

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 18 of 2018  
ERCA 06 of 2019

**BETWEEN:** **RAJESH NARAYAN**  
**APPLICANT/RESPONDENT**

**AND:** **LAND TRANSPORT AUTHORITY**  
**RESPONDENT/APPLICANT**

*Appearances:* Mr. D. Nair for the Applicant/Respondent.  
Ms.E. Dauvere for the Respondent/Applicant.

*Date/Place of Judgment:* Thursday 29 August 2019 at Suva.

*Coram:* Hon. Madam Justice Anjala Wati.

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**A. Catchwords:**

*Employment Law – Application for compliance of the orders of the ERT – ERC does not have jurisdiction to order compliance of the orders of the ERT – it has jurisdiction to punish for failure to comply with the compliance orders of the ERT – application for leave to appeal out of time does not qualify the tests for determination of the application.*

**B. Legislation:**

1. *The Employment Relations Act 2007 (“ERA”): ss. 212; and 221.*

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**Cause**

1. There are two applications before the court. The first one was filed by the employee Mr. Rajesh Narayan on 15 August 2018 for an order for the employer to comply with the decision

of the Employment Relations Tribunal ("*ERT*") of 7 June 2018. The order was issued in Employment Grievance Case No. 03 of 2010.

2. The decision of the ERT was for the employer to reinstate the employee preferably to a position similar to what he was holding prior to the termination. It was also ordered that the employer reimburses the employee with two years of lost wages as a result of the grievance and further 6 months wages as compensation for humiliation, loss of dignity and injury to the feelings of the worker.
3. The second application is filed by the employer against the same decision of the Tribunal. The application is for leave to appeal the decision out of time. This leave application was filed on 08 March 2019, some 9 months after the delivery of the decision.

#### ***Law/Determination***

4. I consider it prudent to determine the issue of leave to appeal out of time first. If it is decided that leave ought to be granted then ordering compliance of the orders would make the orders for leave redundant.
5. I will use the guideline factors that are commonly used to determine applications for enlargement of time. The first is the length and the reasons for the delay. Is the delay inordinate? To determine this, I will look at the explanation for the delay and the time period that has lapsed from the date the employer should have acted to vindicate its rights on appeal.
6. It is the position of the LTA that when the employee served his application for compliance on the employer on 28 September 2018, it noticed that in the judgment of the ERT, the Land Transport Authority was not the respondent but the National Road Safety Council was. This prompted the employer to conduct the search of the ERT file. The search was delayed from October until November 2018 as the original file was missing from the ERT Registry.
7. It is the employer's position that when it searched the file, it was revealed that no hearing date was ever fixed in the matter and that there was no record of the employer attending the hearing. There is also no record of the hearing being conducted in the ERT.

8. The employer says that the delay is due to the LTA not being a party to the case from the beginning. It was thus not aware of the proceedings until it was served with a copy of the application for compliance.
9. The LTA asserts that it was never served with any order of the Tribunal relating to the decision. There is also no formal substitution of the parties. LTA should have been substituted as a party to the cause.
10. On the issue of the chances of the appeal succeeding, the LTA asserts that there was no evidence before the ERT to make a proper determination as the matter was never heard properly. No such opportunity was ever presented to the employer to tender evidence in the court. The improper consideration of the evidence led to the granting of improper remedies to the employee.
11. The LTA's position is that the employee had conducted himself in a manner which created conflict of interest with his work. He was warned 3 times not to operate a driving school which he continued to do.
12. On the question of the prejudicial effect if the application for enlargement is granted, LTA contends that the employee will not suffer any prejudice because the matter has not been heard on merits. The employee cannot enjoy fruits of a judgment not delivered on merits.
13. In determining the application for leave, I will first deal with the issue of breach of natural justice as alleged by the employer. To my mind this is the issue that concerns the proceedings the most since it is fundamental to the principles of natural justice and one which goes to the root of this proceedings, that before a party is condemned or orders made against it, he or she must be given a right to be heard. The precise issue is whether the employer was provided with an opportunity to present its case before the ERT.
14. If any such opportunity was provided and not utilized, the blame should be laid at the door of the employer. The allegation by the employer prompted me to call for the original file of the ERT as no court records were requested by either party filing the applications.

15. It is apparent from the records of the ERT that on 13 April 2010, the ERT fixed the matter for hearing. The hearing fixture was 23 April 2010. For some reason the hearing was then advanced to 16 April 2010. There is a file notation made by the ERT Registry at the back of the submissions filed by the employer on 14 April 2010. The notation reads as follows:

*“14/4/10 @ 11.45am*

*Informed in person*

*Joshua Esala Tuibua about the upcoming hearing on 16/04/2010 @10.30am”*

16. I do not know who made the notes but the notes are definitely from the Registry. I do not doubt the authenticity of the information provided to the representative of the named respondent National Road Safety Council then. This is because on 16 April 2010, the file notes of ERT shows that one Mr. Joshua Tuibua appeared for the employer. Mr. Joshua Esala Tuibua was the representative of the National Road Safety Council. This is evident from one of the documents filed by the employer on 15 February 2010.

17. The hearing took place on 16 April 2010 .Only the grievor gave evidence. There are very brief notes of the employee’s direct and cross-examination evidence. There is no record of any other witnesses produced by the employee or any at all by the employer.

18. What is made clear from the file notes is that the hearing date was fixed and the hearing conducted. The employer was fully aware of the hearing date and took part in the hearing. This indicates that the employer’s deponent of the affidavit filed on 08 March 2019 in support of the application for extension of time is not honest in giving to this court the true account of the history of the proceedings before the ERT.

19. There is a deliberate attempt to mislead this court to obtain extension of time, which act I categorize as undignified on behalf of the employer. Ms. Dauvere should have checked the files before making such false representations in Court. Her conduct is equally despicable in the process.

20. I come to a finding that the opportunity to present its evidence was given to the employer. It deliberately chose not to produce evidence in this case and it only has itself to blame for not being able to tender the required evidence. There was no breach of natural justice as professed.
21. LTA also raised the issue that it was not served with any order of the ERT but only the application for compliance was served on 28 September 2018 through which it knew about the order in existence against it. This is again a blatant lie.
22. Mr. Rajesh Narayan has contended in his affidavit two facts, which I accept, brought to the attention of the LTA, the order of the ERT dated 7 June 2018. The order was sealed on 12 July 2018. Mr. Rajesh Narayan deposes that on 12 July 2018, he made attempts to serve the LTA and it refused to acknowledge receipt of the same. I do not doubt the credibility of the deposition of Mr. Narayan.
23. The original file of the ERT has a copy of the sealed order. A note at the back of the order reads *"13/07/2018 10.20 am, service at LTA Valalevu, refused to sign"*. Mr. Rajesh Narayan definitely is not raising this issue of not acknowledging the service of the order for the first time.
24. The information about LTA not acknowledging service was already recorded in the original file. I therefore accept the deposition by Mr. Narayan that LTA was served with the order on at least by 13 July 2018.
25. After that, Mr. Nair wrote a letter to the LTA on 30 July 2018 vide which he enclosed a copy of the said order of the ERT in respect of which compliance is sought. This letter appears in Mr. Rajesh Narayan's affidavit in support of the application for compliance filed on 15 August 2018. In that letter Mr. Nair complains at paragraph 3 that LTA had refused to acknowledge service of the order effected on it. If there was no service and refusal to acknowledge, Mr. Nair would not make any such allegations like that or LTA should have written back and disagreed with that position maintained by Mr. Nair.

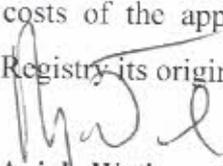
26. That letter by Mr. Nair of 30 July 2018 was received and acknowledged by the LTA on the same day. A seal from its office is evidence of that. This indicates that the employer is not correct in asserting that it did not know about the order until it was served with the compliance application.
27. Further to that, LTA had written a letter to the employer on 1 August 2018 to the Registry in which it indicated having knowledge of the order of the ERT. On what basis then does the employer say that it was not served with the order of the ERT but that it came to know about the same when the application for compliance was filed.
28. When the LTA was served with the order of the ERT on 13 July 2018, the 28 days period for the appeal had expired. However, the LTA should have then acted very quickly in making an application for extension of time to appeal the matter. It should not have taken more than half an hour for the employer to have searched the file in the ERT Registry.
29. I do not accept that the ERT Registry had misplaced the file. There is no request by the employer in the original file requesting for a file search. There is also a correspondence by the Registrar of the ERT in August 2018 through which certain information as sought by the employer was provided to it.
30. If the file was missing, the Registry would not be responding in the manner it did. Against that background, I do not accept the evidence of the employer that the file was missing. I have identified the instances where the employer has attempted to misguide this court by raising false alarm. The employer lacks credibility.
31. The employer took close to 8 months from the time of the service of the order to file an application for extension of time. I find that the time taken is lengthy and the reasons unacceptable and concocted to find a leg for the application.
32. Further, contrary to what the employer asserts, in respect of not having knowledge of the proceedings, I find that LTA was fully aware of the proceedings in the ERT. The affidavit of Rajesh Narayan filed on 15 August 2018 in support of the application for compliance contains a letter by the LTA dated 22 September 2014.

33. Through that letter, the LTA clarifies two matters. The first is that it was aware of the proceedings instituted by the employee which was long pending at the ERT, and the second is that it took no issue for not being substituted as the party to the proceedings. In that letter the LTA unequivocally stated that it will abide by the decision of the ERT. Although I will not take this assertion as waiving its rights to appeal, this definitely constitutes acceptance of being a party to the cause at the ERT.
34. On LTA's own undertaking, no substitution was required. To add to that, the rights and liabilities of the National Road Safety Council was vested in LTA by law. It cannot avoid liability on the grounds that it was not substituted as a party. Even if there was any such right to be formally substituted, that was waived by LTA through its letter to Rajesh Narayan on 22 September 2014.
35. I do not find that the proposed notice of appeal has any merits for consideration by this court. It raises the issue of breach of natural justice which I have dealt with. Secondly it raises the issue that the ERT failed to consider the evidence of the employer on the reasons why the employer found the employee to have conducted himself against the established procedures of the employer. I find that the employer chose not to give evidence to justify its position. The ERT cannot take into account information and evidence which has not been tested and tried in court.
36. On the question of prejudice, I find that any delay in execution of the judgment is prejudicial to any employee. This employee, particularly, has not been able to realize the fruits of his judgment. He is out of employment and the LTA without appealing the decision within a reasonable period, is not complying with the order.
37. The delay in complying by the employer has compelled the employee to bring an application for compliance of the orders of the ERT in this court. I would have given an order for compliance immediately if the employee had chosen the correct procedure to bring the application for compliance.

38. Under s. 221 (1) (a) and (b) of the ERA, the Employment Relations Court ("**ERC**") only has powers to order compliance with the provision of the Act or an order, determination, direction, or requirement made or given under the Act by the ERC.
39. The ERC does not have powers to order compliance with the orders of the ERT. In fact, that power is specifically vested in the ERT itself: *s. 212(1) (b) of the ERA*.
40. Once the ERT orders compliance of its orders under s. 212 (1) (b) of the ERA, any subsequent failures to comply, can result in an application to the ERC under s. 212 (6) of the ERA for punishment for failure to comply with the orders of the ERT.
41. A direct application to this Court for compliance of the orders of the ERT is premature and cannot be dealt with at this stage. The employee should go back to the ERT to seek orders for compliance.

***Final Orders***

42. In the final analysis, I find that the ERC does not have powers to order compliance of the orders of the ERT. It has powers to order compliance of its own orders and also to punish a party for failure to comply with the compliance orders issued by the ERT. I therefore dismiss the application for compliance. The employee is at liberty to file an application in the ERT.
43. I do not find any merits in the application for extension of time to appeal the orders of the ERT, on which basis I dismiss the application.
44. I order each party to bear their own costs of the applications. The Employment Court Registry is directed to return to the ERT Registry its original file today.

  
Anjala Wati

Judge

29. 08.2019



To:

1. Mr. D. Nair.                      2. LTA In-House Legal Counsel.                      3. Files