

IN THE EMPLOYMENT RELATIONS COURT OF FIJI AT SUVA

ACTION NUMBER: ERCA No. 24 of 2017

BETWEEN : SCORPION INVESTMENTS LIMITED
APPELLANT EMPLOYER

AND : RADESHNA GOUNDAR
RESPONDENT WORKERS

CORAM : Justice M. Javed Mansoor

COUNSEL : Mr Singh V for the Appellant
: Ms Matai Gusu L for the Respondent Workers

Date of Hearing : 23 May 2019

Date of Ruling : 20 June 2019

RULING

EMPLOYMENT RELATIONS PROMULGATION: enlargement of time for appeal – delay due error of solicitor termination – factors to be considered – abandonment – termination of employment

Legislation:

- a. Employment Relations Act 2007, Section 234 & 242

Cases:

- a. Natadola Bay Resort Ltd v Tamanitoakula [2014] FJHC 564
- b. Gatti v Shoosmith [1939] 3 All ER 916
- c. McCaig v Manu Civil Appeal CBV0002.12
- d. Kaimacuata v Blake [2017] FJCA 65

1. The Appellant has sought Leave to file its Notice of Appeal - which is out of time - against the Ruling of the Employment Relations Tribunal (ERT) delivered on 22 September 2017. This Application was made by Summons filed on 14 November 2017 pursuant to Sections 234 (1) (a) and 242 of the Employment Relations Promulgation 2007.
2. The Respondent went before the ERT alleging that her employment was terminated by the Appellant. The Appellant denies having terminated the services of the Respondent, and submits that she willingly left employment and refused to return even when the employer attempted to contact her. The Resident Magistrate by his Ruling dated 22 September 2017 held that the employment of the Respondent was unlawfully terminated. The Respondent, Radeshna Goundar, commenced her employment with the Appellant in October 2013.
3. At the hearing of this Application, ERCA No. 24/ 2017 and ERCA No. 25/ 2017 were taken up together and oral submissions were made in respect of both matters at the request of both counsel. The Respondents in these cases, Radeshna Goundar and Pooja Archana Devi, were employees of the Appellant, Scorpion Investments Limited, and their employment ceased on the same day during the same course of alleged events.
4. The Respondent was employed by the Appellant as a cashier, and the Respondent, together with a co-employee, Pooja Archana Devi, ceased to

be employed from 6 November 2014. The circumstances under which their services ceased are vigorously contested. The Respondent, and the co-employee, sought legal remedies from the ERT on the basis that their services were unfairly terminated. The Appellant says the two employees abandoned their employment, and that their services were not terminated. Prior to the initiation of proceedings in the ERT, the two employees referred their grievance to mediation in the Mediation Unit of the Ministry of Employment, Productivity and Employment Relations on 25 November 2014.

5. An appeal to the High Court must be made in the prescribed manner within 28 days from the date of the decision¹. The Appellant filed its Application in this Court on 14 November 2017 seeking the Leave of Court to file the Notice of Appeal. The Affidavit in Support on behalf of the Appellant deposed that the delay was due to an inadvertent error on the part of the Appellant's Solicitor.
6. The Solicitor, Ms. Luisa Lagilevu, has deposed in her Affidavit in Support dated 13 November 2017 that the Tribunal delivered its Ruling on 22 September 2017, and that there was a misunderstanding and a miscalculation of the final date for filing of the Notice of Appeal within its solicitors office, where the filing date of the Notice of Appeal was inadvertently taken from 2 October 2017 instead of 22 September 2017.
7. She deposed further that an inordinate delay had not taken place after the expiry of the date for filing the Notice of Appeal and Grounds of Appeal, and that such delay was not due to the fault of the Appellant.
8. The time limit to file the Notice of Appeal is 28 days. However, Section 234 (1) (a)² permits Court to extend time to do anything not done within the required time limit if the matter is within its jurisdiction and on the application of an interested person.
9. In granting Leave, the Court would consider the following factors: the length of the delay and the reasons for it; the chances of the appeal succeeding; and, the prejudicial effect to the Respondent if Leave is granted³.
10. In Gatti v Shoosmith⁴, the Court of Appeal in England considered the omission to appeal in time due to a mistake on the part of a legal adviser, and stated that it may be sufficient cause to justify the Court in exercising

¹ Section 242 of the Employment Relations Act 2007

² Employment Relations Act 2007

³ Natadola Bay Resort Ltd v Tamanitoakula [2014] FJHC 564

⁴ [1939] 3 All ER 916

its discretion, though such discretion will not be adopted in every set of facts. This reasoning was adopted by the Supreme Court of Fiji in McCaig v Manu⁵, though extension of time was not granted in that case.

11. The Employer has given the necessary instructions to its firm of solicitors who have computed time erroneously for the purpose of filing the necessary papers. The length of the delay itself is about three (3) weeks between the lapsing of the appeal and this Application, and cannot be classified as inordinate or inexcusable. Moreover, this time computational error - as deposed in the solicitor's affidavit - cannot be directly attributed to the Appellant.
12. The Respondent relied on the Court of Appeal decision of Kaimacuata v Blake⁶ and submitted that Leave was refused in that case. This concerned an appeal to the Court of Appeal from a judgment of the High Court. The length of delay in that case was a considerable 122 days after the appeal was due. As such, the delay of about 3 weeks in the matter before this Court may have to be looked at differently. In Gatti v Shoosmith the solicitors misunderstood a rule, leading to the delay in filing the appeal. I am of the view that this is an apt case in which to exercise the discretion of this Court.
13. Whether there is any merit in the grounds urged by the Appellant is a matter that will need a fuller hearing to determine if the ERT was justified in arriving at its findings. What is clear is that there is a dispute as to whether the Respondent's services were terminated, as claimed by the employee, or, whether there was an abandonment of employment, as alleged by the employer. Entirely different legal consequences flow depending upon whether the services of the employees were terminated or whether they had abandoned their jobs.
14. Counsel for the Appellants submitted that the Tribunal failed to consider its case and omitted making any reference to the Appellant's defence i.e: that the Respondent abandoned work as opposed to a termination of employment, and abandonment of employment did not amount to a dismissal as a result of which the employer was not bound to provide a letter of dismissal specifying the reasons for dismissal.
15. The Resident Magistrate has stated that the "Tribunal does not accept the argument advanced by the employer that she left her employment..... this argument is counter intuitive as there was an admission of a disagreement

⁵ Civil Appeal CBV0002.12

⁶ [2017] FJCA 65

between the employees relating to the safety of the Grievor”. The Ruling of the ERT makes no other reference to the Appellant’s claim that employment was abandoned. The Court is of the view that the Appellant’s claim needs to be inquired in full in the interests of justice.

16. There is no doubt that there will be some prejudice to the Respondent as a result of the delay due to these proceedings, and the appeal proceedings if Leave is granted to the Appellant. The Court though has the opportunity to obviate any such resulting prejudice to the Respondent at the stage of determining the appeal.
17. The Appellant has, however, satisfied the Court that in view of the extent and circumstances resulting in the delay in filing an appeal and the nature of the facts in dispute, granting Leave to the Appellant would be just.
18. Orders:
 - a. Leave to file Notice of Appeal is granted.
 - b. The Appellant will pay the Respondent costs summarily assessed at 300 dollars.

Delivered at Suva this 20th day of June, 2019




Justice M. Javed Mansoor
Judge of the High Court