IN THE EMPLOYMENT RELATIONS COURT AT SUVA
CENTRAL DIVISION
CIVIL JURISDICTION

ERCA No. 12 of 2022

BETWEEN: **CITY SECURITY SERVICES (FIJI) PTE LTD**

APPLICANT

AND: **TOMASI SIVISIVI**

RESPONDENT

Date of Hearing	**:**	**31st of October 2023**
For the Applicant	**:**	**Mr Dayal R.**
For the Respondent:		**Mr Naco M.**
Date of Decision	**:**	**12 December 2023**
Before	**:**	**Levaci, SLTTW Acting Puisne Judge**

JUDGEMENT
(AN APPEAL FROM THE EMPLOYMENT RELATIONS TRIBUNAL)

APPEAL ORDERS SORT AND GROUNDS OF APPEAL

1. This is an application to Appeal the decision of the Employment Relations Tribunal delivered on 18th November 2022 with the following orders:

   (i) Judgment in the sum of $16, 576.59 in favour of the Plaintiff against the Respondent company;
   (ii) Costs of $200 summarily assessed to be paid to the Ministry of Labour within 14 days from the date of this judgment.

2. The Orders on Appeal sort upon by the Appellant is as follows –

a. That the Judgment of the Resident Magistrate, Ms Deepika Prakash delivered on 18th day of November, 2022 in the Employment Relations Tribunal at Suva in ERT Miscellaneous Action No. 6 of 2022 be wholly **SETASIDE** and/or **SUBSTITUTED** by its own decision;

b. That the Order made by the Resident Magistrate be stayed until the final determination of this matter;

c. To refer the matter to the Tribunal with any directions to reconsider the whole judgment of the Tribunal;

d. That an order for retrial and/or dismissal of the ERT Miscellaneous Action No. 06 of 2022 with costs to be awarded to the Appellant;

e. That any other Order that the Court deem fair, just and reasonable.

AND TAKE FURTHER NOTICE that the grounds of this appeal are as follows-

1. That the learned trial magistrate erred in law and in fact by accepting in evidence the Ministry of Employment Productivity and Industrial Relations ME/LSS/1-2-RF3 Arrears of Wages Calculation Form issue date 03/08/20 showing the worker has worked 14 hours a day;

2. That the trial magistrate erred in law and fact in failing to properly consider and/or analyzing and/or evaluating the evidence of the employer;

3. That the trial magistrate erred in law and in fact by accepting the evidence of the worker and not evaluating properly and this resulted in the miscarriage of justice;

4. That the trial magistrate erred in law and in act by accepting all the evidence of the Labour Officer and not evaluating properly and this resulted in the miscarriage of justice;

5. That the trial magistrate erred in law and fact in failing to require the Labour Officer to provide to the Tribunal the Company's Computerized Wages records provide to them;

6. That the trial magistrate erred in law and in fact by stating that the Plaintiff bears the burden of proof in respect of the claim on balance of probabilities and

not evaluating the evidential burden and this resulted in the miscarriage of justice;

7. That the trial magistrate erred in law and in fact in awarding Judgment in the sum of $16, 576.59 in favour of the Plaintiff and costs summarily assessed to be paid to the Ministry of Labour within 14 days from the date of judgment.

8. That such further and/or other additional grounds as the Appellant may give notice of.

SUBMISSIONS BY PARTIES

3. In their oral submissions, Counsel for the Appellant submitted that the Respondent had filed both a charging summons as criminal proceedings as well as a Writ of Summons as a claim against the Appellant. The Summons had a validity date of 12 months and expired on 21 December 2017. The Writ of Summons has claimed a debt owing for unpaid wages amounting to $16, 576 which was awarded to the Respondent. There was no evidence by the Respondent that he had worked for 14 hours. Applied for re-calculation of monies to be paid to worker as there was no evidence.

4. The Counsel for the Respondent argued that they had filed a Writ of Summons in order to obtain relief for remuneration from the Court. The Respondent had forwarded records to the Ministry of Labour which was tendered into court. They however did not tender any pay slip denying that the worker was not an employee. The calculation of salary of the Claimant was based on the workers statement. There was no books to record the amount of hours by the employee.

5. In their written submissions, the copy records show that Appellant was not present during continuation of hearing. The Tribunal was not satisfied with the application for adjournment and proceeded with the matter. The Tribunal thereafter adjourned the matter after hearing the Respondents evidences in order to await the Appellants evidences. The Appellant then called their witness and closed their case.

LAW REGARDING APPEALS IN EMPLOYMENT MATTERS

6. Pursuant to section 220 (1) (a) of the Employment Relations Act empowers the Court –

‘220 (1) The Employment Relations Court has jurisdiction –

(a) To hear and determine appeals conferred upon it under this Promulgation and any other written law.'

7. Section 225 of the Employment Relations Act 2007 stipulates that an Appeal to the Employment Relations Court is as of right from a decision of the first instance of the ERT.

8. An Appellate court will be slow to interfere with the factual findings of an original court unless they are plainly wrong or drew wrong inferences from the facts and the Appellate court need not exercise jurisdiction to interfere with the Tribunal's decision only because it exercised its discretion in another way (see Tuckers Employees and Staff Union -v- Goodman Fielder International (Fiji) Limited ERCA No. 28 of 2018). The Appellate Court will review a decision where from the face of the record the Court finds that the Tribunal has blatantly erred in facts or law and has acted in ultra vires or has failed to consider a pertinent issue raised before the Tribunal.

9. As was said by Pathik J in Fiji Sugar Corporation Ltd -v- Labour Officer [1995] FJHC 27; Hba0004,93b (3 February 1998) when he paid heed to the dicta of Lord Shaw in Clark -v- Edinburgh Tramways Corporation [1919] UKHL 303; (1919) S.C (HL) 35 where it was stated –

> ' … in my opinion, the duty of the appellate Court in these circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantage, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my mind that the Judge with those privileges was plainly wrong then it appears to me to be my duty to defer his judgment.'

ANALYSIS OF THE GROUNDS OF APPEAL

Grounds (1), (2), (3) and (4) of Appeal

10. Grounds (1) (2) (3) and (4) refer to the weight given by the learned tribunal to the evidences pertaining to the number of hours of work claimed by the Respondent in arriving at its decision. These grounds will be dealt together.

11. This stems from the Employment Relations Tribunal impugned decision as follows :

> *"The employer stated in evidence that the wages record for the employees was maintained in the computer system of the company. He did not produce the same to the labour officer when the initial demand was made nor produced the same in Court to assist the Tribunal in verifying the claim amount. The Tribunal found the witness*

for the employer to be evasive and denied all responsibility about providing the records and other information to the Ministry of Labour.

The Tribunal also finds that there is a bare denial of the claim by the employer. The Plaintiffs witnesses were not shaken in cross-examination."

12. The Learned Tribunal, from her judgment, considered the weight given from the evidences before the Court. The Wage slip tendered into court showed that the Respondent was paid up until 27 April 2020 at a sum of $134.00 net wages at a rate of 2.68 hours for a pay of $697.00 at the normal hours of 50.

13. The Court records show that the learned tribunal confirmed that the Respondent was an employee based on his evidences via the pay slips tendered into court. The Court finds that the Tribunal had correctly arrived at this decision.

14. The evidence of the complaint form and the calculation by the Ministry of Labour was tendered into Court and was not contradicted to or objected to by Counsel. This was because Counsel for the Appellant failed to appear and sort, by instruction for an adjournment due to a family death which was refused.

15. There is a discretion to an adjudicator, on an application for adjournment, to weigh out the parties rights to have the matter heard within a reasonable time. In this instance, the matter was adjourned part-heard to allow the Respondent's second witness, the labour officer, to be present.

16. In Goldenwest Enterprises Ltd -v- Pautogo[2008] FJCA 8; ABU0038;2005 (3 March 2008) Byrne JA and Scutt J.A held that :

"37. Generally, this is the principle covering courts' discretion to adjourn or not to adjourn. If refusal to grant an adjournment amounts to a denial of a fair hearing and hence denial of natural justice or procedural fairness, or where a refusal to adjourn would cause definite and irreparable harm to the party seeking it, an adjournment should be granted. If it is not, an appeal court has power – and one might say a duty – to redress the wrong by allowing an appeal against the denial of the adjournment : Gasparetto v. Sault Ste-Marie [1973] 2 OR 847 (Div. Ct); see also Jim Patrick v. United Stone (1960) 21 DLR (2d) 189 (Sask. CA)

38. An objecting party is compensated by costs – unless the adjournment would cause irreparable damage to it. Then a court must weigh up the competing interests

and consequences ruling according to the fairness and justice of the particular case."

17. In Order XXX Rule (3) of the Magistrates Court Rules provides –

> **"Of defendant**
>
> 3. If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of the summons proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant."

18. The requirement under the Magistrate Court Rules requires the Counsel to show sufficient excuse of absence.

19. In this instance the learned Tribunal was not satisfied with the excuse of absence. The evidence of the labour officer was crucial to establish the calculation of the wage slip which was the crux of the claim. If she had granted an adjournment, the Respondent was in a position to provide veracity as to the evidence tendered by the labour officer.

20. However although the Counsel had not appeared to cross-examine as to the veracity of the evidence by the labour office, he was also not able to provide any contradictory evidence that rebutted calculation of the wage statement tendered by the Respondents.

21. The Court therefore finds that there was no irreparable damage to the evidences of the Appellant when they failed to appear and cross-examine the labour officers tendered wage statement and her evidence as well.

22. In having done so, I find that the Tribunal was correct to give weight, as it had, to the evidence before it on a balance of probabilities to arrive at the conclusion that it did.

Grounds (5), (6), (7) and (8) of Appeal

23. From these grounds, the Court finds relevant grounds in (5) and (6) and will analyze thereof.

24. The Court considered the grounds in light of the Court records. The records show that no tabulated computerized wage system was tendered by the Defendant to rebut the wage calculation statement by the labour officer.

25. The Court finds that the learned tribunal's analysis was correct. The claim filed is on the proof of balance of probabilities. The Claimant has already proven their claim for the sum provided.

26. As the Appellant, the onus was on the Defendant to disprove this by providing contradictory evidence.

27. The contradictory evidence was the testimony of the officer of the Appellant. However no documentation was given to court as secondary evidence to validate their testimony.

28. The claim is not for failing to provide proper computerized wage system to the Ministry of Labour. The claim is for failing to pay for the calculated debt of wages. The onus was therefore on the Appellant to disprove this by providing their evidence of their wage computerized system.

29. The Appellants failure to provide any form of such evidence, which the Ministry of Labour has also confirmed was not shown to them, gave rise to the correct analysis and final conclusion by the learned tribunal.

30. The Court therefore determines that the learned tribunal was correct in arriving at her findings and that the grounds of appeal have not been made out.

Costs

31. Costs will be granted to the Respondents for the sum of $400 for costs of this hearing.

Orders:

32. The Court orders as follows:

(i) That the Grounds of Appeal is hereby dismissed;
(ii) The Tribunal decision is upheld;
(iii) Costs awarded to the Respondent to the sum of $400.

Mrs Senileba LWTT Levaci
Acting Puisne Judge
High Court – Suva, 12 December, 2023