IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 3 of 2013**
BETWEEN:	**SHERATON FIJI**
	APPELLANT
AND:	**ETUATE NAQAI**
	RESPONDENT
Appearances:	*Mr. V. Prasad for the Appellant.*
	Mr. A. Pal for the Respondent.
Date/Place of Judgment:	*Friday 28 August 2015 at Suva.*
Coram:	*Hon. Madam Justice A. Wati.*

JUDGMENT

Catchwords:

Employment Law – Appeal – time period for serving appeal – incomplete records of hearing notes – procedure to be adduced at hearing of the appeal where it is alleged that the hearing notes of the presiding officer is defective or erroneous.

Legislation:

1. ***The Employment Relations Promulgation 2007 ("ERP"): ss. 238 (2); 242(2).***
2. ***The High Court Rules 1988 ("HCR"): Order 55 Rule 4 (2); Order 55 Rule 7 (4).***

The Background

1. The employee filed an employment grievance that he was unfairly dismissed by the employer on 25 June 2009.

2. The matter was heard on 28 July 2010 and a judgment was delivered some 2 ½ years after, that is, on 16 January 2013.

3. The Employment Relations Tribunal ***("ERT")*** held that Mr. Naqai was unfairly terminated and awarded remedies of one year's lost wages.

4. The employer appealed on the grounds that the ERT erred in law and in fact in:

    1. ***holding that the employee was unfairly terminated.***

    2. ***awarding compensation to the employee of one year's lost wages.***

    3. ***failing to take into account the mitigating factors and income which the employee would have earned during the period between his termination and the delivery of the decision and/or the said award is excessive.***

    4. ***failing to properly evaluate the evidence and give weight to the evidence adduced by the employer leading to the termination of the employee.***

    5. ***failing to hold that the employer had taken all reasonable steps and according the employee a fair and due process before terminating him.***

    6. ***giving undue weight to the evidence of the employee.***

    7. ***not giving consideration or weight to the employee's past employment record and breaches of employment contract.***

5. In order for the appeal to be prosecuted I had ordered the ERT registry to compile the records of the ERT. This is the normal practice in all appeal cases. A record needs to be furnished to the appellate court and the counsel for the parties at the appeal proceedings.

6. The records were compiled and the hearing notes were produced in two pages, the notes being typed.

7. The notes in the form it is being produced is not comprehensive, complete, or adequate. The judgment contains the expanded version of the evidence containing 7 paragraphs.

8. The counsel for the appellant indicated that the notes are not complete and that they would be prejudiced in that they are not able to prosecute the appeal. I then indicated to both the counsel that they could produce to Court the hearing notes that they have recorded and kept. The indication was that there were not any notes that the counsel had kept.

9. The appellant's counsel informed the Court that the hearing notes are defective and on that basis the matter was set for hearing to determine what should be the next course of action in a situation of this kind.

10. The matter that was therefore argued was whether the incomplete records is a hindrance to prosecuting the appeal.

The Submissions

11. Mr. Prasad argued that the matter was heard on 28 July 2010. The decision was delivered on 16 January 2013. The time to deliver the decision took 2 years 6 months. The ERT would have had to rely on the hearing notes for the determination of the cause. The hearing notes are deficient and incomprehensible.

12. The evidence which was given at the hearing was not properly recorded. The hearing notes do not record the questions that were asked to the witnesses and only records the answers in a sporadic manner. Without the questions, the answers are incomprehensible.

13. At the ERT, in its closing submissions, the employer had submitted that during the trial, the employee was asked to read the date of the receipt number 1424. The submissions also indicate that the employer addressed the evidence in relation to which the employee was asked various questions. However the haring notes only records "*check receipt*" and it does not record the

questions the employer asked in relation to the receipt and the evidence of the employee thereon.

14. Mr. Prasad submitted that one of the grounds of appeal is that the ERT failed to give proper weight to the evidence of the parties. Since all the evidence was not recorded and analysed, it is severely prejudiced in prosecuting the appeal.

15. It was submitted that the primary role of the appellate court is to review the decision made by the trial court rather than to decide on the issues of first instance. The appellate court may only consider the pleadings, evidence, objections and all matters raised before the trial court as contained in the trial court record.

16. The hearing note is the most fundamental part of the records and the record is meaningless if the hearing notes/transcript is ambiguous and unclear.

17. The doubt is whether the ERT was able to consider the evidence properly when it gave the decision after two and a half years.

18. The fairness of the matter requires that a re-trial be ordered as the appeal cannot be prosecuted.

19. The counsel for the respondent cited the HCR and Court of Appeal Rules and submitted that if the records are incomplete it is for the appellant to give evidence or statement or note of what transpired at the hearing which can be used in determining the appeal. The appellant has not indicated by any evidence, note or statement of what evidence is missing from the records and therefore it cannot make a request for a re-trial. Counsel for the appellant relied on Order 55 Rule 7(4) of the HCR.

20. It was also raised by the respondent that the notice of appeal is defective as it was not served within 28 days as required by Order 55 rule 4(2) of the HCR.

21. In reply, Mr. Prasad argued that the filing and serving of an appeal is provided for by s. 242(2) of the ERP and since there is a specific provision that prescribes for filing of an appeal, Order 55 Rule 4(2) of the HCR will not apply. Order 55 Rule 1(3) itself indicates that the rule is subject to any provision made specifically in relation to appeals under any enactment.

22. Mr. Prasad further argued that the Court had given them an opportunity to find out whether the parties had kept any hearing notes which could be used in addition to the presiding officer's notes and that they had advised the Court that they did not have any such notes. It was only after exhausting that procedure that the court gave the appellant an opportunity to argue what should be done regarding the incomplete record, whether the matter should be sent back for re-trial or not.

The Law and Analysis

23. I will first of all deal with the objection taken up during the hearing that the appeal is defective for it was not served within 28 days of the date of the decision. The submission was made pursuant to Order 55 Rule 4(2) of the HCR.

24. Order 55 Rule 4(2) is not applicable in this instance as there is a specific provision in the ERP which deals with the filing of the appeal. The provision is s. 242(2) which only stipulates the time frame for filing of the appeal and not service of the same. If there is not any strict provision for service within 28 days, it would mean that service must be conducted within a reasonable period upon filing the appeal.

25. The appeal was served on the 29th day and I do not find that the service was delayed or served at a time to cause substantial prejudice to the respondent. When the matter was first called in Court, the respondent was represented and did not take any objections to the service.

26. I therefore find that the service was within a reasonable period and proper on the respondent.

27. On the main issue, the ERP does not provide for the procedure to be followed where there is incomplete record such as in this case. In absence on any such procedure, I have to resort to the HCR and find whether there is a provision on this aspect.

28. The Court of Appeal Rules are not applicable as it applies to appeals from High Court. This is an appeal to the High Court and so the HCR will apply: ***s. 238(2) (b) of the ERP.***

29. Order 55 of the HCR provides for procedure on appeals to High Court from court, tribunal or general person. This is an appeal from the Tribunal so Order 55 is applicable.

30. Order 55 Rule 7 (4) addresses the issue of incomplete records. It reads:

" It shall be the duty of the appellate to apply to the judge or other person presiding at the proceedings in which the decision appealed against was given for a signed copy of any note made by him of the proceedings and to furnish that copy for the use of the Court; and in default of production of such a note, or, if such note is incomplete, in addition to such note the Court may hear and determine the appeal on any other evidence or statement of what occurred in those proceedings as appears to the Court to be sufficient.

Except where the Court otherwise directs, an affidavit or note by a person present at the proceedings shall not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments".

31. I note that although the evidence is recorded in a short form, the judgment to a large extent identifies what was said during the trial by each witness. If the appellant still contends that the judgment and hearing notes do not adequately identify the evidence, then under the above provision of the law, the appellant is to provide to the Court an affidavit evidence of what transpired at the hearing and is missing or not completely recorded.

32. I note that that cannot be done as none of the counsel has the hearing notes. If any one of them had records of the evidence, I would have given orders to the effect that the same be compiled in an affidavit for it to be commented on by the presiding officer after which I could give directions on whether the affidavit evidence could be used at the appeal hearing.

33. As it is, the only record available before me is the notes kept by the ERT and the judgment which contains the evidence. There is nothing before me, than the submissions of the appellant counsel to say that there was more than what is recorded or what is recorded is not correct, defective or erroneous.

34. At this stage I have to rely on the records available before me. However I will not prejudice the position of the appellant and give him an opportunity to compile his notes of evidence and present to the Court.

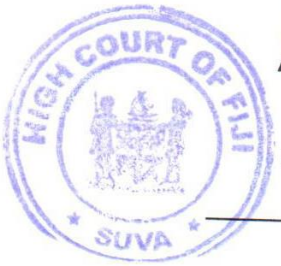
35. The request to send the matter back for re-trial on incomplete notes is not supported by law and as such I refuse the application.

Final Orders

36. In the final analysis, I refuse to order the matter to be sent back for re-trial on incomplete records but order that the appellant provides an affidavit indicating what should be the proper records of the hearing notes.

37. I assign the appellant 21 days to file such an affidavit after which I shall be obtaining the comments of the presiding officer and thereafter give further directions.

38. If the appellant does not wish to proceed with the above directions then the appeal should be listed for hearing as soon as possible upon consultation with the parties.



Anjala Wati

Judge

28.08.2015

To:

1. *Mr. V. Prasad for the Appellant.*
2. *Mr. A. Pal for the Respondent.*
3. *File: Suva ERCA 3 of 2013.*