

IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL



Decision

Section 13 *Workmen's Compensation Act*

Title of Matter:	LABOUR OFFICER	(Applicant)
	v	
	NIRMALA HOLDINGS TRADING	
	AS OCEANVIEW HOTEL	(Respondent)
Section:	Section 13 Workmen's Compensation Act	
Subject:	Application to Strike Out Proceedings Commenced Out of Time	
Matter Number(s):	ERT WC 116 of 2016	
Appearances:	Mr R Naidu for the Applicant Respondent Ms R Kadavu for the Labour Officer as Respondent Applicant	
Dates of Hearing:	2 December 2016	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	2 December 2016	

KEYWORDS: Notice of Motion to Strike out Proceedings; Section 13 Workmen's Compensation Act (Cap 94); Claim for Compensation; Recovery of Compensation for Injury; Application for Determination.

CASES CITED:

Carpenters Steel Company Limited v The Labour Officer for and on behalf of the Dependents of Isikeli Kubu deceased. Civil Appeal HBA No 9 of 2003 (24 February 2012).

Lautoka General Transport Company Limited v The Labour Officer for and on behalf of Jo Isoa aka Jo Kaiboca. Civil Appeal No HBA 0018.19981. (6 October 2000).

Sharma v Secretary for Labour [1975] FjLaw Rp26; [1975] 21FLR190 (26 November 1975).

Background

1. This is an interlocutory application made by the Respondent Employer, Nirmla Holdings. The Notice of Motion and supporting Affidavit, calls for the 'striking out' of an application made by the Labour Officer on behalf of the dependants of the deceased workman (Potivera Sebu), seeking compensation where death has resulted from the injury to the workman. By way of background, the liability for an employer to meet the compensation payments of a worker who dies as a result of suffering from an accident arising out of his or her employment, is provided for within Section 6 of the *Workmen's Compensation Act* (Cap 94). The basis of the Notice of Motion that has been brought by the Employer, is that the Labour Officer has failed to commence proceedings for the recovery of compensation,¹ within what it says is the 12 month time window provided for within Section 13 of the Act. Relevantly that Section provides inter alia:

Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given by or on behalf of the workman as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within twelve months from the occurrence of the accident causing the injury or, in the case of death, within twelve months from the time of death:

2. In considering the submissions of the parties, the Tribunal has had regard to the following materials:-
 - Notice of Motion filed by Applicant Respondent on 16 October 2016;
 - Affidavit in Support of Moala Tamani, dated 6 October 2016;
 - Submissions of Respondent (Employer) dated 14 October 2016;
 - Applicant (Labour Officer's) Legal Submission filed 25 October 2016;
 - Affidavit in Opposition by Vani Doge dated 28 October 2016;
 - Supplementary Submissions of Respondent (Employer) dated 2 December 2016; and
 - Affidavit in Reply of Moala Tamani dated 2 December 2016.

The Case of the Employer

3. The deceased worker was a former Security Officer at the Ocean View Hotel in Suva. He had worked in that capacity with the Employer for 11 years.² According to the Notice of Accident submitted by the Employer to the Permanent Secretary for Labour on 10 March 2014,³ the worker had collapsed at the workplace while working on 2 March 2014. It

¹ It is noted throughout the submission material that the Applicant Respondent refers to the proceedings for recovery as the 'claim for compensation'. In the Affidavit in Support of Moala Tamani dated 6 October 2016, he refers to the "application/claim for compensation" as being out of time. As is canvassed later, these two concepts 'recovery of compensation' and 'claim for compensation' are markedly different and are not interchangeable.

² See Folio 5 of the Applicant's Disclosures filed on 30 September 2016.

³ See LD Form/C/.

appears from the materials, that he was shortly afterwards pronounced dead by doctors at the Colonial War Memorial Hospital, Suva. As the present matter before the Tribunal is one relating to the status of the substantive application only, it is not relevant at this time to provide any further information pertaining to the nature of the employment that the worker had been engaged in, nor the events that are alleged to having given rise to his demise. What is at issue however, is whether or not the present application that has been made by the Labour Officer, on behalf of the deceased worker's dependants with respect to compensation claimed, has been done so within the legal time requirements set out within the *Workers Compensation Act* (Cap 94).

4. In response to the assertion that the application has been made 'out of time', the Labour Officer has referred the Tribunal to the category of proviso cases available under Section 13 of the Act, where it is stated:

Provided that-

(a) the want of, or any defect or inaccuracy in, such notice shall not be a bar to the maintenance of such proceedings if it is proved that the employer had personal knowledge of the accident or had been given notice of the accident from any other source at or about the time of the accident, or if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect or inaccuracy, or that such want, defect or inaccuracy was occasioned by mistake or other reasonable cause;

(b) the failure to make a claim for compensation within the period above specified shall not be a bar to the maintenance of such proceedings if it is proved that-

(i) the failure was occasioned by mistake or other good cause; or

(ii) the employer failed to comply with the provisions of subsection (1) or (2) of section 14,

so, however, that no proceedings for the recovery of compensation shall be maintainable unless the claim for compensation is made within a period of six years from the date of the accident.

The Labour Officer relies on Section 13(b) (i) of the Act, so as to claim that there was good cause justifying such a delay. Those reasons are contained within the *Affidavit in Opposition by Vani Doge dated 28 October 2016* and are essentially attributed to difficulties that were experienced by the Labour Officer in gathering relevant information as part of the investigation and what is claimed was the lack of assistance provided to it from the Employer during that process. Ms Kadavu for the Labour Officer, submits that the prevailing principles articulated within *Sharma v Secretary for Labour*⁴ should apply, insofar as a favourable interpretation of the discretion giving rise to an extension of time is justified and consistent with the beneficial nature of the legislation. Unsurprisingly, that Affidavit material has been

⁴ [1975] FJLawRP26; [1975]21 FLR 190 (26 November 1975)

refuted in reply by the Employer⁵ and for reasons that will become apparent shortly, the Tribunal makes no findings in relation to those competing versions of events. Suffice to say, Mr Naidu on behalf of the Employer, has provided two authorities in *Lautoka General Transport Company Limited v The Labour Officer for and on behalf of Jo Isoa aka Jo Kaiboca*⁶ and *Carpenters Steel Company Limited v The Labour Officer for and on behalf of the Dependants of Isikeli Kubu deceased*⁷, in support of a strict interpretation giving rise to the available statutory timeline.

Analysis of the Issues: The Statutory Framework for Making Applications for Compensation in Case of Death

5. To assess whether or not the substantive application before the Tribunal is compliant for the procedural purposes of the Act, one must pay attention to both the Act and its supporting sub-ordinate legislation. To commence that inquiry, needs an appreciation of how claims for compensation are initiated and prosecuted. From a procedural starting point, Section 42(1) (a) of the *Workmen's Compensation Act* (Cap 94) is a good place to begin, where it provides inter alia, that

The Minister may make regulations for the purpose of giving better effect to the purposes and provisions of this Act, and without prejudice to the generality of the foregoing power may make regulations- prescribing procedure, forms and fees;

6. Relevantly, those Regulations were issued by the Minister on 31 August 1964 and 7 December 1964, in the form of the *Workmen's Compensation Regulations 1964* and the *Workmen's Compensation (Rules of Court) Regulations 1964*. Insofar as the *Workmen's Compensation Regulations 1964* is concerned, Regulation 4 is entitled 'Claim for Compensation' and provides:

Where a workman has suffered an accident as a result whereof he has been injured or has died and thereby he or his dependants becomes or become entitled to claim compensation under the provisions of the Act, he or his dependants (as the case may be), or some person on his or their behalf, shall make any such claim in accordance with the form set out in the Third Schedule.

7. An extract of that form as it appears within the Third Schedule to the Regulation, is reproduced as follows:

⁵ See *Affidavit in Reply of Moala Tamani dated 2 December 2016*.

⁶ Decision of Madraiwiwi J; Civil Appeal No HBA 0018.19981. (6 October 2000)

⁷ Decision of Calinchini J; Civil Appeal HBA No 9 of 2003 (24 February 2012)

NOTICE OF CLAIM BY OR ON BEHALF OF A WORKMAN

To

Address

NOTICE IS HEREBY GIVEN that (2)
of.....on the() day of.....,19....
at(*)..... met with an accident
causing his injury/death and that the
cause of the injury/death was (.....).

AND NOTICE IS ALSO GIVEN that in consequence thereof compensation is claimed from you under the Workmen's Compensation Act.

Dated this day of 19....

.....

Insert at-

- (1) Name and address of employer.
- (2) Full name, address and identity particulars of workman.
- (3) Date of accident.
- (4) Place of accident.
- (5) Whether disablement or death.
- (6) State in plain and ordinary terms the cause of the injury or death.
- (7) Signature and address of person giving notice.

8. Within Paragraph 6 of the *Affidavit in Support of Moala Tamani, dated 6 October 2016*, the deponent states that on 10 April 2014, the Labour Officer served the Notice of Claim on the Respondent. The Tribunal notes at Folio 4 of the *Applicant's Disclosure* documents filed on 30 September 2016, that the Notice of Claim is in the exact form as required by the Regulation. It is also noted within the Answer filed by the Respondent on 30 September 2016, that the Employer admits that the deceased worker Potivera Sebua, died on 2 March 2014. Despite that admission and that the claim for compensation has been made within approximately five weeks from the date of death, the Employer alleges within its submissions, that the “application/claim for compensation...is statute barred under the provisions of Section 13 of the Workmen’s Compensation Act”⁸. Within the Submissions of the Respondent it is stated that:

*The Applicant filed these proceedings for compensation on or after 26 August 2016. The application is dated 11 August 2016.*⁹

⁸ See Paragraphs 6 and 7 of the *Affidavit in Support of Moala Tamani* dated 6 October 2016.

⁹ See Paragraph 5.0 of that Submission dated 14 October 2016.

9. The Labour Officer on the other hand states that the application for the said claim was filed on 11 August 2016.¹⁰

Distinction between Claim for Compensation and Application for Enforcement of Compensation

10. An issue that neither party seem to have been mindful of in their submissions and positions adopted in proceedings, is the distinction between a '*Claim for Compensation*', as opposed to an '*Application for Enforcement of Compensation*' with respect to the compensation payable. To understand this distinction further requires a brief deconstruction of the statute. The *Claim for Compensation* is a creature of Part II of the Principal Act. Its basis and source of authority arises out of Section 6 of the Act. (Compensation in Fatal Cases). The method of calculating the statutory entitlement is set out at Section 10 (Method of Calculating Earnings). Who are to be the beneficiaries of the claim and how it is to be distributed, is provided for at Sections 11 and 12 respectively and the requirements as to the application for compensation contained within Section 13 (*Requirements as to notice of accident and application for compensation*).
11. Put simply, in this regard the legislation provides for two key steps. The first, is the *Claim for Compensation* that is initiated as per the form provided for at Schedule III to the *Workmen's Compensation Regulations 1964*.¹¹ The second aspect that gives rise to the actual pursuit of the compensation amount, comes about by an *Application for Enforcement of Compensation*.¹² That is, this application commences where an Employer does not wish to agree to the *Claim for Compensation* in a manner consistent with Section 16 of the Act (Agreement as to compensation). The trigger for commencing proceedings for the *Enforcement of Compensation*, is Section 17 of the Act (Determination of claims) that provides:

(1) Subject to the provisions of section 13, if an employer to whom notice of the accident has been given under the provisions of that section does not-

(a) within twenty-one days after the receipt of the notice agree in writing with the workman as to the amount of compensation to be paid in respect of temporary incapacity; or

(b) within twenty-one days after the receipt of a claim from the workman for the payment of compensation in respect of permanent incapacity, agree in writing with the workman as to the amount of such compensation; or

(c) within twenty-one days after the receipt of a claim on behalf of a dependant of a deceased workman for payment of compensation in respect of death, agree in writing with the claimant as to the amount of such compensation,

¹⁰ Whether that date is 11 August 2016 or 26 August 2016, is not that germane to this analysis as will shortly be made clear.

¹¹ This according to the Employer was provided on 10 April 2014 that is five weeks after the death of the Worker on 2 March 2014.

¹² See Section 17 of the Act (Determination of claims)

the workman may, in the prescribed form and manner, make an application for enforcing his claim to compensation to the court having jurisdiction in the Division in which the accident giving rise to the claim occurred.

(2) All claims for compensation under the provisions of this Act, unless determined by agreement, and any matter arising out of proceedings thereunder shall be determined by the court whatever may be the amount involved and the court may, for that purpose, call upon any person to give evidence, if the court is of opinion that such person is, by virtue of his expert knowledge, able to assist the court.

12. Regulation 3 of the *Workmen's Compensation (Rules of Court) Regulations 1964* prescribes at Schedule 1, the relevant 'Form 2' to be used for the enforcement of such a claim consistent with Section 17(1) (c) of the Act.¹³ That form is entitled '*Application on behalf of Dependants of Deceased Workman, with respect to the compensation payable to such dependants where death has resulted from the injury to the workman*' and is to be used when commencing proceedings in accordance with Regulation 11 of those *Rules of Court Regulations*. In the present proceedings, a Form 2 application of that type was signed by the Labour Officer on 11 August 2016. It is that application that gave rise to the issuing of the *Notice to Respondent as to Application* (Form No 4), that alerted the Employer to the proceedings before this Tribunal on 26 August 2016. And it is that application that is the subject of challenge, on the basis it is claimed to have been made out of time.¹⁴

Deconstruction of Section 13 of the Act

13. With those above distinctions drawn between the '*claim for compensation*' as opposed to an '*application for enforcement of compensation*', it is worthwhile revisiting the language of Section 13 of the Act, that is the focus of this present 'strike out' application. For the sake of convenience, the provision has been reproduced a further time where it states inter alia:

Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given by or on behalf of the workman as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within twelve months from the occurrence of the accident causing the injury or, in the case of death, within twelve months from the time of death:

14. In the present case, the '*claim for compensation*' has been made by the Labour Officer within 12 months from the time of the death. The claim for compensation has been made in accordance with Regulation 4 of the *Workmen's Compensation Regulations 1964*. By the Employer's own admissions, the worker in this case passed away on 2 March 2014 and the claim for compensation was received on 10 April 2014. That is five weeks later.

¹³ That is, in the case where the claim for compensation has been made on behalf of dependants and it has not been satisfied by the Employer within 21 days.

¹⁴ That is, despite the fact that on occasion the parties in dispute have been referring to the claim for compensation as being the issue at challenge.

15. Having regard to the language within Section 13 of the Act, that claim for compensation complies with the 12 month non-exceptional circumstances window. The claim for compensation cannot therefore be regarded as out of time. The provisos to Section 13 have no work to do, in the case where a valid claim for compensation is made within time. The trigger for the 'recovery of compensation' comes about, where the Employer is not prepared to submit to the compensation claim within the 21 day time period set out within Section 17 of the Act. In the present case, the Employer Nirmala Holdings has not submitted to the claim.

16. For the sake of completeness and consistent with Calinchini J's decision in *Carpenters Steel*, the final proviso at Section 13 of the Act, states:

no proceedings for the recovery of compensation shall be maintainable unless the claim for compensation is made within a period of six years from the date of the accident.

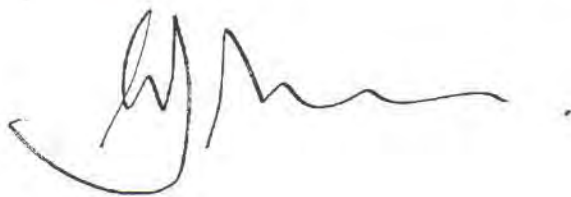
17. This limitation on the commencement of recovery proceedings is of relevance, only in circumstances where a claim for compensation has not been made within the six year period. That is, regardless of whether or not there had been a mistake or good cause¹⁵ or a failure of the Employer to provide notice of death in accordance with Section 14 of the Act.¹⁶ Such a limitation would appear to be consistent with that more broadly found within Section 4(1)(d) of the *Limitations Act* (Cap 35). In any event, the limitation found in Section 13 of the *Workmen's Compensation Act* has no bearing on the proceedings initiated by the Labour Officer in circumstances where the Claim for Compensation was made within 12 months and the action for recovery of compensation commenced within the six year time frame available.

18. For the above reasons, the Notice of Motion of the Applicant Respondent must therefore fail.

19. The matter will be relisted before the Tribunal in Suva at a date to be advised.

Decision

The Notice of Motion to strike out the application for recovery of compensation is dismissed.



Mr Andrew J See
Resident Magistrate

¹⁵ See Section 13(b)(i) of the Act.

¹⁶ See Section 13(b)(ii) of the Act.