

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 16 of 2015

**BETWEEN:** **THE PERMANENT SECRETARY, PUBLIC WORKS DEPARTMENT**

**1<sup>st</sup> APPELLANT**

**AND:** **ATTORNEY – GENERAL OF FIJI**

**2<sup>nd</sup> APPELLANT**

**AND:** **MAKERETA VUNICOKULA** *as the administratrix in the Estate of DOUGLAS REID*

**RESPONDENT**

*Appearances:* Ms. K. Naidu for the Appellant.

Mr. D. Prasad for the Respondent.

*Date/Place of Judgment:* Monday 30 January 2017 at Suva.

*Coram:* Hon. Madam Justice Anjala Wati.

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## **JUDGMENT**

**Catchwords:**

*Employment Law – Workmen’s Compensation Claim by wife of deceased – employer refutes that deceased employed by it – Whether deceased a workman who died in the course of the employment: Claimant to prove.*

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***Cause and Background***

1. Makereta Vunicokula is the wife of the deceased Douglas Reid. Douglas Reid died on 27 April 2006. He was at the time of his death checking the water level at the Colo – i- Suva dam. The dam was filled with water and had railings which had to be held on while checking the water level.

Whilst Douglas Reid was checking the water level in the dam, the rusted railing collapsed and Douglas Reid fell in the dam and died. He sustained head injuries and drowned in the dam.

2. The Public Works Department ("**PWD**") being the purported employer denied at all material times that Douglas Reid was employed by it. The contention by the employer was that he was made redundant 4 months prior to the incident, that is, on 14 December 2005, and his presence at work on the day was neither authorized nor legal. Simply put, it was the position of the employer that Douglas Reid was not a workman who sustained injuries during the course of the employment.
3. The employer's contention was that Douglas Reid was at the Suva Water Supply depot premises seeking re-employment and he asked the staff there to drop him in town in the meter reading vehicle, however, he did not get off in town as per the agreement. He continued his journey to the job site. He went to the job site on his own without anyone's permission or instructions.
4. After the trial proper, the Employment Relations Tribunal ("**ERT**") found that Douglas Reid was employed by the PWD and that his death arose in the course of the employment as a result of which the wife was entitled to workmen's compensation in the sum of \$24,000 to be paid within 30 days of the decision.
5. There were various evidence based on which the ERT found that the employee was a workman. The first evidence was from the wife of the deceased who gave evidence that one Ili from the employer's office had called the deceased on 24 April 2006. The call was made on the mobile phone of one of the relatives Seini Koroï. The wife testified that Ili had told the deceased to report to work on 27 April 2006 at the Waila Station where Reid was previously being employed.
6. The evidence of Seini Koroï was also accepted in evidence. She had testified that she was the owner of the mobile phone and that one Ili called asking to speak to Douglas Reid about going back to work.
7. The ERT also gave credit to the evidence of one Apisai Matau who gave evidence that on 27 April 2007, he went in a bus with Douglas Reid and that he happily told him that he had been recalled to work at Waila Station.

8. The ERT found that the evidence of the widow was not challenged and that the employer did not even call Ili to refute the evidence. It was also found by the ERT that there was no reason why the employee would go back to work after 4 months had he not been called. He also found the evidence of the employer in favour of the employee when one Mr. Bhim Sharma gave evidence that the employee was a redundant worker who went around with the 2 meter readers employed by PWD to look for jobs. He also said that he was not aware of the employee coming to the worksite.
9. The ERT found that if there was no employment arrangement between the parties for the employee to return to work, the employee would not have been taken in the government vehicle by the two meter readers employed by PWD to Waila Station.
10. The ERT said that even if what the employee did was illegal, he was at work and he ought to be paid the compensation for his death.

#### **Appeal**

11. Aggrieved at the findings, the employer appealed the decision on various grounds which I have summarized and combined for reasons of logic. The grounds are that the ERT erred in law and in fact in finding that:
  1. *the appellants had failed to object to a private law firm bringing the matter when the Labour Office should have instituted the proceedings.*
  2. *Douglas Reid was employed by the PWD and that he died out of an accident in the course of his employment.*
  3. *the employer did not object to the evidence of the wife that one Ili had called the deceased back to work and that it did not call the maker of the telephone conversation to come and give evidence.*
  4. *Douglas Reid was employed by PWD based on the evidence of Apisai Matau and the fact of him being present at work whilst disregarding the evidence of the employer that he was made*

*redundant and not re-employed and there being lack of documentary evidence that he was re-employed for example the absence of the pay slip.*

***Submissions/Law and Analysis***

12. The facts of this case indeed, as Ms. Naidu said, are unique and unfortunate. The issues before this Court are simply whether the evidence before the ERT supported that Douglas Reid was employed by PWD on 27 April 2016 and if the finding is in the affirmative then his death definitely has arisen in the course of the employment as he sustained the accident of falling in the dam and dying. I am however obliged to deal with all the grounds of appeal to avoid the risk of not addressing the specific concerns of the employer.

***Ground 1: Failure by Labour Office to bring proceedings on behalf of the Deceased***

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13. On the first ground of appeal, Ms. Naidu argued that s. 18(b) of the ERP says that the Permanent Secretary, or a labour officer or labour inspector authorized in writing by the Permanent Secretary, may appear in the ERT on behalf of a worker or institute civil proceedings on behalf of a worker against the worker's employer in respect of a matter or thing or cause of action arising out of or in the course of the employment of the worker.
14. Ms. Naidu said that the provision is discretionary and does not mandate the Labour Officer to bring the proceedings on behalf of the worker. Having said that, Ms. Naidu said that it was always the position of the employer that Douglas Reid was not employed by PWD. In that case the Labour Officer would not have brought the proceedings.
15. I have perused the judgment of the ERT. Although the Tribunal did raise the issue that the employer and the Attorney-General's chambers did not question the applicant on why the matter was not brought by the Labour Office, he did not refuse to hear the case on that basis. I do not know why the appellant has raised it as a ground of appeal when nothing turns out on that remark which was made in passing only.
16. Now that the appellants have raised it in the appeal and tried to justify the reasons why the Labour Office did not institute the proceedings on behalf of the worker, I am obliged to deal with

the issue. The explanation provided is simply unacceptable. The employer is giving the reasons why the Labour Office did not act on behalf of the employee. There is no reason forwarded by the Labour Office.

17. From what Ms. Naidu says in Court, there appears to be some conflict of interest of the Labour Office when there ought not to be. The purported employer and the 2<sup>nd</sup> appellant are State institutions. The Labour Office always acts in the interest of the workers.
18. Ms. Naidu says that the Labour Office knew that the contention was that Douglas Reid was not an employee of PWD. How would the Labour Office know this without the proceedings being filed? The objections would only come about after the Labour Office has instituted the proceedings. Even if the appellants had communicated this to the Labour Office, it is not for the Labour Office to make that decision. Its obligation was to institute the proceedings and let the ERT decide on the issue of whether Douglas Reid was a workman.
19. If a private employer also raised this issue of whether a person is employed by it, the Labour Office would have still gone ahead and filed the proceedings. The same should apply when the employer is the State or a government institute. The privilege must extend to all employees and not selected ones. The concerns of the ERT therefore were not frivolous. At least the ERT ought to have been explained the position.

**Grounds 2 and 3 (combined):**      ***Was Douglas Reid an employee of PWD and did he die in the course of the employment?***

20. Ms. Naidu argued that Douglas Reid was made redundant from work on 14 December 2005. After that he was never re-employed by the PWD. He was simply at the worksite trying to look for work. For the claim for workmen's compensation to be successful, it had to be proven by the applicant that the employee was a workman of the PWD.
21. It was contended by Ms. Naidu that there was no evidence to prove that the employee was a workman. There was only hearsay evidence based on which the finding was made.

22. Mr. Prasad argued that the ERT had relied on important and reliable evidence to make a finding that the employee was a worker of the PWD. These are findings of fact and the appellate court must not lightly interfere with it. There was enough evidence from the wife of the deceased and one Seini Koroï that one Ili had called the deceased back to work from 27 April 2006. Apisai Matau also testified that he was told by the deceased that he was called back to work and that the deceased was very happy.
23. Further, there was evidence of the deceased being physically present at the Waila Station dam. He was also working and checking the water level in the dam. He was also taken to the Waila Station by the two employees of the PWD by a vehicle. All this point to only one direction that the employee was called back to work.
24. I have read the record containing the evidence and I find that not only there was hearsay evidence but also direct and circumstantial evidence based on which it was open to the ERT to come to the conclusion that the employee was called back to work on 27 April 2006.
25. My first concern is how the employee ended up at the dam which is supposedly a prohibited area. Can just any member of the public walk up to the dam when no one is noticing and start peeping inside or attempt to pollute the dam or even attempt some silly act which would be disastrous in the interest of the person or the public? It goes without saying that this is a highly secured area and only authorized personnel are allowed to go near the dam.
26. For a former employee to seek access to the dam is the same as an outsider attempting to seek access to the dam. The presence of the employee at the dam and the fact that he was peeping inside the dam and checking the water level can only point to one conclusion that he was allowed to do what he was doing. If he was not, he would have been easily noticed and shown his way out of the premises.
27. Coupled with that fact is the evidence of the employer that the employee arrived at the worksite in its vehicle. The employer however says that the drivers of the PWD gave him a lift to town as he was looking for work and that he was to get down in the town but he refused and came with the other workers to the dam.

28. I find the employer's contention incredible and concocted to defeat the claim. First of all, the government vehicle does not seat any outsiders and even if the workers had favoured the former employee by giving him a lift, they would not dare to take him up to the dam to get reprimanded. They would have attempted to drop Douglas Reid at a place where no one would know that they offered him transportation.
29. The two workers will not have brought the employee to the premises where Douglas Reid was not supposed to be and then sent to work at the dam.
30. I find that the reason why Douglas Reid was allowed to enter the worksite and to be given the transportation to the worksite is that the arrangement was for him to return to work. It was unfortunate that the accident happened and the employer had out of spite refused to accept him as a worker. It is an unfortunate event that Douglas Reid died at the employment on the first day otherwise the situation for his family would have been different, even if he worked only for the second day.
31. Coupled with the evidence that the employee was at work, taken to the worksite by two other meter readers was the evidence of his wife, Seini Koroï and one Apisai Matau. Collectively, the inevitable conclusion was that Douglas Reid was called back to employment. I have no reasons to disturb the findings of fact which was made by the ERT having the special advantage of seeing the demeanour and deportment of all the witnesses and attaching to the evidence the value it did based on the concept of credibility.
32. The employer seems to suggest that there is no reason for Douglas Reid to be called back when he was made redundant. The averment makes no sense. Douglas Reid was not terminated by the employer. He was made redundant because there was no work at the time for him. Normally, the positions of redundant workers' are that the same employer can call them back when work is available. The fact that Douglas Reid was made redundant carries no weight to support the argument of the employer that he was not the workman.

**Grounds 4 and 5 (combined):**

***Challenging the evidence that Ili called the deceased back to work and failing to produce Ili to give evidence.***

33. As I have stated earlier, the ERT found that the wife's evidence was not challenged that one Ili had called the deceased and spoken to him regarding returning to work. It was further found by the ERT that the employer ought to prove that the employee was not called back to work and to establish that the employer ought to have called the maker of the call to come and give the evidence.
34. Ms. Naidu asserted that the employer does not know who Ili was and there was no way in which it could have summoned Ili to give evidence. This evidence came from the wife and her witness and it was for them to prove that Ili made the call. Had Ili been called to give evidence the employer would have cross-examined Ili on its contention that there were never any instructions to call Douglas Reid back.
35. I have perused the records of the evidence. When the wife of the deceased and Seini Koroi gave evidence that the deceased had spoken to one Ili who had told the deceased that he was to return to work on 27 April 2006, the employer did not even contend or contradict the evidence that they did not know any Ili and that there was no phone calls made on the employer's account. At least that evidence could have been contradicted by the employer's evidence in chief and cross-examination of the relevant witnesses.
36. It is only at the appeal hearing that it was apparent that the employer did not know who Ili was. Nothing of this nature was raised in the evidence or the submissions at the ERT. It was however clear from the evidence that the claimant did not know who Ili was except that the caller on 24 April 2006 on Seini Koroi's number identified himself as Ili.
37. It is common knowledge that in Fiji, people are identified by their nick names even at some places at work. It could be possible given the other evidence that Ili was one of the nicknames of the employees of the PWD. It is also possible that no worker is officially named Ili at PWD.
38. The reason why the ERT made that comment was on the understanding that Ili was known to the employer and the employer did not challenge the evidence that a call was made on its behalf for Douglas Reid to return to work.



39. Even if the ERT is wrong in saying that Ili should have been produced by the employer to support its contention, there are other evidence based on which the finding was made that Douglas Reid was employed by PWD and I am not inclined to disturb that finding without any basis.

**Grounds 6, 7 and 8 (combined):** *Giving Improper Weight to Evidence and disregarding material evidence.*

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40. Ms. Naidu argued that there was no documentary evidence like a pay slip provided by the claimant to say that the employee was called back to work or that he was employed by PWD. The evidence of Apisai Matau should not be decisive in absence of any pay slip or documentary evidence.
41. It was further argued that if Douglas Reid was employed, he would have been required to sign a contract and nothing of that sort happened. The employer always requires the workers to sign a contract no matter what the nature of the employment is.
42. The ERT found that even if Douglas Reid was at the employment and doing an illegal work, he would still be considered a workman. That would only hold true, argued Ms. Naidu, if there was a contract of employment and Douglas Reid was doing some illegal work.
43. Ms. Naidu asserted that the fact of the employee being present at the worksite is also used to make a finding that Douglas Reid was employed when it should not have been. The employee was there looking for work and not working for PWD.
44. I agree with Ms. Naidu on one point which is that the ERT's conclusions that even if Douglas Reid was doing some illegal work, he would still be considered a workman. This will hold true if the employer does not deny that the employee is a workman. If the employer denies that, the finding whether the employee is a workman needs to be established by the claimant.
45. Having said that, I do not agree with Ms. Naidu that Apisai Matau's evidence was decisive. It was one of the many evidence based on which the ERT made a finding that Douglas Reid was called back to employment. The presence of Douglas Reid at the worksite strengthened the evidence of the witnesses. Both the evidence of Apisai Matau and the presence of Douglas Reid at the

worksite were material evidence which could not be disregarded and the appellate court cannot discredit that evidence based on which the finding was made.

46. Ms. Naidu seems to suggest that cases can only be proven by documentary evidence. There was no such documentary evidence by any party. The wife of the deceased did not provide any pay slip or the contract. This was only the first day of Douglas Reid to be at work after he was made redundant and most employers will not give pay slips for working for a day. If a fortnight had gone by and the accident had happened, there would have been a realistic expectation of a pay slip. For Ms. Naidu to say that the absence of pay slip proves that Douglas Reid was not a workman does not hold any substance and is weak in logic.
47. Ms. Naidu also says that there was no contract produced by the employee's wife when the employer gives contract to all employees irrespective of the nature of the employment. This is Ms. Naidu's version of how contracts are given to workers. There was no evidence to the effect that all workers are given written contracts and that they are given a copy on the first day. There was no evidence that in 2006, all employees who were under contract had written contracts for themselves. In absence of such evidence from the witnesses, I treat this as evidence from the bar table and unreliable to be considered by this Court or the ERT.

**Final Orders**

48. In the final analysis, I find that the appeal has no merits and I dismiss the same with an order that the appellants must pay the costs of this proceeding in the sum of \$1,500 within 7 days.
49. I also affirm the decision of the ERT and order that a sum \$24,000 as ordered by the ERT be paid to the wife of the deceased within 7 days.

  
**Anjala Wati**

**Judge**

**30.01.2017**



To:

1. Attorney – General's Chambers for the Appellant.
2. Diven Prasad Lawyers for the Respondent.
3. File: Suva ERCA 16 of 2015.