

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 10 of 2014

**BETWEEN:** **FOOD FOR LESS (FIJI) LIMITED**

**APPLICANT**

**AND:** **ELIZABETH CHAND**

**RESPONDENT**

*Appearances:* Mr. Ritesh Naidu for the Applicant.

Ms. T. Sharma and Ms. R. Mani for the Respondent.

*Date/Place of Oral Judgment:* Friday 30 January 2015 at Suva.

*Date/Place of written Judgment:* Wednesday 13 January 2016 at Suva.

*Coram:* Hon. Madam Justice A. Wati.

---

## **RULING**

**Catchwords:**

*Employment Law - Application for Leave to Appeal out of Time- Factors to be assessed: length of delay; reasons for the delay, chances of appeal succeeding and the degree of prejudice to the respondent.*

**Legislation:**

1. *The Employment Relations Promulgation 2007 ("ERP"): ss. 234 (1) (a).*

---

**Cause**

1. The applicant seeks an order for leave to appeal out of time the decision of the Employment Relations Tribunal ("**ERT**") of 14 July 2014 wherein it held that the employee was unlawfully and unfairly terminated and ordered that she be paid one years' wages lost for unlawful dismissal

and 6 months wages as compensation for humiliation, loss of dignity and injury to the feelings of the worker.

2. The basis upon which the application was brought was deposed through an affidavit of Sunil Chand Verma who is the General Manager and Financial Controller of the employer.
3. Mr. Verma deposed that the matter was heard by the ERT on 5 and 6 June 2011. After the completion of the hearing, the ruling was adjourned for a date to be notified to the parties.
4. Mr. Verma said that he recalls receiving a telephone call from one Nani who said to him "you have a document to pick up at the Ministry of Labour, Civic House". What he cannot recall is the date of the call as he did not make a note of it anywhere but it may have been in July 2014.
5. He could not inform the Director Mr. Rudra Prasad of the call because Mr. Prasad was abroad between 25 June 2014 and 26 July 2014. He returned to Fiji on 8 September 2014 by which time he had totally forgotten about the telephone call. He was also not aware of the importance and urgency of the telephone call that he had received. He was not handling the case and he was not aware of any proceedings before the ERT in relation to this grievance. Mr. Prasad was in full carriage of the matter. Mr. Verma says he did not know that a judgment was pending in this case.
6. On 2 September 2014 the employer was served with a copy of the order which was filed and sealed on 29 August 2014. By then the time for appeal had expired. At the time of service of the order, Mr. Prasad was away in USA and returned to Fiji on 7 September 2014. He was in Office on 8 September and Mr. Verma brought the order to his attention.
7. Legal advice was obtained on 9 September 2014 from Naidu Law. As requested by Naidu Law a copy of the judgment was obtained on 9 September from the ERT and handed to it.
8. Mr. Verma stated that the grounds of appeal presented to the Court are meritorious and the employee will not be prejudiced in any manner if leave were granted. The employer will prosecute the appeal expeditiously.



9. In opposition an affidavit was deposed by one Lanieta Mataigusu. She stated that after the completion of the trial, the ERT had informed the parties that the judgment would be delivered on notice and that the parties were to collect the same from the Registry of the Tribunal.
10. It was further deposed that enquiries were made with the clerk Nani. According to Nani, she made several telephone calls to Mr. Verma who was informed that the judgment in this case was ready for collection. Mr. Verma kept on advising that he was not available to pick the judgment. He finally did so on 2 September 2014 where he was verbally reprimanded for the delay in collection.
11. The employer is a huge and successful entity. It had more than ample time and resources to appeal the decision within the requisite time frame. Due to its failure and lack of concern, a timely appeal could not be filed and the worker is out of employment for over 4 years. She has been put to great stress and expenses of having to run after the employer who seems not to care about her plight. The worker has undergone a major surgery and is due to undergo another one as soon as proper diagnosis is made by the doctors. Any grant of leave would be prejudicial.

### **Submissions**

12. Mr. Naidu argued that the ERT delivered its judgment on 14 July 2014. The employer had 28 days to file an appeal. The time expired on 11 August 2014. The application for leave was filed on 12 September 2014. The delay is of 33 days.
13. Mr. Naidu said that the practice of the ERT asking the parties to collect the judgment from the Registry must be discouraged. Judgments must be delivered in Court.
14. It was averred by Mr. Naidu that the proposed grounds of appeal have been identified in the affidavit of Mr. Verma. The grounds are not doomed to fail. They raise arguable points.
15. The first ground of appeal, it was argued was that the ERT erred in law in awarding the worker compensation in terms of reimbursement of one year's wages. The award is manifestly excessive. There was no evidence before the ERT to justify the remedy. The ERT heard the

matter one year after the termination. The employer should not be punished for it. The ERT also failed to consider whether the worker had mitigated her loss and why she did not.

16. The second ground of appeal states that the ERT erred in law in awarding the employee 6 months wages as compensation for humiliation, loss of dignity and injury to the feelings of the worker when there was no claim to this effect. Be that as it may, the award is manifestly excessive.
17. Mr. Naidu contended that there was insufficient evidence before the Court to justify the award for unfair dismissal. Substantial proof was required and damage could not be assumed. The judgment does not contain proper reasoning and justification for such an award.
18. The third ground of appeal is that the ERT erred in fact and in law in applying the principle set out in the New Zealand case in relation to summary dismissal since it is not on par with the statutory provision for summary dismissal provided for in the ERP.
19. The fourth ground of appeal is that the ERT erred in law in holding that the worker was unfairly dismissed having regard to the evidence as a whole. The employee was terminated on the grounds of incompetency when the employer found that its funds were missing. She was provided with a letter stating the reasons for the dismissal. The procedure was correctly followed as well. The court should look at the conduct complained of and decide whether the employer's belief that it amounted to gross misconduct fell within the range of reasonable responses.
20. Mr. Naidu further argued there will not be any prejudice to the employee if leave were to be granted. Once the appeal is determined, if she succeeds, she will be entitled to her fruits of the judgment.
21. Ms. Mani argued that the affidavit of the respondent shows the lack of initiative demonstrated by Mr. Verma. He could have sought legal advice when he was asked to collect the judgment but even if he did collect, the position would not change as he would have waited for the Director to return. The excuse that he presented for the delay is thus not excusable.



22. The one years' wages and also 6 months wages lost as a result of the grievance is justified under s. 230 (1 (b) and ( c) (i) of the ERP. The timeframe before the matter was heard was one year. The ruling also justifies that the worker was humiliated when she was demoted before being dismissed. She was also humiliated when the employer involved the police and destroyed the good faith element between the parties.
23. Ms. Mani also argued that the employer had the benefit of seeing the credibility of the evidence and the making a finding of unlawful dismissal. The decision should not be interfered with lightly.
24. The employee is out of work and has been denied the fruits of the judgment and any further delay with definitely be prejudicial.

#### **Law and Analysis**

25. The right to bring an application for extension of time to file the appeal arises from s. 234(1) (a) of the ERP.
26. In considering whether leave ought to be granted or not, the court normally considers the factors of *the length of the delay, the reasons for the delay, the chances of the appeal succeeding; and the degree of prejudice to the respondent if the application were to be granted.*
27. The application for leave was filed almost a month after the time limited for filing the appeal. There is dispute as to the facts regarding the reasons for the delay and when the judgment was uplifted by the employer. Mr. Verma, on behalf of the employer asserts that when he was called sometimes in July, he was told that he had to pick a document from the ERT Registry. He was neither aware of the nature of the document nor the urgency of the same. He says that the judgment was collected on 9 September 2014.
28. The employee contends that the Registry rang numerous times to advise the employer that the judgment had to be collected in this case and that the employer refused to pick up the same. It is asserted by the employee that the judgment was collected on 2 September 2014.

29. I am surprised at the practice adopted by the ERT of not delivering the judgment in Court and asking the parties to pick the same from the Registry. It is another matter if judgment was delivered and the parties were asked to pick a corrected copy from the Registry. In this case the ERT wrote the judgment and did not pronounce it in open Court.
30. All judgments must be delivered in Court and the parties to the proceedings must be properly notified. A proper notification would be informing the parties of the date and place of the judgment. In this case, there is no certainty that The ERT informed the employer on a number of occasions that a judgment had to be collected. In that regard, I will resolve the issue in favour of the applicant in that the particulars of the document to be picked up and its urgency were not divulged to the employer.
31. Normally if a clerk calls any party to the proceeding and discusses an issue, a file note is made and kept in the file. There is no such record of the date and time of the call and what was discussed. In that regard, the proper practice adopted in all the registries, and I believe this is a common and efficient practice, was not followed. There would therefore be injustice if the assertion of the ERT made through the employer's affidavit is given weight.
32. The Registry also keeps a "*document release form*" whenever a party picks up any document from the Court. The collecting party signs for the document before taking the same. There is no record when the judgment was collected by the employer. The failure of the registry cannot be used against a party.
33. I find that if the employer was told about the nature of the document and the urgency of the same, sufficient arrangements may have been made to collect that judgment and early an advise sought on the decision.
34. I also find that on the face of the judgment, there are errors of law and fact. I will not deal with each ground in detail but generally address it.
35. I find that the judgment does not address the law in Fiji for summary dismissal and the procedure prescribed by the statute for carrying out summary dismissal. New Zealand law was used to determine whether the dismissal was lawful.




36. The judgment also does not address the factors based on which the remedies were assessed. One such factor was whether the employee had mitigated her loss and why she could not if she did not.
37. The other aspect is that for the court to award the remedy of humiliation, loss of dignity and injury to feelings, there must be established that there was bad conduct on the part of the employer in carrying out the dismissal. Apparently the evidence on which the remedy was based did not clearly establish bad faith on the part of the employer. In the main appeal, the parties may be able to point out the pertinent evidence but apparently the same has not been addressed adequately in the leave application.
38. I need not make a conclusive finding on any particular ground of appeal, save to say that the appeal is not doomed to fail on which basis together with the other factors, the application for leave must be granted.

**Final Orders**

39. The application for leave to appeal out of time is granted.
40. The appellant must file the appeal within 30 days with effect from the date of the oral judgment.
41. I make no order as to costs.



  
Anjala Wati  
Judge  
13.01.2016

To:

1. *Naidu Law for the Appellant.*
2. *AG's Chambers for the Respondent.*
3. *File: Suva ERCA 10 of 2014.*