Interlocutory Decision

Employment Relations Tribunal

Title of Matter:	**Semisi Manasa Rakale (Applicant)** **v** **Cakaudrove Provincial Holdings Company Limited (Respondent)**
Section:	**Section 214 *Employment Relations Act* 2007**
Subject:	**Recovery of wages and other money**
Matter No:	**ERT Misc Application No 32 of 2017**
Appearances:	**Ms R Kadavu, Labour Office Legal Unit, for the Applicant** **Mr N Nawaikula, Nawaikula Esquire Barristers and Solicitors**
Dates of Hearing:	**26 August 2019, 21 October 2019.**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**20 January 2020**

KEYWORDS: Section 210 *Employment Relations Act* 2007, Functions of the Tribunal; Section 233 Power to proceed if parties fail to attend; Section 231 Evidence; Proceedings of the Employment Relations Tribunal.

Background

[1] This is a claim that has been made for unpaid wages, alleged to be owed to the Applicant whilst engaged by the Respondent as a caretaker at Devodara Estate, Cakaudrove Province. The proceedings have been complicated by the fact that at various times, there has been a dispute as to who was the relevant employer, if in fact anyone was at all and whether or not, the correct entity to the initial application, was served relevant notices issued by the Tribunal or the Applicant, as a result of such confusion[1].

[2] On 26 August 2019, in Labasa, this Tribunal proceeded to deal with the application before it, with the intention of adjudicating the matter. That step was taken in accordance with Section 233 of the

[1] The history of the file and various audio transcripts, will show that on occasion the Cakaudrove Provincial Council was served with materials, when in fact the Respondent was itself a distinct legal entity.

Employment Relations Act 2007, that gives the Tribunal authority to proceed to determine a matter, if parties fail to attend. Prior to issuing a decision, representations were made by Counsel for the Respondent, that it should be heard and that the non-appearance of the company, arose out of a mistake and nothing more. With the consent of the Labour Office, the Tribunal re-opened proceedings to allow for the Respondent to be properly heard. The subsequent procedural steps that have been taken by the parties, were formulated and agreed to by the parties and sanctioned by the Tribunal.

Procedures of the Tribunal

[3] It is probably a useful juncture, to remind the parties of the underlying imperatives and influences that guide the Tribunal when making decisions in relation to matters of procedure. It goes without saying that Section 216(2) of the Act, requires that in all proceedings the Tribunal must act fairly. But what is the procedure that should be best adopted?

[4] It is well recognised that the modern employment tribunal, must provide timely, fair and cost effective ways of meeting the needs of all stakeholders. For example, in the case of the large number of 'dismissal grievances' that are referred to the Tribunal from the Mediation Service in accordance with Section 194 of the Act, these must be dealt with in a timely fashion. Such an imperative becomes all the more important, where the statutory function of the Tribunal is to assist parties achieve and maintain effective employment relations and where possible, to allow for them to amicably settle the matter. Further, in the case of dismissal grievances at least, if reinstatement of a dismissed worker is to seriously be contemplated for the purposes of Section 230(a) of the Act, the determination, resolution or adjudication of the grievance, must take place within a reasonable period of time, in order to take into account the practical implications that must be assessed in such circumstances. For that reason, in cases where parties fail to attend hearings, or on some occasions, feign reasons for why matters should not proceed and the circumstances dictate the speedy resolution of a matter, then matters can and do proceed, despite such absence.

Case of Self Represented Parties

[5] The case of self-represented parties is also another category of case that warrants special consideration. That is, whether in the case of a small business owner or individual worker, where they lack either the procedural knowledge, skills or resources to adequately participate in formal proceedings before the Tribunal, various levels of accommodation and adjustment to procedure will be required, so as to ensure all parties are dealt with fairly and are engaging on a 'level playing field'. For example, a small business owner with little means to fund litigation, cannot be expected to be able to undertake all of the requirements associated with formal proceedings, such as the filing of Affidavit Material, the preparation of legal submissions, leading evidence and cross examining witnesses, in a manner akin to a well experienced employment lawyer, who has been engaged by a Union or individual to represent her or himself. In a similar way, a dismissed worker with little means and a low level of formal education, may not be able to adequately compete against a senior legal practitioner engaged by a multinational organisation, that can withstand the expense and time of litigation and for whatever reason has made that policy or business decision to do so. For that reason, the modern Employment Tribunal needs to be quite flexible and its members alive to the adjustments required to ensure that all parties are heard and all issues canvassed in a fair and often flexible manner.

[6] It may even be the case, that some matters may require the parties to be given an opportunity to review all materials placed before the Tribunal, prior to making formal closing submissions. This may necessitate that an audio recording of proceedings be made available and could be the preferred initial source of the record, particularly where the written transcript is not available or does not for whatever reason, adequately capture or reflect all of what has transpired.

New Ways of Doing Things in the Modern Tribunal

[7] Since the inception of the *Employment Relations Promulgation* in 2007, the emphasis within the law has been on adopting less adversarial ways to resolve workplace conflict. The Second Reading Speech of the Minister makes that point crystal clear. Like in Australia and New Zealand, the latter country upon whose regime the present employment law is said to be largely based, the typical view of the Employment Tribunal, is one where an administrative decision maker relies on processes that are less legalistic, more flexible and more cost effective than the common law courts. This is despite the fact, that a Tribunal's role may still be seen through functions that are described as judicial, legislative and facilitative.[2] From a historical and comparative perspective, the 1968 Report of the *Donovan Royal Commission into Trade Unions and Employer Associations*, from which the present UK Employment Tribunal came about, recommended that the new body be easily accessible, informal, speedy and inexpensive, open to all litigants, in person or represented as they wish; and their procedures were specifically designed to be used, with help readily available if required, by the person on the street[3]. Yet despite that initial intent, it has been reported that litigants have found the Tribunal a closed and off-putting place, where the language of the court was highly formal and procedures of the Tribunal rigid in nature and where parties addressed the court with all the protocols from other civil jurisdictions.[4] One commentator has observed that after 50 years of evolution, the Employment Tribunal of the United Kingdom had become barely distinguishable from the courts[5]. A similar observation had been levelled at the situation in the case of Northern Ireland, in which the Fair Employment Tribunal created under the *Fair Employment (Northern Ireland) Act* 1989[6].

[8] Given that the current Fijian employment law was approximately nine years in the making and particularly informed by the laws of New Zealand and Australia, it would be useful to appreciate some of the developments that have taken place in those countries in this regard. By way of example only, in the case of Australian unfair dismissal applications, of the approximately 15,000 that are lodged each year, only 2 per cent of those (approximately 300) will be formally arbitrated by the Fair Work Commission to determine whether a worker has been 'unfairly dismissed'. What that has meant, is that all parties who appear before the Tribunal, need to be prepared to adopt new ways of resolving the grievance, that are less adversarial. A further administrative development within the Australian tribunal context, is the emergence of the 'determinative conference', which in some ways, particularly in the case of non-represented parties, provides a new way of approaching the determination and adjudication of issues that whilst still underpinned by fairness, is designed to circumvent unnecessary formalities in a bid to ascertain the legal truth[7]. Of course, this requires the usual safeguards, inherent within the traditional natural

[2] Thornthwaite, L. & SHELDON, P. 2011. Fair Work Australia: Employer Association Policies, Industrial Law and the Changing Role of the Tribunal. *Journal of Industrial Relations,* 53**,** 616-631.

[3] Merritt, N. 1968. Legal Developments – The Donovan Report: *Management Decision : Quarterly Review of Management Technology,* 2**,** 195.

[4] Renton, D., Proquest, E. & Ebrary, I. 2012. *Struck out: why employment tribunals fail workers and what can be done,* New York;London, Pluto Press.

[5] Corby, S. 2015. British employment tribunals: from the side-lines to centre stage. *Labor History,* 56**,** 161-179.

[6] Bell, C. 1996. Informal or specialist? An analysis of procedures in the Fair Employment Tribunal. *Northern Ireland Legal Quarterly,* 47**,** 397.

[7] The determinative conference is designed to dispense with a lot of the formality of a formal adjudication process in a bid to more efficiently isolate the facts and determine the law.

justice models of legal inquiry. That practice has recently been adopted in Fiji and has been met with a good degree of success.

[9] In the case of Fiji, more efficient methods of resolving grievances before the Tribunal, to provide access to justice and a cost effective service are imperative and have been adopted. In this regard, the jurisprudence of the Fijian law is well established and it is important to view the conduct of the way in which the Tribunal operates through that lens and not from locations or time periods that are no longer relevant. The history of the legislation and its driving principles cannot be overlooked. Significant changes have occurred in modern employment tribunals over the past 20 years and such changes are consistent with the spirit and framework of the Fijian employment law[8].

Hearing Matters in a Non Adversarial Way

[10] It is useful at this point, to refer to the Second Reading Speech coinciding with the introduction of the *Employment Relations Bill* 2006, when the Honourable Minister Datt stated:

> ***..the Bill also establishes a separate specialist adjudicating body, known as the Employment Relations Tribunal, to hear and determine employment matters in a speedy and sometimes non-adversarial way.***
>
> ***The Tribunal will have the power to gather information, call evidence and investigate matters as they see fit, in order to understand the key issues in dispute and make pragmatic determinations about them.***
>
> ***It is intended that the Tribunal make practical decisions quickly with a minimum of detail, discussing on key issues and how to resolve them[9].***

[11] It is important that parties do not lose sight of this role and the intended way in which the Tribunal should operate in these circumstances. Note specifically, the recognition that the Minister has given to the fact that the Tribunal will often take the lead in informing itself of matters and this must be seen as a marked departure from the traditional adversarial approach adopted in the common law courts. A case in point is the power vested in Section 229(3) of the Act, that allows the Tribunal to order any person to appear before it. It will also mean that the Tribunal could facilitate the adducing of evidence, particularly where one or both parties have no capacity to do so; or in some cases, where they are simply unwilling to provide that assistance.

[12] Note also that there is an expectation, that the Tribunal should make practical decisions quickly. In some limited circumstances, this may also mean that an ex tempore decision should be issued, so as to circumvent any further prejudice that may have taken place, due to deliberate delays or other attempts by one or both of the parties to frustrate proceedings. The making of ex tempore judgments in such

[8] In some cases, parties may elect to have matters determined 'on the papers' and this on occasion may be a legitimate and fair way of assessing and determining the respective cases of the parties. On other occasions, parties may request that deponents make themselves available to submit to questions or 'cross examination'.

[9] See Parliamentary Hansard, Employment Relations Bill 2006, p580.

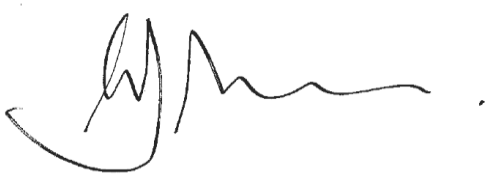
circumstances can be quite legitimate and does not without more, suggest that in some way the decision maker has committed some jurisdictional error because the decision was issued quickly[10].

[13] The fundamental principles of natural justice nonetheless remain and these cannot be compromised. The Tribunal needs to be very transparent in relation to the procedural journey that has taken place, particularly so as not to give the impression to any appellate jurisdiction, that procedures have been unfair or that a party has not been given an opportunity to be heard[11]. The rights of unrepresented parties in this regard need to be protected, particularly if on appeal they are unable to articulate a fair account of what has transpired or lack the means to defend the decision at first instance. In this regard, the probono legal community in particular, may play a critical role in ensuring that access to justice for both employer and worker alike is achieved. If that means that principles such as these need to be determined or clarified by the Employment Court, or the Court of Appeal, the Supreme Court, or the parliament, then so be it.

Conclusions

[14] Consistent with the above and in light of the fact that in the present case, the Tribunal does not have sufficient facts before it to make an informed decision, it will request that the matter be reconvened, to identify the gaps in the analysis thus far and so as to set down the procedural steps required to bring the matter to an end as expeditiously as possible.

[15] Registry staff shall notify the parties of the next available date for that purpose.



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[10] A case in point may be where a worker has been deprived for a lengthy period of time, statutory entitlements that are due and are in desperate need of those monies. Other occasions have included the Order to release unlawfully retained properties held by an employer or where a worker's grievance has no reasonable prospects of success and it should be brought to an end so as to avoid the respondent employer incurring the unnecessary ongoing costs associated with a vexatious or frivolous claim.

[11] In this regard, an accurate record of the Tribunal's sittings is critical.