested in the ERT, which is judicial in nature. Clearly, only upon an application to the ERT can a party seek to have late claims submitted or reported, determined or adjudicated through the systems and process prescribed in the ERP 2007. This refers to mediation or adjudication respectively. Not the other way around.

4.12 For this reason, when it seems that the Mediation Unit is compelled under **s110 (3) of the ERP** to virtually accept any kind of claim pertaining to a grievance, whether incomplete, invalid, without merits, out to time and so on, and thereafter refer the same to the ERT under **s194(5) of the ERP**, it can only be tested in terms of its validity, jurisdictional issues, defective claims, being out of statutory time limit and similar issues that do not comply with the ERP 2007 by way of a preliminary application in the ERT without flouting the protection accorded to mediators under s197 of the ERP.

4.13 Indeed in the above-mentioned ***ANZ case***, Wati J commented (at page 7) that: ***"...the basis to refuse the hearing of the case was the proper from of bringing ...the dispute..."*** and it is my observation that grievances is also in the same category.

4.14 Thus, by reference to the ERT's proceedings to be treated as a "juridical proceedings" pursuant to section 209(2) of the ERP, I am of the view that the ERT is a separate jurisdiction from the Mediation Unit which can include the Permanent Secretary's statutory functions and responsibilities under the ERP 2007 that gives rise to referrals to the ERT where disputes are concerned.

4.15 This would mean that once we have a matter referred to the ERT that purports to either directly or indirectly invoke any of the broad jurisdictions accorded to the ERT under s211 of the ERP, it is the duty of the adjudicator to weigh the merits of each case before considering or proceeding to adjudicate on the substantive matter. Further, a party defending the grievance or dispute, in all cases that would be the employer, has a right to defend a claim that is only properly brought within the ambit of the ERP 2007 and that can be fairly adjudicated without compromising or prejudicing the rights of either party.

4.16 In that regard, of critical importance is to test whether the jurisdiction is properly invoked which is not contingent on only meeting the definition of s211(k) of the ERP by way of a referral of a matter or grievance by the Mediation Unit, but in my opinion, that matter or grievance must have reasonable merits to justify adjudication by the ERT. Otherwise, anything or everything will have a potential to be heard and this is nothing short of an abuse of process.

4.17 I then concur with Mr Kapadia's position and for further clarity I am testing "matters" that can be accepted and adjudicated by the ERT under s211(k) of the ERP. Wati J has looked at the issue as to what constitutes a **"matter"** and at what point the ERT was obligated under the statute to deal with the same. In the ***ANZ case*** she said and I quote (at pg 28-29):

"...The term 'matter' is not defined by the ERP 2007. The ordinary English meaning of the word matters would mean a subject or situation that one must consider or deal or the present situation or situation that one is talking about. ***So even if the ERT refuses to deal with the employment dispute under its determination that dispute over dismissals are not covered and hence there was no employment dispute before the ERT, it was at least obligated to deal with it under section 211(1)(k) as a matter to be adjudicated since it was referred to it by the Mediation Services.*** *It was improper for the matter to have been left in abeyance without adjudication of the merits of the case especially when a livelihood of a worker is involved. ...**Indeed a dispute was reported but to turn away an employee from the ERT without adjudicating on the same on a mere technicality of use of words, I think is prejudicial to the employee and not in consonant with the terms and spirit of the ERP 2007. The issue or dispute could simply have been accepted as a matter to be determined and adjudicated upon on merits.*** *I do not see any flouting or bending of the provisions on jurisdiction if this course of action was taken by the Tribunal..."*

(Bold and underlining is my emphasis)

4.18 The ERC seems to suggest that I am at least obligated to deal with the matter by mere fact of a referral by the mediator. So far, the ERT has not seen any solid evidence in terms of the "duress" allegations. I have also stated that the employee in his capacity as an Operations Supervisor raised no grievance with his employer in relation to a breach of his contract of service (implied or express) at any given time and most, if not all of his allegations pertains to his secondary role as a shareholder. Again, he did not bring any clear basis to build his defence on serious allegations of duress when he signed the said Deed of Settlement that was also done under the hand of a solicitor. Other than his mere words and believe of "duress", he has sought adjudication from the ERT with no witness statements, eye witnesses or any documentary evidence to prove his allegations and provide a reasonable cause of action to justify his late claim.

4.19 I am not convinced that the grievor's words and belief alone is enough to qualify the requirement of a ***matter to be determined and adjudicated upon merits,*** even if the ERT is obligated to at least deal with the matter under s211(k) of the ERP. Notwithstanding that, I do not see how the grievor can mitigate bringing a matter in the first place by not complying with s111(3) of the ERP.

4.20 In fact, it is my view that Section 111(3) of the ERP has to be read in line of s211(k) of the ERP to entitle the grievor to properly invoke the Tribunal's jurisdiction to have not just any "matter" heard but one that has merits and one that is within the time limit prescribed in the ERP 2007.

4.21 Further the grievor has made no formal application to date to comply with s111(3) of the ERP.

4.22 Even if he had done so, I am not persuaded that he has demonstrated any exceptional circumstances or provided satisfactory basis to grant him an extension of time to have his substantive grievance matter heard as he has not provided any plausible or "**good reasons for the delay**".

4.23 On this point, the employer's counsel brought two New Zealand cases to the ERT's attention. Mr Kapadia has rightly observed that ERP does not define what would constitute "good reasons for the delay" while he says that referring to the NZ cases can assist the ERT in this area of law as Fiji labour laws are modeled on the NZ labour law, and there are some comparable basis to refer to the two case laws he has cited.

4.24 Section 111 of ERP is similar to Section 114 New Zealand's Employment Relations Act 2000 which reads:

Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of **90 days** beginning with the date on which the action alleged to amount to a personal grievances occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) .....

(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90 day period, the employee may **apply to the Authority for leave to raise the personal grievance after the expiration of that period.**

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority -

(a) Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115): and

(b) Considers is just to do so.

(5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

(6) No action may be commenced in the Authority or the Court relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

4.25 The NZ law allows only 90 days to bring a personal grievance to the notice of the employer while Fiji's law under the ERP 2007 allows for six months or about 180 days. The said "Authority" under the NZ law is similar, if not same, as the Employment Relations Tribunal in Fiji and there are again equivalent powers to grant leave to raise personal grievance after the expiration of statutory period prescribed in the law upon an application to the Authority or as in Fiji to the ERT.

4.26 Of great interest and importance to this case is section 114(4) of the New Zealand Employment Relations Act 2000 where there are additional matters listed to allow the Tribunal (or the Authority) to make proper assessment of the employee's application when considering to grant an extension of time as stated in subsection (a) and (b). This is missing from the Fiji's legislation under s111 (3) which does not give any guidance to the ERT as to how it can assess delay which it seems that in NZ it must be occasioned by "exceptional circumstances". Section 115 of the NZ law also goes to define what "exceptional circumstance" are, which states:

S115 For the purposes of section 114(4)(a), exceptional circumstances include–

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or
- (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
- (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

4.27 For the benefit of doubt to the grievior, let me give a cursory look at his reasons for coming to the ERT some two years, 1 month and 11 days after the alleged termination took place. I will start with the reasons for his termination which is reflected clearly in the employer's letter of termination dated 28th January 2009.

4.28 As the law requires, the employee raised with the employer his issues regarding the termination albeit the contentious issue here was in terms of his loan commitment and shareholding rights in the company but on 11 March 2009, some two months after his termination, both the employer and employee attempted to resolve internally by way of signing a Deed of Settlement. Now the grievor is saying the same Deed is plagued with doubts as he signed under duress. He has not shown any concrete proof of 'duress', quite apart from his own contradictory email dated 25th February 2009 where he had proceeded to meet with the employer whereby this Deed of Settlement was initiated and executed.

4.29 Further he has not shown any breach of his contract of service to this ERT nor raised this to the employer where they are entitled to defend or know what they must address as to the grounds for a grievance brought forward by the grievor.

4.30 Neither he had appointed any representative or even a legal counsel (apart from the present counsel) to pursue his case which they had failed to do so. Nor did he come to Ministry of Labour although he was aware of its existence since his termination in 2009 but only submitted a claim in 2011.

4.31 Grounds under (b), (c), and (d) above for satisfying exceptional circumstance is not fulfilled in any context.

4.32 As for ground "(a)", that is, whether he was so traumatized with the matter that he could not appreciate the effect and impact of 'duress" at the time, this is also difficult to say in this case. Difficult because there is no evidence that 'duress" can be justified under any circumstance based on the present facts and evidence before me. More so, the late reporting makes it even more a doubtful claim particularly where statutory "dismissal" is concerned.

4.33 A "dismissal" in normal circumstance can be accepted by the Mediation Unit as a grievance matter without subject to even a time limit as appears to be the position under Schedule 4 of the ERP (see: Clause 2) but dismissal must be occasioned by virtue of a breach of an implied or express provisions of a contract of service between the parties (see: Clause 1 of Schedule 4).

4.34 Duress claims by employees is something that the ERP 2007 appears to have reluctance in entertaining which is perhaps, the reason **section 4** definition of "employment grievance" does not include an allegation of duress in relation to a dismissal but rather gives protection in only one circumstance where *"the worker has been subject to **duress in the worker's employment in relation to membership or non-membership of a Union"***. There is no other provision in the statute that makes reference or justifies duress in any other context, which proves the limitation ERP intended to place on such allegations which would be nothing short of matters relating to a constructive dismissal. Therefore, in my mind, the 'duress' allegation from which the grievor is basing his unfair dismissal claim has no basis or justification here and in fact, it is time-barred notwithstanding Schedule 4, Clause 2 provision in the ERP 2007.

4.35 I am also unable to comprehend how a man of Mr Tobanidalo's standing who obviously is educated, understands company shareholding rights and obligations and one who has good knowledge of relevant authorities to seek independent advice did not pursue this claim any earlier. Hence, the final ground (a) fails also.

4.36 Let me look at the case authorities highlighted by Mr Kapadia. In the case of the **Mark Raymond Creedy vs. Commissioner of Police (2008) 3 NZLR 7** the Supreme Court of New Zealand whilst dealing with Section 114 of New Zealand's Employment Relations Act 2000 confirmed that in order to obtain leave under S 114(4), two conditions must be satisfied; first the delay must have been occasioned by "exceptional circumstances"; and second that the justice of the case must require an extension of time. The full Court held that there were no exceptional circumstances shown for the delay and therefore that Appellant was time barred. This case was followed in the case of **Melville v Air New Zealand Ltd (2010) NZEmpC 87** by the Employment Court of New Zealand where the Employee had filed an application to seek leave to file personal grievances in accordance with Section 114. Leave was refused as there were no exceptional circumstances in which the Court would have exercised its jurisdiction under Section 114(4) in granting the said leave.

4.37 Both NZ cases provide this ERT sound basis to test and assess "good reasons for delay" under the Fiji law and I have attempted to that in different case scenarios to allow natural and justice and fairness to both sides. I am convinced and persuaded by the employer's submissions that a delay of over 2 years with no good or valid explanation whatsoever for the delay does not meet the requirements of Section 111(3) of the ERP.

4.38 Further because no leave was obtained by the Employee to file this proceedings before the Tribunal, these proceedings must be dismissed for want of jurisdiction to hear this matter in the first place.

5.0 Decision and Orders

1. The claim and/or allegations pursuant to Form ER1 submitted by the grievor, Mr Tabanidalo to the ERT is outside the scope and jurisdiction of the ERT by virtue of failing to comply with s111(3) of the ERP 2007. The grievor's claim is substantially out of time prescribed in the statute (ERP 2007) which is clearly failing to fulfill the requirements that would properly submit a "grievance" matter pursuant to s111 of the ERP to the Tribunal.

2. Subsequently, the preliminary application of the employer is successful and the grievor's claim is declared time-barred, therefore dismissed herewith costs.

3. Cost is assessed on an indemnity basis keeping in mind the various appearances before this ERT which also takes into account one cost for wasted hearing paid by the grievor. I award a cost of $1,500.00 against the grievor to be paid to the employer within three months of this decision.

DATED at Suva this 18th day of July 2012.

.....
LEGAL TRIBUNAL