IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: **ERCA NO. 17 OF 2012**

BETWEEN: **FIJI NATIONAL UNIVERSITY**

APPLICANT

AND: **JOHN FILIPO**

RESPONDENT

Appearances: **Mr. V. Kapadia for the Appellant.**

Mr. D. Nair for the Respondent.

Date and Place of Judgment: **Monday 17 February, 2014 at Suva.**

Coram: **The Hon. Justice Anjala Wati.**

JUDGMENT

CATCHWORDS:

EMPLOYMENT LAW – APPEAL – SECOND APPLICATION FOR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER OF THE TRIBUNAL-FIRST APPLICATION MADE AND REFUSED BY ERT-CONCURRENT JURISDICTION TO HEAR LEAVE TO APPEAL FROM AN INTERLOCUTORY ORDER- A PARTY HAS TO EXERCISE THE OPTION OF THE FORUM-IF ERC IS CHOSEN, THE TIMEFRAME WITHIN WHICH THE APPLICATION FOR LEAVE MUST BE BROUGHT- THE QUESTION ON APPEAL BEING WHETHER A PARTY HAS THE RIGHT TO FILE A GRIEVANCE AT THE MEDIATION UNIT WITHOUT EXHAUSTING THE INTERNAL APPEAL PROCEDURE PROVIDED FOR IN THE CONTRACT- IS IT MANDATORY TO USE INTERNAL APPEALS PROCEDURE-BALANCING THE RIGHTS OF THE PARTIES AFTER SO MUCH DELAY IN FINALISNG THE GRIEVANCE AFTER THE DATE OF THE DISMISSAL.

LEGISLATION:

THE EMPLOYMENT RELATIONS PROMULGATION 2007 ("ERP"): ss. 110 (2), (4), 242 (5) (e) (i), 243, 244.

The Cause before ERC

[1]. The Applicant seeks leave to appeal against the interlocutory decision of the Employment Relations Tribunal ***("ERT")*** of 24 January 2012. This is a second application for leave to appeal, the first being made and refused by the ERT.

The Cause at the ERT

[2]. The substantive matter before the ERT concerns the summary dismissal of the respondent. The respondent brought an action against the appellant on the grounds that he was unfairly dismissed on 25 June 2009.

[3]. At the Tribunal the appellant had submitted a preliminary objection that the respondent should have proceeded with his appeal to the Appeals Committee of the appellant and should have complied with clause 23.10.4 of the Collective Agreement ***("CA")*** between FIT and FPSA.

The Ruling of the ERT

[4]. After hearing the preliminary objection, the ERT ruled that since the matter was referred to it by the Mediation Unit, the ERT was bound to hear the same. The ERT also found that the respondent did not fully comply with the internal appeal's procedure but the ERT did not view that as being deliberate on his part but rather an act without proper advice from either the union or the employer. The ERT ruled that it will hear the substantive matter.

Leave to Appeal at the ERT

[5]. The applicant sought the Tribunal's leave to appeal the decision which was refused. On 11 September 2012, the ERT found that the grievance has been before the ERT for nearly 2 years and it was in everyone's interest that it was resolved. Any further adjournment will prejudice the respondent. In the interest of justice generally and for the need to generally and efficiently dispatch business at the ERT, the matter needed to be heard. The ERT found that by hearing the substantive case, the appellant would not be prejudiced in anyway although it was mindful of the appellant's concern that *"it was necessary and important that its employees follow the internal appeal procedures set out in the collective agreement and the codes of conduct. The applicant has over 1,800 employees and needs to maintain discipline and orderly procedure in how disciplinary matters are resolved."*

[6]. The ERT found that when the parties are referred to the ERT, the expectation is that the matter will be adjudged.

The Grounds and Submissions in Support.

[7]. Mr. Kapadia argued that following the dismissal of the respondent, the disciplinary committee hearing was held on 19 April 2010. The allegation was that the respondent sold scrap metal belonging to the applicant without its permission or authority. The disciplinary committee found the respondent guilty on 2 June 2010. The respondent through its representative tendered his mitigation. On the same day the disciplinary committee ruled that the conduct warranted summary dismissal. In the final ruling the committee advised the respondent to appeal within 14 days if he so wished.

[8]. The respondent filed his appeal on 3 June 2010. As required by clause 23.10.3 of the CA, the disciplinary committee reviewed its decision before the matter could be referred to the appeals committee.

[9]. The respondent filed detailed written submissions on 13 July 2010. On 20 July 2010 the disciplinary committee upheld its earlier findings.

[10]. Mr. Kapadia argued that the respondent should have then under clause 23.10.4 of the CA informed the disciplinary committee that its review decision was not accepted. The matter would have been referred to the full appeal vide clause 23.10.4. The respondent, instead, filed a grievance at the Mediation Unit.

[11]. Mr. Kapadia contends that the employer has very good grounds of appeal. The ERT found that the procedures in the CA were not followed but it was inadvertent due to no proper advice from the union or the employer. There was no evidence in this regard before the ERT. The respondent was represented by a very able and experienced union official Mr. Nair who regularly appears before committees, Tribunals and the Courts.

[12]. Mr. Kapadia stated that s.110 (4) of the ERT requires that *"where an employment contract includes an internal appeal system, the internal system must first be exhausted before any grievance is referred for Mediation Services"*. In this case the respondent has not exhausted the internal appeal system and this will cause serious prejudice to the applicant contrary to what the ERT found. The applicant is a statutory university. It has over 2000 employees. It needs to maintain discipline and orderly procedure in how disciplinary matters are resolved.

[13]. Mr. Kapadia averred that an important and practical issue is at stake. It is of practical relevance to other employers who have internal disciplinary procedures.

[14]. The applicant had initially filed an application for leave to appeal at the ERT. That was done on 1 February 2012 pursuant to s.242 (5) (e) (i) of the ERP.

[15]. The decision refusing leave to appeal was granted on 11 September 2012. An application for leave was thus filed in ERC on 24 September 2012. The respondent, it was argued, is raising an objection that the leave to appeal ought to have been filed in the ERC within 14 days from the delivery of the interlocutory decision appealed as outlined in s.243 of the ERP.

[16]. Mr. Kapadia contended that s.242 (5) (e) (i) states that no appeal shall lie, except with leave of the Tribunal or the Court, from any interlocutory decision. S.243 states that *"a party who is dissatisfied with an interlocutory order of the Tribunal, may, within 14 days, apply to the Court for leave to appeal"*. It was argued that s.242 (5) (e) (i) is a mandatory

provision. The provisions of S.243 are directory in that it uses the word *"may"*. The practice of the High Court on interlocutory appeals is also the same and that is leave must be obtained from the High Court and if refused then leave may be sought from the Court of Appeal within a reasonable time.

[17]. Mr. Kapadia further argued that there is apparent contradiction between s.242 (5) (e) (i) and s.243 of the ERP. This point has not been expressly decided by either the ERT or the ERC save to say that both the Tribunal and the Court have heard applications for leave to appeal from an interlocutory decision on the basis that the correct and proper approach is to apply S242 (5) (e) (i) whereby the initial application for leave is filed with the Tribunal and if unsuccessful then the applicant can file an application with the Court. There is no time limit set out in the ERP on this subsequent application to the Court but it must be done within a reasonable time.

[18]. Mr. Kapadia said that the ERT accepted that it had jurisdiction to hear the application for leave. It heard the application and delivered the decision on 24 January 2012. The respondent did not raise any objection that the application for leave was wrongly before the ERT. In any event, once the decision was delivered, a second application for leave to appeal was promptly made at the ERC.

[19]. Mr. Kapadia stated that the respondent relied on clause 1 (2) of schedule 4 of the ERP and stated that the aggrieved party may refer the grievance directly to mediation. This submission, says Mr. Kapadia, ignores s.110 (2)(b) which states that where there is no agreed procedure for settling grievances then the procedure set out in schedule 4 is applicable. In the present case, the CA governs the procedure that is to be followed in employment grievances. The respondent has taken steps pursuant to the agreed procedure but failed to complete it.

[20]. The employee filed an appeal which under clause 23.10.3 went for an initial hearing. Initial hearing result was that the disciplinary committee reviewed the verdict and maintained it. It was then for the respondent to inform the appellant that the review decision was not acceptable to him. The same appeal would then have been listed for full appeal. Without completing this process the respondent went to Mediation Unit. The appellant has set up a considerable sum of money in setting up a grievance procedure for its 2000 employees. It is therefore crucial that its employees comply

with the internal grievance procedure and not flaunt it and put the appellant to additional costs and time in taking the same matter through the Tribunal and Courts when it can be dealt with fully by the internal procedures.

[21]. Mr. Kapadia also contends that the respondent had raised an issue that it filed an appeal and that it was declined. That statement, argued Mr. Kapadia, is not factually correct. The appeal was listed for initial hearing which was in the form of a review. It was for the respondent to advise the disciplinary committee that its decision upon the initial hearing is not accepted. The disciplinary committee would then have referred the appeal for full hearing under a differently constituted committee.

[22]. The respondent referred the matter to the Mediation Unit contrary to s.110 (4) of the ERP. The appellant was called for mediation. The proceedings there are confidential and the parties attended the mediation without their legal advisers. The applicant, as argued by the respondent, cannot be said to have acquiesced or waived its right to raise any procedural non-compliance. No one can acquiesce in breach of the provisions of the ERP.

[23]. The respondent cannot challenge the agreed grievance procedure in the CA. The reference to clause 23 of the Human Resource Polices of FNU in the respondent's submission is irrelevant as the CA governs the relationship between the parties.

[24]. Mr. Kapadia argued that this application is not relating to a practice or procedure matter but is an important decision relating to substantive rights between the parties. It was argued that it is the employers substantive rights to have a set procedure exhausted by an internal mechanism which it has set up for the benefit of the parties upon agreement with the employees.

[25]. S.234 of the ERP, in any event, grants powers to extend time within which the thing may be done, or the validation of the thing formally done.

The Grounds and Submissions in Opposition

[26]. The respondent argued that s.243 of the ERP states that if any leave to appeal application is to be brought to the Court, it must be done within 14 days. The

decision appealed is that of 24 January 2012. The applicant filed leave to appeal after lapse of about 10 months.

[27]. The respondent also argued that the appellant has not in any way shown that the ERT erred in law or in fact in not staying or dismissing the proceeding.

[28]. The respondent was dismissed in mid 2010 and ever after 3 years his case is pending. It must now be determined by the ERT.

[29]. The respondent argued that clause 1 (2) of schedule 4 enacted pursuant to s. 110 states that *"where the employment grievance relates to dismissal, paragraphs 2 to 6 do not apply. The aggrieved party may refer the employment grievance directly to the Mediation in the prescribed manner"*. The respondent thus could have referred his grievance against his dismissal directly to the Mediation Unit even without first exhausting the internal grievance procedure. However the respondent did file his appeal. It was declined and then the respondent filed his grievance in the Mediation Unit.

[30]. The respondent was subject to disciplinary action in accordance with the appellant's HR Policies, hence the appeal procedures as contained in the same policy was pursued. Clause 23.1 of the HR Policy states that *"the parties may appeal against the decision of the Staff Conduct Appeals Committee under the provisions of the ERP"*.

[31]. By participating in the Mediation and not raising the objection the appellant has waived its rights to raise any procedural non-compliance.

The Law and Analysis

[32]. The first issue that I need to look at is whether the applicant can as of right bring an application for leave to appeal to the ERC after having been unsuccessful in its first application.

[33]. The two sections in the ERP that governs the issue of leave is section 242 (5) (e) (i) and s.243.

[34]. The two sections respectively read as follows:

" No appeal shall lie except with the leave of the Tribunal or the Court from any interlocutory decision"

"A party who is dissatisfied with an interlocutory order of the Tribunal may, within 14 days, apply to the Court for leave to appeal".

[35]. Mr. Kapadia argues that the Tribunal and the Court has concurrent jurisdiction to hear leave application and that the use of the word ***"may"*** in s.243 is directory and so the time limit only applies if the first application for leave is made to the Court but if the second application is made after refusal by the ERT, the application has to be made within a reasonable time. Mr. Kapadia compares this to the civil procedure rules in High Court and Court of Appeal where leave to appeal can be filed in High Court and upon refusal a fresh application can be filed to the Court of Appeal.

[36]. I do agree with Mr. Kapadia that the Tribunal and the Court have concurrent jurisdiction to hear leave to appeal application but I do not agree that once an application is made to the ERT and leave is refused, a second application can be made to the ERC. The applicant's must choose the forum they want to seek leave from. If ERT is chosen and leave is refused, a second application cannot be made to ERC but there can be an appeal to the ERC from the refusal to grant leave by ERT. However this rule will not apply between the ERC and the Court of Appeal. These two Courts also have concurrent jurisdiction to hear leave applications and if the ERC refuses the first application for leave, instead of appealing the refusal, the applicant can file a fresh application for leave in Court of Appeal. This is unequivocally stated in s. 244 which is quite a different provision from that of s.242 (5) (e) (i).

[37]. S.244 reads:-

"Appeal on interlocutory order of the Court.

A party who is dissatisfied with an interlocutory order of the Employment Court may, within 14 days, apply to that court for leave to appeal to the Court of Appeal

or if leave to appeal is refused by the Employment Court apply to the Court of Appeal for leave to appeal".

[38]. If the ERT and ERC could both entertain fresh applications for leave to appeal then there was no reason for the two different provisions of s.242 (5) (e) (i) and s.243. The legislature would have simply said what it said in s.244 with Tribunal substituted in place of Court and Court in place of Court of Appeal.

[39]. I also cannot fathom Mr. Kapadia's argument in that the use of the word ***"may"*** in s.243 is a directive provision. S.242 (5) (e) (i) clearly states that a party has the choice to apply for leave to appeal either from the ERT or ERC. The use of the word ***"or"*** makes it optional which takes away any debate that separate fresh leave applications could be made in the two forums. Then s.243 states that if a party under s.242 (5) (e) (i) opts to apply for leave from the Court then the time frame to do so is 14 days. The use of the word ***"may"*** is the option to choose to go to ERT or ERC. It is to be read disjunctively from the words "within14 days," which sets the time period for making an application.

[40]. The other reason to support my finding is that if a person is going to first apply to ERT for leave, it will be practically impossible to bring a second application to ERC with 14 days. So one has to decide where one wants to go - the ERT or the ERC. If one chooses ERT, any grievance upon refusal to grant leave by ERT can only be subject to an appeal. There cannot be a fresh application to ERC for leave to appeal.

[41]. Mr Kapadia's comparison of concurrent jurisdiction of High Court and Court of Appeal has no legal basis. Here we are dealing with the subordinate Court and the ERC.

[42]. On this basis I find that the application cannot survive but I do wish to turn my mind to the issue arising out of s.110 (4) which reads:

"Where an employment contract includes an internal appeal system it must not provide for appeal to the Tribunal or Employment Court, and the internal appeal

system must first be exhausted before any grievance is referred for mediation services."

[43]. The CA entered between the parties clearly states that the grievance procedure is enlisted from clauses 23.9.5 to 23.10.6. Out of them the relevant ones are 23.10.3 and 23.10.4. The two clauses are procedures on appeal. They read as follows:

"23.10.3 Initial Hearing.

In the first instance, the Disciplinary committee will review the decision and the staff member shall be informed of the reviewed decision in writing.

23.10.4 Full Appeal

If the staff does not accept the decision from the review undertaken by the Disciplinary committee the matter will be referred to an Appeals Committee".

[44]. S. 110(4) is mandatory in that it requires compliance and if there is no compliance the proceedings should be stayed to order compliance.

[45]. In this matter the decision of the disciplinary committee was appealed by the respondent. As the procedure prescribes that appeal went for initial hearing under clause 23.10.3. The verdict remained the same. The respondent was advised of it and he should have, if he did not accept the verdict, applied for a full hearing. He did not do so and made an application to the Mediation Unit by stating in his application form that all the internal procedures to resolve the grievance was complied with. The matter went from Medication Unit to the Tribunal where it currently is.

[46]. Mr. Nair says that the respondent is following the procedure in the Human Resources Manual. The parties in this case have contracted via the CA. That is the contract that must be followed. Further, I was not given any manual as asserted, to substantiate the argument. I thus cannot make a finding on that aspect apart from finding that it has not been provided in evidence that the HR policy is part of the contract which must be followed.

[47]. The other interesting issue that was argued by the respondent is clause 2 of schedule 4. Schedule 4 is enacted under s.110. S.110 (2) states that schedule 4 only applies if the procedures set out for settling an employment grievance is not provided for by the contract. There are, indisputably, agreed procedures in the CA so the argument on clause 2 schedule 4 is baseless.

[48]. If there was a grievance between the parties, it is mandatory that the internal appeal system of the contract be exhausted before the grievance is referred to the Mediation Unit. A party filing the grievance in the Mediation Unit must make a declaration to that effect in the form provided being Form 1 of schedule 1. That form was filled by the respondent, filed in the Mediation Unit and served on the employer on 29 July 2010.

[49]. The employer therefore ought to have raised the issue of non-compliance with the mediator who could have referred the parties to exhaust the internal appeal system before conducting the mediation. I do appreciate that lawyers are not permitted in the Mediation Unit but the appellant could have raised this on its own upon legal advice from its solicitors. The Mediation Unit was the first opportunity to raise this issue and the applicant slept on its rights.

[50]. Finally, I wish to make one comment. The respondent has been out of employment from June 2009. It is now 4 years and he is still waiting to have his case finalised. It may be his fault that he did not complete the procedures outlined in the CA and filed a grievance in the Mediation Unit. Since the matter is now before the ERT, in the interest of justice, it should be allowed to be disposed off.

[51]. If the matter is sent back to the full hearing committee there will be more delay and one outcome is certain. If the respondent is unhappy he will again turn to the ERT. There will be more delay to the outcome of the matter. The delay is not justified notwithstanding whose fault it is.

[52]. I encourage the parties to proceed to hearing on the substantive matter.

Final Orders

[53]. This application for leave to appeal is dismissed.

[54]. Each party must bear their own costs.

[55]. The substantive matter is to proceed in the Tribunal unless any subsequent stay order is granted by any Tribunal or Court.

[56]. So ordered.

Anjala Wati

Judge

17.02.2014

To:

1. Mr. Kapadia, counsel for the Appellant.

2. Mr. Nair, representative of the Respondent.

3. File: ERCA No. 17 of 2012.