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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL N0. ABU0040 OF 2005
(High Court Civil Appeal N0. HBJ31 of 2002)

BETWEEN:

AIRPORT FIJI LIMITED

APPELLANT

A N D:

PERMANENT SECRETARY FOR LABOUR,
INDUSTRIAL RELATIONS AND PRODUCTIVITY,
ARBITRATION TRIBUNAL
THE FIJI PUBLIC SERVICE ASSOCIATION

RESPONDENTS

K. Qoro for applicant
L. Daunivalu for first and second respondents
H. Nagin for third respondent

Hearing: 21 February 2006

Ruling: 24 February 2006

RULING

This is an application for an order that time to appeal a decision of Jitoko J made on 18 April 2005 be extended. The applicant had sought judicial review of three separate decisions of the Permanent Secretary and the Minister of Labour, Industrial Relations and Productivity and of the Permanent Arbitrator respectively. The orders were refused by the learned judge.

Ashok Nath, the Manager, Human Resources and Administration of the applicant explained in his affidavit:

> "5. I did cause our solicitors to appeal [the] order which they did within the required time. *(It was filed on 22 June 2005)*
>
> 6. Unfortunately, the clerk who was assigned the task of ensuring that the steps in the appeal are complied with misunderstood the order for security for costs made on 21 July 2005.
>
> 7. I was informed by ... the new litigation clerk ... that he thought that according to the Order the respondents were to pay the security for costs. Having that in mind, he wrote to the Court of Appeal registry on 17 August and 2 September 2005 requesting for a judge's notes."

The summons for security for costs was heard by the Deputy Registrar on 21 July 2005 and he ordered, "security for costs to be fixed at $1,000.00 for each respondent to be paid within 28 days" followed by orders regarding the filing of the record. The formal Order was filed by the applicant's solicitors on 29 July and signed by the Deputy Registrar on 1 August 2005.

As a result of the clerk's error, the security was not paid and the appeal was deemed to be abandoned under rule 17(2) on 19 August 2005. Under that rule, the applicant had 42 days in which to lodge a fresh notice of appeal but that was not done. Hence this application filed on 3 November 2005.

It is clear that the failure was the result of the solicitor's default and, as such, should have been discovered in time to correct it. Such duties are commonly assigned to a clerk but his principal remains responsible. The record shows that Mr Vuataki was present at the hearing before the Deputy Registrar and should have checked the payment was made.

On the other hand, it is clear that the clerk wrote to the registry one day before the appeal was deemed to have been abandoned asking for the judge's notes. He repeated the

request in a further letter dated 2 September 2005. The registry replied on 8 September 2005 making no mention of the abandonment and explaining the notes were being transcribed. On 27 September 2005, a further letter from the registry advised the notes were ready for collection upon payment of $36.00 and that sum was paid on 28 September 2005.

It was not until 12 October 2005 that the registry wrote to the solicitors advising them that the appeal had been deemed abandoned on 19 August 2005.

I accept that the correspondence may have lulled the applicant's solicitors into a false sense of security but that does not absolve them of full responsibility for the proper conduct of the action.

Counsel for the respondents, and in particular Mr Nagin, suggest that such a mistake is not credible. It is simply another example of the manner in which the applicant has been able to delay implementing the award in this case.

That the case as a whole has been delayed cannot be challenged. The original decision of the Permanent Secretary was his acceptance, on 24 October 2001, of a trade dispute reported by the third respondent on 24 August 2001in relation to a log of claims in respect of COLA for 2000. However, I am only dealing with any delays which arise from the applicant's actions since the decision of Jitoko J on 18 April 2005.

Mr Nagin has produced correspondence which shows that, despite letters from his firm to the solicitors for the applicant, there was a repeated failure properly to serve the respondents and the knowledge of the hearing of this motion was only discovered by a fortunate coincidence on the day fixed for the hearing before me.

In an application for leave to appeal out of time, the court must consider the length of the delay and the reasons for it.

As I have stated, the delay I am considering is the delay since the decision from which it is sought to appeal. In real terms, it is the delay from the deemed abandonment caused

by the failure to pay security and subsequently to file fresh notice of appeal. Against the history of the action as a whole, I consider that was a significant delay although the manner in which the correspondence was conducted by the registry must have contributed.

The court must also consider the likelihood of success in the appeal. The main thrust of the appeal is a challenge to the decision of the learned judge that recognition of the Union by the applicant could be clearly inferred from the conduct of the parties. The applicant suggests that the procedures under the Trade Unions (Recognition) Act only allow voluntary or compulsory recognition.

The learned judge relied heavily on the decision of this Court in the case of *Fiji Public Service Association v Arbitration Tribunal and Airports Fiji Ltd* ABU 10 of 2003 delivered on 19 March 2004. The judge accepted that the earlier appeal was not on all fours with the case he was considering but he considered that it was good authority for the decision he reached. I accept that the applicants have an arguable case and should not, on that ground alone, be denied the opportunity to present it to the Court.

However, the remaining considerations point the other way.

This appeal is most recent step in an action which has followed a very leisurely progress through the courts. I have no reason to blame the applicants for the slow progress up to this stage but the fact remains that it is now important for the members of the respondent union to have the matter resolved. At this stage any delay is likely to have an exaggerated prejudicial effect on respondent. In the light of that, the delay by the applicant over the last few months becomes more serious and does, I am satisfied, seriously prejudice the applicant and its members.

Finally the Court has an over-riding discretion to extend the time to appeal if the applicant satisfies it that "in all the circumstances the justice of the case requires that [the applicant] be given an opportunity to attack the judgment from which [it] wishes to appeal"; per Richmond J in *Avery v No 2 Public Service Appeal Board and ors*, [1973] 2 NZLR 86.

Counsel for the applicant challenges the result of appeal no. 10 of 2004 yet it did not seek to appeal it to the Supreme Court. It now suggests the matter could be considered afresh by this Court in the circumstances of this case. I do not consider there is a reasonable chance of success in such an appeal.

I am satisfied that the interests of justice require me to refuse the application to extend time to appeal. The respondents are entitled to finality. The applicant had an opportunity to appeal and, having failed to pursue it properly, then failed to lodge a fresh appeal in time. Nothing in this application persuades me that it is in the interests of justice to allow any further delay.

The application is refused with costs of $400.00 to each respondent.

FIJI COURT OF APPEAL

[GORDON WARD]
President
FIJI COURT OF APPEAL

24TH FEBRUARY, 2006