IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	ERCA 6 of 2013
BETWEEN:	DAYALS SAWMILLERS LIMITED APPELLANT
AND:	SALIMONI NACELE RESPONDENT
Appearances:	*Ms. D. Gandhi for the Appellant.* *Mr. N. Chand for the Respondent.*
Date/Place of Judgment:	*Wednesday 26 October 2016 at Suva.*
Coram:	*Hon. Madam Justice A. Wati.*

RULING

Catchwords:

Employment Law – Employment cause heard on an undefended basis as the employer chose not to take part in the proceedings- The decision of the ERT is not appealed within time - Leave to appeal out of time filed – Appellant wants the Court to consider evidence which was not before the Court – the appellant ought to have then made an application for setting aside of the judgment in the ERT- factors to consider an application for extension of time to appeal: *Length and reasons for the delay; chances of appeal succeeding; prejudice to the respondent if leave is granted-* ***a party cannot escape responsibility for filing a timely appeal if he does not follow up with his counsel on the progress of the appeal-An appellate court will not disturb a finding of fact if it was open to the lower Court on the evidence before it to make such findings of fact- delay in having the course heard and to file timely appeal is depriving the employee of the fruits of the judgment thus prejudice to him which must be considered together with all other factors.***

Legislation:

1. ***The Employment Relations Promulgation 2007 ("ERP"): ss. 234 (1) (a); 242(2).***
2. ***Magistrates' Courts Rules Cap.14 ("MCR"): Order XXIX Rule 5.***

Cases:

1. ***Gatti v. Shoosmith [1939] 3 All ER 916.***

Application

1. The appellant seeks an extension of time to appeal the decision of the Employment Relations Tribunal ***("ERT")*** of 9 January 2013. S. 242(2) of the ERP requires that an appeal be filed within 28 days from the date of the decision of the Tribunal.

2. S. 234 (1) (a) of the ERP empowers the Court to hear and determine an application for extension of time to appeal.

Background and Findings of the ERT

3. Salimoni Nacele was in the employ of the appellant from 1992 to 22 November 2010.

4. On 22 November 2010, he was temporarily laid off by a memorandum addressed to the employee. The contents of the memorandum are pertinent to repeat:

"This is to confirm that you are hereby LAID-OFF on the following terms with effect from today:

1.	*Period of Lay Off:*	*Temporary*
2.	*Date to be Recalled:*	*To be advised (in March, 2011)*
3.	*Reasons for Lay Off:*	*Closure of One shift due to Rain resulting in very low supply of raw materials (an Act of God). We cannot replace you with any other employee.*
4.	*Other Remarks:*	*This is not termination of your employment.*

5. *Please ensure that when we recall you to work you must present yourself to work immediately, otherwise we would deem your employment had been abandoned by you".*

5. The matter was heard undefended as the employer did not participate in the hearing or comply with the order for submissions. In fact the chronology of the matter which I will outline in a while will show the lack of interest demonstrated by the employer in the proceedings. The chronology is as follows:

- *23 June 2011 - Matter listed for first call. None of the parties appear. Notice served on both.*
- *26 August 2011 – Only the employee appeared in the ERT.*
- *20 October 2011 – Only the employee appeared in the ERT. Notice was served on employer to appear in Court.*
- *7 November 2011 – Both parties appeared.*
- *6 December 2011 – Only the employee appeared and not the employer.*
- *16 January 2012 – Both parties appeared and given 21 days to file their written submissions.*
- *16 March 2012 – Only the employee appears. Notice served on employer.*
- *14 May 2012 – Only the employee appears. The employer does not appear. The matter is fixed for formal proof.*
- *4 June 2012 – only the employee appears. The employer does not appear. The matter is re-fixed for formal proof.*
- *6 June 2012 – The matter was heard on an undefended basis.*

6. The employee was the only witness in the case. He testified under oath that he worked as a machine operator at $3.50 an hour. He worked for 45 hours in a week. There was no employment contract in writing. He stated that he was sacked from employment and was not given any termination letter.

7. He stated that the memorandum dated 22 November 2010 which indicated that he was laid off temporarily due to bad weather condition was never given to him. He was never called back to work.

8. As per the evidence of the employee, he received the memorandum when he went back to the employer in March 2011 to enquire when he was to resume the employment.

9. The ERT found that under s. 24 of the ERP, the employer was under a statutory duty to provide the employee with work unless amongst other reasons, the contract is frustrated or its performance prevented by an act of God. If the employer failed for valid statutory reasons to provide work to the employee, he was under a statutory obligation to pay the employee in respect of every day on which he failed to provide work at the same rate as if the worker had performed the work.

10. In finding whether the contract was frustrated by an act of God, the ERT found that the memorandum did not indicate that the rain caused the flood or that roads were damaged which prevented the performance. The ERT found that rain was part of an everyday life and that it could not be claimed to be an Act of God exempting the employer from providing work and/or paying the workers for the work.

11. The ERT found that the employer ought to have planned for these rainy days and provided for these matters in the contract.

12. The ERT also found that after the temporary lay-off period, the employer did not call the employee back to work.

13. The ERT ordered the employer to pay the employee lost wages from the date of lay off, that is, 22 November 2010 until the date of formal proof, that is, 6 June 2012. Specifically, the ERT ordered the employer to pay the employee wages for a period one year and 5 months'.

Submissions of Parties/ Law and Analysis

14. Before I consider the application for leave to appeal out of time, I must say that the appellant has chosen the wrong procedure to appeal the decision of the ERT. This matter was heard and determined in absence of the appellant.

15. If the appellant was not satisfied with the decision, it ought to have applied to the lower court for a setting aside of the decision: ***Order XXIX Rule 5 of the MCR.***

16. There is no explanation given by the appellant why it chose not to apply for setting aside of the said decision. The appellant had failed on many occasions to appear in the ERT and to comply with its orders. This may be, and I say ***"may be"*** one of the reasons why the decision is appealed instead.

17. This judgment will at an appropriate time indicate that the appellant wants this Court to analyse evidence which was not even before the ERT. If such an act is desired, the proper course would have been to file an application for setting aside.

18. By bringing an application for extension of time to appeal, the appellant is only bound by the evidence that was presented at the lower Court and cannot assert that the Court failed to take into account their evidence as there was no such evidence on oath to place any weight on the same. At the appeal stage, the appellant is restricted to argue errors of fact

and law made on the evidence of one party alone. Having said that, I will now proceed to consider the application for extension of time to appeal.

19. The factors that are normally considered in determining an application for extension of time are:

    (a). Length of the delay;

    (b). Reasons for the delay;

    (c). Chances of the appeal succeeding if time for appealing is extended.

    (d). Degree of the prejudice to the respondent if extension is granted.

20. I will discuss each factor in turn, the first being the two factors on the length and reasons for the delay. The appellant says that the ruling was delivered on 9 January 2013 and that the same was sent to the employer by post on 23 January 2013. On the same day, they sent instructions to their lawyers Natasha Khan & Associates to appeal the decision. An email from the office of Natasha Khan & Associates indicates that the firm received the documents from the employer on 24 January 2013.

21. It is asserted that Natasha Khan & Associates did not do any work on the appeal. The employer says that it was not informed on what was happening to his case until the 28 days' time period for appealing had expired. It was on 22 February 2013 that they proceeded to instruct its new solicitors Messrs Neel Shivam Lawyers to file an appeal which was done on 12 March 2013.

22. It was argued that if Natasha Khan Lawyers had acted promptly then the appeal would have been filed on time. It is the mistake on part of the employer's lawyers not to have attended to the instructions on time and the employer should not be penalized but given an opportunity to present its appeal.

23. It was argued that if the delay was solely on part of the employer then the blame could be put on the employer but in this case, the employer's counsel failed to act timely.

24. The counsel for the respondent argued that the employer cannot blame his counsel when it was its duty to ensure that an appeal is filed on time.

25. On the question of delay and the reasons for the delay, I find that the appellant cannot escape the blameworthiness. If the history of the matter is examined, Natasha Khan & Associates was also the employer's counsel in the ERT. In fact, the firm had even appeared in the ERT. There was continuous default on the part of both the employer and its lawyers to appear in Court, file written submissions and be present for the hearing.

26. In light of that conduct of the counsel, the employer ought to have been very vigilant when it once again appointed Natasha Khan & Associates to act on its behalf to file the appeal. The care should have been exercised to follow up and see to it that a timely appeal is filed.

27. The employer says that it received the judgment on 23 January 2013. Even it 28 days is granted from that period, the employer is still late by approximately two weeks to file its appeal.

28. At the trial stage, the employer chose not to defend the matter and delayed the matter immensely by not appearing in Court. At the appeal stage, after handing the file over to its lawyers, it did nothing constructive to ensure that the appeal is filed. There is no evidence of the employer having visited the lawyer's office and given proper instructions for appeal or that it followed up with its lawyers on the progress of the matter.

29. The attitude of the employer was nothing less than lethargy and ignorance of Court proceedings and the plight of the employee on the continuous delay. There should been some positive action on the part of the employer to ensure that an appeal is filed on time. When the employer received the judgment, it had only approximately a week and a half remaining to file the appeal (if time is to be calculated from the date of the judgment).

30. When the initial 28 days was over, the employer still did not get his new lawyers to file a timely appeal within the next set of 28 days. Even that delay is not sufficiently explained.

31. It should not have taken any lawyer more than a week to file an appeal in this case. The evidence was so brief in this case and the judgment was succinct and simple. Any prudent lawyer could have understood the history of the matter and proceeded to file an appeal within 7 days. It should not have taken so long. Why it took even the new counsel so long is not explained.

32. I find that the employer is blaming his counsel to escape the responsibility for delaying the matter so much.

33. My attention was brought to the case of ***Gatti v. Shoosmith [1939] 3 All ER 916*** and the decision of *Sir Wilfred Greene, M.R.* I was asked to rely on this case to exercise my discretion in favour of the appellant on the ground that Natasha Khan & Associates had made a mistake in not filing a timely appeal.

34. I think I must cite the relevant part of the decision of Sir Wilfred Greene, M. R which is as follows:

"On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of the legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say "may be," because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may

be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.

The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised. If ever there was a case in which it should be exercised, I should have thought it was this one. We are not, I think, concerned here with any question at all as to the merits of this case or the probability of success or otherwise. The reason for the appellant's failure to institute his appeal in due time, was mere misunderstanding,...-a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal..."

35. The above case is confined to mistakes of legal advisers. The term mistake refers to some misunderstanding on the rules and mistake on counting the days to appeal. It does not cover a situation like the present one where there is no explanation from the lawyer why there was a delay. I cannot say for definite that the lawyer had deliberately delayed the filing of the appeal but certainly, the delay was within the control of the employer and could have been attended to. The employer was to have pushed for an early filing of the appeal and if that was not forthcoming, it ought to have very quickly found a new counsel for representation.

36. For the lawyer to have filed a timely appeal, it was not only necessary to give the file to the lawyer but for the employer to attend to other matters as well. The employer needed to attend to its lawyer's office and given proper instructions with payment of fees. There is no evidence of any complete instructions given to Natasha Khan & Associates except for a letter from its office stating that it had received the file. There was no indication from the

firm that they agreed to act for the employer and that agreement basically is dependent upon a lot of matters.

37. I find that there is insufficient evidence before the Court to find that Natasha Khan & Associates were entirely or at all to be blamed for the delay in filing the appeal. I find that neither the delay nor the reasons advanced for the same are satisfactory.

38. I must now examine the second factor which is the chances of the appeal succeeding. The appellant's counsel is asking the Court to look at evidence which was never before the ERT for it to make any findings based on that evidence. The employer chose not to tender any evidence and even if I were to grant an extension of time, this Court will not be able to look at new evidence.

39. If the employer wants the Court to look at the evidence than the proper application would be to apply for a setting aside of the decision.

40. The appellant is asking this Court to take into consideration the following evidence:

1. *That the respondent was never terminated but decided that he did not wish to return to work.*

2. *The respondent was paid 11 months leave pay upon his request to leave employment.*

3. *The appellant could not provide work for the respondent as the heavy rains caused shut down of the mills and such closure was not in the control of the employer.*

4. *The respondent refused to acknowledge the notice of temporary layoff when the appellant attempted to provide him a copy on 22 November 2010.*

5. *The respondent was at liberty to find other employment during the temporary absence at work.*

41. The above evidence was never tendered in Court on oath and is not tested and tried evidence for the ERT to give any consideration to it in making any finding. It is improper for this Court to give weight to that evidence as well.

42. The appellant alleged that the ERT was not correct in finding that the employer had asked the employee to stay home and not to look for work anywhere else when the memorandum did not state that.

43. The memorandum very clearly stated that whenever the employee was required by the employer, he must report to work. This is an impossible ask because if the employer allowed the employee to find other employment, it would realize and appreciate that the employee cannot just leave the new employment. He has to give reasonable notice. If the employee gives the notice, he cannot start work immediately with the new employer. By demanding such immediate presence when asked for, it was open to the ERT to make a finding that the employers had not permitted the employee to find other work. There was no evidence to suggest otherwise.

44. As the respondent submits, this Court cannot lightly interfere with finding of a fact when on the evidence, it was open to the ERT to come to that conclusion.

45. The appellant also complains that the ERT erred when it made a finding that the rain was part of life and it cannot be claimed to be an Act of God. It was averred that the ERT did not make a finding of what effect the rain had on the availability of raw materials.

46. As far as the memorandum is concerned, it indicated that the rain caused very low supply of materials and closure of shift. There had to be evidence by the employer on what was the nature of the weather condition and the impact it had. The ERT was correct that rain was part of everyone's life and these matters must be catered for in the contract.

47. If the weather was not expected or there was natural disaster then it can be classified as act of god but normal usual rain cannot be. I cannot interfere with the finding of the ERT in absence of any evidence that the weather condition was unexpected and therefore classified as an act of god.

48. The third error alleged on the part of the ERT is that the rain had caused flooding and the mills had to be closed. This was not evidence before the ERT to give regard to the same.

49. The last error alleged on the part of the ERT is when it made a finding that the employee was terminated from work. The employer stated that he himself decided not to return to work and advised the appellant of his intention and asked for leave pay that was due and payable. The leave pay, it was submitted, was paid prematurely. These are new evidence before me which was not available before the ERT to make a finding on. There cannot be error on the part of the ERT in not having considered this evidence.

50. The ERT heard the uncontested evidence from the employee that in March 2011, he went to ask the employer for work and was not taken back. If that is the only evidence before the ERT, it was open for it to make a finding that the employee was unlawfully laid off and then terminated from work.

51. I now come to the last factor which is whether the respondent would suffer any prejudice as a result of the granting of an extension of time for appealing. The appellant says that the respondent did not file any affidavit in opposition to the application which shows that it is not objecting to the application and therefore is not to be taken as having being prejudiced.

52. The respondent need not file any affidavit in response to argue factual matters which are already before the Court in some other form for example Court records. All the information about the delay and the findings of facts which are subject to appeal were all provided for

in the records. The respondent can argue its case with reference to those facts and the law. This does not mean that the respondent is not prejudiced by such a delay.

53. The respondent was laid off in 2010 and was never taken back to employment for one reason or the other. There was no evidence to suggest that there was valid lay off even for a temporary period. In the ERT, the delay in hearing the case was caused by the employer and now the delay in appealing is also laid at the employer's door. The employee is without any remedy and I find that for him to wait for such long time for his cause to be finalized is prejudicial.

54. On the factors considered in granting an application for appeal out of time, the appellant is not able to convince me that on the facts of this case, he qualifies for an extension of time.

55. Although it is not necessary in light of the orders that I propose to make, I must mention in passing that the appellant had also made and argued the application for stay of the decision of the ERT pending the appeal. It would only be necessary for me to attend to this application if I was of the view that an extension to file the appeal ought to be granted.

56. In my findings, the application for extension of time ought to be dismissed and based on that there is no reason for staying the decision of the ERT.

Final Orders

57. I make the following orders:

1. ***The application for extension of time to appeal the decision is dismissed.***

2. ***The application for stay of the decision of the ERT consequently does not need to be determined.***

3. ***The respondent shall have costs of the proceedings which I summarily assess and fix at a sum of $1,500.***

4. *The costs must be paid within 14 days.*

Anjala Wati

Judge

26.10.2016

To:

1. *Neel Shivam Lawyers for the Appellant.*
2. *Attorney- General's Chambers for the Respondent.*
3. *File: Suva ERCA 6 of 2013.*