

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 04 OF 2012

BETWEEN: **ABINESHWAR VINOD**

APPLICANT

AND: **FIJI NATIONAL PROVIDENT FUND**

RESPONDENT

Appearances: Mr. P. Rae for the Applicant.

Mr. D. Sharma for the Respondent.

Date /Place of Judgment: Wednesday 17 April 2013 at Suva.

Coram: The Hon. Justice Anjala Wati.

JUDGMENT

CATCHWORDS:

EMPLOYMENT LAW - LEAVE TO APPEAL OUT OF TIME - LEAVE TO MAKE APPLICATION FOR LEAVE TO APPEAL OUT OF TIME- DELAY IN FILING APPEAL- JUDGMENT NOT GIVEN FOR INTERLOCUTORY DECISION - IS THE EXCUSE REASONABLE - QUESTIONS OF LAW ARGUABLE - WHETHER REINSTATEMENT CAN BE ORDERED AS AN INTERIM REMEDY - WHETHER INJUNCTION GRANTED TO RESTRAIN EMPLOYER FROM TERMINATING EMPLOYEE IS WIDE ENOUGH TO PREVENT AN EMPLOYER FROM EXERCISING ITS RIGHT TO DISMISS AN EMPLOYEE FOR SUBSEQUENT DISCIPLINARY OFFENCES - WHETHER SUBSEQUENT GRIEVANCES CAN BE AMALGAMATED AND DEALT BY THE ERT ON AN INITIAL GRIEVANCE CLAIM.

LEGISLATION:

THE EMPLOYMENT RELATIONS PROMULGATION 2007 ("ERP"): ss. 112, 234(1) (a), 243.

The Cause

1. The respondent applies for an order for leave to appeal out of time and for leave to make an application for leave to appeal the interlocutory decision of the Tribunal of 19 December 2011. The respondent is asking for a stay of the orders of 19 December and for enlargement of time for compliance of the said orders.
2. The respondent also seeks an order that Mr. Rae be disqualified from representing the worker in the case.

The Case Background

3. On 29 June 2009 the worker reported an employment grievance claiming prejudice over the employer's action to enforce his transfer. The case was allocated an action number "ERT Grievance No. 98 of 2009".
4. The hearing of the grievance began in May 2010. At the hearing on 21 July 2010, the ERT directed that the worker was to remain in his position at Lautoka pending determination of the grievance. The employer complied with the order but the employee was no longer, as he previously was, holding the position of the Team Leader Member Benefits.
5. On 3 May 2011, the grievor was again charged by the employer with falsification and alteration of FNPF record where it was alleged that the employee had falsely altered the address of the witness in the education assistance application form of member no. 1525800, Isoa Wasenavanua. The hearing was conducted on 5 May 2011. On 31 August 2011 the employee was terminated.
6. The employee filed a motion on 17 October 2011 and sought the following orders :-
 1. *That the respondent's action in terminating the applicant's employment constitutes discrimination in employment contrary to section 77(1) (a) and (c) of the Employment Relations Promulgation 2007, is in breach of his employment contract, unjustified and unfair.*
 2. *That the respondent be ordered to comply with the Employment Tribunal's directions of 21 July 2010, the applicant's employment contract and section 24 of the*

Employment Relations Promulgation 2007 and provide him with work in his position as Team Leader Member Benefits at its Lautoka Branch.

3. *That the respondent be ordered to cease and desist from requiring the applicant to re-apply for his position pending the final determination of the within Motion and Grievance No. 98 of 2009.*
 4. *That the respondent be restrained from terminating the applicant's employment pending the determination of the within Motion and Grievance No. 98 of 2009.*
 5. *That the respondent be ordered to provide the Tribunal and the applicant with particulars of its Reform Program requiring the applicant to re-apply for his position.*
7. On 19 December 2011, the ERT made the following orders on the motion :-
1. *That Worker, Abineshwar Vinod, is hereby reinstated to his position as Team Leader Member Benefits from 31 August 2011 at the Employer's Lautoka Branch pending the final determination of Grievance No. 98 of 2009 and the Motion herein.*
 2. *That the employer, Fiji National Provident Fund is restrained from terminating the worker's employment pending the determination of Grievance No. 98 of 2009 and the Motion herein.*
 3. *That the ruling on Preliminary issue in Grievance No. 98 of 2009 is that the employer carries the burden of proof pursuant to section 77(3) of the Employment Relations Promulgation 2007 in respect of the Grievance.*
 4. *That the matters are adjourned to further mention on 23 January 2012 at 9.00am.*

The Law and Analysis

Leave to Appeal Out of Time

8. Mr. Rae and Mr. Sharma both submit that the order is an interlocutory order and thus not appealable as of right. In this instance s.243 of the ERP requires a party who is dissatisfied with an interlocutory order of the Tribunal to within 14 days apply to the Court for leave to appeal.

9. No application for leave was made so an extension of time is sought to make an application for leave to appeal. Mr. Sharma also applies for leave to appeal simultaneously.
10. The power to enlarge time for appeal is provided for by s. 234(1) (a) of the ERP.
11. Normally the Court considers the following basic principles in considering leave to appeal out of time: the length of the delay, explanation for the delay: is it sufficient, prejudice if extension is granted, and chances of success in the appeal.
12. Mr. Sharma submitted that the ERT only made orders. They reasonably expected a judgment or written reasons for the verdict. They waited; when none was forthcoming they were out of time in appealing and so applied for leave to appeal. Mr. Sharma said that they are entitled to the decision upon which the orders were made. He stated that the Christmas vacation ran until 16 January 2012. He stated that he should have lodged the appeal from 19 December within a period of 28 days. They are only out of time by 24 days.
13. Mr. Rae argued in respect of the length of delay and the adequacy of the explanation that the leave to appeal should have been brought within 14 days. Mr. Rae said that the delay is of 52 days. No request was made from the ERT for a decision so the excuse that the employer was waiting for the ruling is improper.
14. Indeed as Mr. Rae says, Mr. Sharma should have applied for leave to appeal the interlocutory decision within 14 days from 19 December 2011. Whether the delay is inordinate perhaps in this case has to be examined with the reason for the delay. The ERT made orders which affected the right of the employer to dismiss an employee. It also restrained the employer from doing an act which had already occurred. In this situation I would expect the Tribunal to have and granted justifiable reasons why such orders were made. At least some cogent reasons were to be delivered. The employer had the right to know why it could not exercise its rights to terminate the employee for alleged serious disciplinary acts of the employee.
15. I do not find that the waiting for the reason to be delivered before leave to appeal was any improper act. Normally framing of applications for leave to appeal requires parties to examine the basis of the interlocutory orders since appeals from interlocutory orders

are not encouraged as it tends to affect the progress of the case before the officer who made such orders. Exceptional circumstances must exist and the party applying for leave must show that.

16. Since the employer did not have the benefit of the judgment, it would be a formidable task for it to make an application for leave upon proper basis.
17. I accept that reasons should have followed the order or granted at the time of making the orders. I cannot find any reasons for such orders and I conclude that the employer's explanation that it waited for the reason is satisfactory.
18. On the grounds of success of appeal, Mr. Sharma submitted he has arguable grounds on points of law and fact. He stated that the ERT should not have granted a restraining order when the termination had occurred. The best it could do was to stay the orders for termination upon proper basis. Mr. Sharma stated that there was no substantive dispute before the Tribunal on the subsequent disciplinary charges faced by the employee for which he was terminated. Grievance No. 98 of 2009 did not cover the subsequent disciplinary acts and for the Tribunal to make orders in ERT No. 98 of 2009 is improper in law. Mr. Sharma also argued that the orders granted by the ERT are substantive in nature and should not have been granted on an interlocutory stage. He said that the orders are prejudicial to the employer in that it is not able to exercise its rights to discipline an employee who misbehaves at work. The employee can take advantage of these orders and can cause loss and harm to the employer.
19. Mr. Sharma also stated that a proper grievance ought to have been filed within 6 months from the date of the charge in May. The employee did not take any action of reporting a grievance within 6 months as prescribed under s. 111(2) of the ERP 2007. The proper procedures would then have been followed giving the employer right to due process of mediation as well.
20. Mr. Sharma stated that S.112 of the ERP states :-

"s.112)---If the worker brings an employment grievance in relation to one aspect of employment but during the determination of the grievance there is evidence of a grievance in relation to another aspect of employment, the decision may also cover that

other aspect, provided that the employer is advised during the proceedings of such matter”.

However, he argued that the section covers the discovery of other grievances that may have existed at the time the existing grievance was filed at the Tribunal. If the section were to be read otherwise it would cause substantial prejudice because the employee may bring a grievance and use that grievance as weapon to restrain the employer from further disciplining him or her against future offences.

21. In this case, Mr. Sharma argued that the employee continued to offend and so he had to be disciplined by termination.
22. Mr. Rae argued that the act of termination is viewed by the employee as another act in the series giving rise to his claim for unfair discrimination in employment and hence it is very much related to the original grievance in ERT 98 of 2009. The subsequent grievance can be covered by s. 112 of the ERP and dealt with in ERT 98 of 2009. The employer's action in dismissing the worker is seen as an attempt to pre-empt the Tribunal and the ERT has hence quite correctly given orders restraining the employer. The ERT is still to decide the ERT Case 98 of 2009. Mr. Rae stated that the six months rule applies to only raising the grievance with the employer.
23. Mr. Rae further argued that all these questions of law must first be determined by the ERT. The ERT can refer the question of law to ERC. There is no cause for the ERC's intervention at this stage.
24. Having heard the counsel I am of the finding that the granting of the orders on 19 December 2011 affects the substantive rights of parties. The ERC needs to examine whether interlocutory orders akin to those final in nature can be granted and circumstances in which it can be. I also find that there is an arguable case in that whether or not the orders affect the contractual rights of the employer to dismiss an employee for a subsequent offence. What is also arguable is whether s.112 of the ERP is wide enough to cover occurrence of separate subsequent incidents giving rise to a grievance or whether a fresh dispute ought to have been lodged.
25. I find that the appeal grounds are points of fact and law which is arguable.

26. On the aspect of prejudice Mr. Sharma submitted that the employer is forced to keep an employee whose presence is affecting the employer. All trust and confidence is lost in the employee who will now if reinstated damage the data and work of the employer.
27. Mr. Rae submitted that this employee had been subjected to discrimination and the employer is trying to circumvent the proceedings. It is highly prejudicing the employee in his employment.
28. I have to assess the aspects of prejudice in light of the surrounding circumstances. The orders are substantive in nature and affect the rights of the employer in that it is not permitted to work without an employee who it views as a threat to the work and system of the employer. Even if reinstatement is put on a hold it may affect the employee that it will not be paid any money but that prejudice can be cured after a while. The potential damage to the employer may be irreparable.
29. On that basis I view the prejudice to the employer greater in that there will be irreparable damage to it and its clients.
30. I thus am of the view that leave to appeal out of time be granted.

Leave to appeal interlocutory orders

31. Leave to appeal from interlocutory orders are granted in most exceptional cases and where substantial injustice will occur if leave is not granted.
32. I have said that the orders of the ERT tend to affect the substantive rights of the parties thus it in effect is an exceptional circumstances on which leave to appeal should be granted.

Stay

33. On the basis of my observation above, I will only order that compliance of the ERT decision be deferred until such time I hear the appeal.

Mr. Rae's disqualification as a counsel

34. Mr. Sharma stated Mr. Rae deposed an affidavit in respect of the motion pursuant to which he received the orders of 19 December 2011 so he cannot appear in Court.
35. Mr. Rae stated that the issue should have been brought up at the ERT not in ERC. He also argued that he is a union representative and he has all the information within his knowledge so he properly executed an affidavit.
36. I am not told of the nature of the affidavit and its content which possibly will jeopardize Mr Rae's position if he remains on record. The application should have thus been properly made with all relevant information as to conflict and prejudice to client. The ERT was the first forum in which this application should have been made. These issues cannot be brought on an application for leave to appeal. I disallow the application. At leave stage neither Mr Rae's affidavit is used nor is it subject to the grounds of appeal.

Final Orders

37. I grant leave to appeal the decision of 19 December 2011. The appeal must be entered and served within 14 days.
38. The compliance of the ERT's decision is deferred until determination of the appeal.
39. The application to disqualify Mr. Rae is refused.
40. Each party to bear their own costs.

Anjala Wati

Judge

17.04.2013

To:

1. *Mr. P. Rae, for the applicant.*
2. *Mr. D. Sharma, for the respondent.*
3. *ERCA: 04 of 2012.*