IN THE EMPLOYMENT RELATIONS COURT
APPELLATE JURISDICTION
AT LAUTOKA

ERCA No. 02 of 2019

BETWEEN : SOLOMONE RAMENAWA

APPLICANT

AND : AIR TERMINAL SERVICES (FIJI) LIMITED

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. T. Dunasali for the Applicant

: Ms. M. Rakai for the Respondent

Date of Hearing : 16 October 2019

Date of Judgment : 23 June 2022

DECISION

PRACTICE & PROCEDURE: Appeal – Leave to Appeal – Extension of time to appeal – Factors to be considered – Whether delay excused

The following cases are referred to in this decision

a. *Norwich and Peterborough Building Society v Steed [1991] 2 ALL ER 880*
b. *Rasoki v Attorney General [2014] FJHC 454; HBC 107.2009 (24 June 2014)*
c. *Avery v No. 2 Public Service Appeal Board and others [1973] 2 NZLR 86*
d. *NLTB v Ahmed Khan and another [2013] FJSC 1; CBV 0002.2013 (15 March 2013)*
e. *Gallo v Dawson [1990] HCA 30*
f. *Revici v Prentice Hall Incorporated [1969] 1 All ER 772*
g. *Ratnam v Cumarasamy [1964] 3 All ER 933, [1965] 1 WLR 8*
h. *Sandilands v Chief Executive of the Department of Corrections WC 23/09 [2009] NZEmpC 94 (14 October 2009)*
i. *Fiji Industries Limited v National Union of Factory and Commercial Workers [2017] FJSC 3; CBV 0008.2016 (27 October 2017)*

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1. The applicant filed a summons dated 5 March 2019 seeking leave to file an appeal out of time against the decision of the Employment Relations Tribunal (tribunal) at Lautoka. The application states that it is made under orders 55 and 59 of the High Court Rules 1988 and section 242 (5) (e) (ii) of the Employment Relations Act 2007. The respondent opposed the application.

2. Proceedings in the tribunal were initiated after the applicant's union filed an employment dispute following the termination of his employment. The applicant's employment was terminated following the alleged misappropriation of a stock of fuel. The dispute filed by the union was on the basis that the actions of the employer were harsh, unfair and unreasonable. The union alleged that the employer's actions led to a breach of the collective agreement.

3. By judgment dated 15 December 2017, the tribunal declared that the termination of the worker was lawful, just and fair. On the last page of its judgment, the tribunal has indicated that there are 28 days in which to lodge an appeal. The applicant, however, did not lodge the appeal within time.

4. The applicant filed this application together with his intended grounds of appeal on 5 March 2019, more than 14 months after the order. According to the applicant's affidavit in support of his application, the last date on which the appeal could have been filed was 11 January 2018.

5. Mr. Solomone Ramenawa, the applicant, averred in his affidavit that he didn't understand court procedures related to appeals after the receipt of the tribunal's decision, and that he could also not afford the expense of engaging the services of a lawyer as he was out of employment. He said he was unable to obtain all relevant documents from the Federated Airline Staff Association (FASA), the union that represented him before the tribunal and at internal hearings held by the employer.

6. He averred that his solicitors initiated correspondence with FASA on 27 July 2018 and requested a copy of the tribunal's decision. On 30 July 2018, his solicitor requested FASA to furnish him with the appeal review committee's findings and notes in order to appeal the order. By letter dated 31 July 2018 FASA responded stating that all requested documents were in the applicant's custody. However, the applicant says he did not receive the notes of the appeal hearing.

7. On 3 August 2018, according to the affidavit, the applicant's solicitor received a copy of the findings of the appeal review committee, but not the notes of the appeal hearing. His solicitor again requested FASA by letter dated 8 August 2018 for copies of the notes. FASA responded that they did not have the appeal hearing notes. The applicant declared that, as a result, he could not prepare and file his application seeking leave for extension of time at an earlier date.

8. Mr. Ramenawa averred that he had a high chance of success in view of the manner in which the investigation was carried out. He stated that the disciplinary inquiry committee and the appeal committee did not act within the ambit of the ATS/FASA master agreement. He averred that the appeal committee did not call his witnesses to give evidence, and that, instead of doing so, the committee had relied on written witness statements. He stated that they had not allowed him to be represented by a representative of the association. He was not allowed to cross examine members of the staff mentioned in the report. He said that the only

evidence on which his services were terminated was given by the respondent's investigating officer.

9. In his affidavit in opposition, Mr. Richard Donaldson, the respondent's manager human resources and operations averred that the application for enlargement of time was out of time by a year and two months. He stated that the applicant was represented by one Monish Dutt of the Fiji Public Service Association and FASA during the hearing. He averred that the applicant was given procedural and substantive fairness and the applicant exercised his right to appeal the decision of the disciplinary inquiry committee before initiating proceedings in the tribunal.

10. The applicant submitted that though he was represented by FASA and the Public Service Association, their personnel were not professional solicitors who could explain to him court procedures to appeal the tribunal's decision, that he was unemployed since 2013 when his contract was terminated by the respondent and that he did not have the finances to obtain the services of a solicitor. He submitted that all relevant documents relating to proceedings in the tribunal as well as documents related to the internal hearings were not in his custody, and that obtaining these documents took time.

The Law

11. The principles concerning the enlargement of time are generally settled. It has been said that courts have an unfettered discretion in the grant or refusal of leave to appeal out of time[1]. Such discretion must be exercised judicially and according to established principles. In considering an application for extension of time to appeal, courts have generally considered the length of the delay, the reasons for the delay, the chances of succeeding if time for appealing is extended and the degree of prejudice to the respondent if the application is granted[2].

12. In the Supreme Court of Fiji decision of *NLTB v Ahmed Khan*[3] and another, Gates P, laid these down as relevant factors for consideration:

    i. The reason for the failure to file within time

[1] Norwich and Peterborough Building Society v Steed [1991] 2 All ER 880
[2] C M Van Stillevoldt BV v El Carriers Inc. [1983] 1 All ER 699
[3] CBV 0002.2013 (15 March 2013)

ii. The length of the delay
iii. Whether there is a ground of merit justifying the appellate court's consideration
iv. Where there has been substantial delay, nonetheless, is there a ground of appeal that will probably succeed?
v. If time is enlarged, will the respondent be substantially prejudiced?

13. In *Revici v Prentice Hall Incorporated*[4], the English Court of Appeal stressed the importance of solicitors adhering to the timetable given by the rules. The court stated:

> "On the contrary, rules are there to be observed and if there is non-compliance (other than a minimal kind), that is something which has to be explained away. *Prima facie* if no excuse is offered, no indulgence should be granted".

14. In *Norwich and Peterborough BS v Steed*[5], the Court of Appeal stated:

> "Once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would-be appellant."

15. The grant of an extension of time is not automatic. The court has discretion to extend time in order to do justice between the parties as the circumstances may dictate. Discretion can be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice with the parties[6]. In *Ratnam v Cumarasamy*[7], the Privy Council stated:

> "The rules of court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion"

[4] [1969] 1 All ER 772 at 774
[5] [1991] 2 All ER 880 at 885
[6] Gallo v Dawson [1990] HCA 30
[7] [1964] 3 All ER 933 at 934

16. That the burden of satisfying court that it is apt to grant an enlargement of time is upon the appellant was emphasised in *Avery v No.2 Public Service Appeal Board*[8]. In that case, the Supreme Court of New Zealand stated:

> "Once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal."

17. In *Gallo v Dawson*, the applicant explained the delay that much research and careful assessment of the possibilities was required before filing the appeal. The High Court of Australia observed that no details were furnished as to the time spent in research or the nature of the research upon which the applicant engaged or when she decided to appeal.

18. In *Sandilands v Chief Executive of the Department of Corrections*[9], the New Zealand Employment Court held:

> "In deciding this application, I reiterate that the overriding consideration must be whether the justice of the case requires that the extension of time sought be granted. In making that assessment, the most significant factor is that the proposed challenge has little if any chance of success. While none of the other factors mitigate strongly against granting the extension of time sought, in my view it is not in the interests of justice to permit a party to prolong litigation without a real prospect of success. The application for extension of time is refused".

19. In *Fiji Industries Limited v National Union of Factory and Commercial Workers*[10], the Fiji Supreme Court stated that to make the merits of the appeal the paramount, indeed the decisive, consideration, was to go too far. His Lordship Keith J said:

> "There may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard. By the same token, there may be cases

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[8] [1973] 2 NZLR 86

[9] WC 23/09 [2009] NZEmpC 94 (14 October 2009)

[10] [2017] FJSC 30; CBV 0008.2016 (27 October 2017)

where the merits of the appeal are strong, but the prejudice caused to the other party if the appeal was allowed to proceed would be so substantial that it would be an affront for the delay to be excused".

20. The Supreme Court went on to say:

> "The bottom line here is that each case should be considered on its facts, with none of the factors which the court is required to take into account trumping any of the others. Each factor is to be given such weight as the court thinks appropriate in the particular case. In the final analysis, the court is engaged in a balancing exercise, reconciling as best it can a number of competing interests. Those interests include the need to ensure that time limits are observed, the desirability of litigants having their appeals heard even if procedure requirements may not have been complied with, the undesirability of appeals being allowed to proceed which have little or no chances of success, and the prospects of litigants who were successful in the lower court having to face a challenge to the decision much later than they could have expected".

The Application

21. The principles referred to in the preceding paragraphs have to be considered in the context of the facts of this case. The applicant's delay was about 14 months. The delay is not insubstantial. The excuse given by the applicant is that he was not properly advised of the applicable appeal procedures by qualified legal professionals. The applicant's representatives at the internal hearings and before the tribunal, he says, were not solicitors. He explained that he could not afford to retain the services of a solicitor. When he did eventually retain solicitors he found that he did not have the necessary documents. They were with the trade union that represented him at the internal and tribunal proceedings. These were the main reasons the applicant gave for not filing his appeal within time.

22. According to Mr. Ramenawa's affidavit, his solicitors first wrote to FASA on 27 July 2018 and requested a copy of the tribunal's decision. This was more than seven months after the tribunal's decision on 15 December 2017. Why he did so at this stage is not clear. In his affidavit he declares, "I genuinely did not understand the court procedures after receipt of the judgment from the ERT".

23. The affidavit does not say when the tribunal's decision was eventually received by him. It is also unclear as to why the applicant could not have obtained a copy of the decision from his FASA representatives. He does not say that he made an attempt to do so after the tribunal handed down its decision. There is no clear explanation as to why the applicant took so long to obtain a copy of the tribunal's decision; a decision that was adverse to him and the correctness of which he disputes.

24. The applicant declared that his solicitors made several requests from FASA for the notes of the internal appeal, but did not receive these. The last communication sent by the applicant was through his solicitor by letter dated 8 August 2018 to which FASA responded on the same day saying that they did not have the notes of the disciplinary inquiry and of the appeal committee's hearing. Even if it is to be assumed that these notes were essential to the filing of the appeal against the decision of the tribunal, there is no explanation why the applicant waited until March 2019 to file this summons. The internal inquiry notes, both of the disciplinary and the appeal hearings, were not, in my view, essential at the stage of filing an appeal against the decision of the tribunal. The tribunal's decision was all that was needed to initiate the appeal.

25. The charges against the applicant were under articles 2 C (i), (ii) & (iii) of the ATS/FATA industrial agreement. On 8 August 2013, Mr. Ramenawa was informed that following the disciplinary inquiry he is guilty of the charges against him in 2 C (i) & (ii) of the ATS/ FATA industrial agreement, and that the disciplinary committee had decided to terminate his services. The charges were (i) willful misconduct inconsistent with fulfillment of the conditions expressed or implied of his contract of service and (ii) gross incompetence and gross negligence in the work he is engaged to perform. The workman appealed internally. The record indicates that the applicant's objections were considered by the respondent in the appointment of the appeal committee's chairman. The disciplinary inquiry appeals committee, through a majority decision, upheld the disciplinary investigation committee's decision and dismissed the applicant's appeal. By letter dated 11 October 2013, the respondent's manager human resources informed the applicant of the appeal committee's decision. The applicant was told that his employment was terminated with effect from 8 August 2013.

26. At the hearing before this court, it was submitted on behalf of the applicant that the investigation committee did not call witnesses and, as a result, the applicant was deprived of cross examining witnesses. The applicant relied on three grounds in his proposed grounds of appeal against the tribunal's decision. The first ground is that the magistrate erred by misconstruing article 26 B of the ATS/ FASA master agreement. Article 26 is concerned with the disciplinary process. The disciplinary committee is vested with authority to interview and investigate an alleged irregularity or misconduct by an employee under 26 B. The second ground is that the decision under article 26 B of the master agreement contravened the applicant's right to a fair hearing under section 15 of Fiji's Constitution. The last ground is that the magistrate erred by failing to consider that the disciplinary committee hearing was conducted without any witness called and that only a bundle of statements were considered. There seems to be no complaint against the other findings made by the magistrate.

27. Counsel submitted that the applicant has a high chance of succeeding in the appeal as the magistrate misinterpreted article 26B of the ATS/ FASA master agreement. He also submitted that there would be no prejudice to the respondent saying it would not incur any expenses. This and the applicant's lack of understanding of legal procedures were the basis of the counsel's submission in seeking leave to appeal out of time.

28. Concerning the disciplinary investigation, the tribunal stated that the employer had provided to the worker the disciplinary investigation notice which included the allegations as well as copies of the supporting documents. The tribunal observed that at the disciplinary investigation hearing, the applicant was represented and had the opportunity to have his side of the story heard. Subsequently, he exercised his internal right of appeal and was represented by his union. The tribunal's finding was that the respondent followed the proper process in terms of the master collective agreement prior to terminating the services of the applicant. The tribunal noted that no evidence was led as to any humiliation suffered by the applicant.

29. The applicant gave evidence before the tribunal on his behalf. Parnesh Sharma, an electrical, air condition and refrigeration mechanic of the respondent's technical services department, Ilai Koroitamana, the supplies supervisor and Adi Varanisese Derenalagi, the assistant manager, human resources, gave evidence on behalf of the respondent. Witnesses on behalf of both parties were cross examined. The applicant's representative, Mr. Monish Dutt, cross examined the respondent's three witnesses. The applicant had the opportunity of testing the evidence given on behalf of the employer before the tribunal even if he did not have the opportunity to do so at the respondent's internal hearings.

30. The material placed before court do not show that the resident magistrate failed to consider and make an overall assessment of the evidence relating to the respondent's charges against the employee. The resident magistrate saw the witnesses and heard their testimony before making her findings. In the tribunal's decision, there is reference to the notice of the disciplinary inquiry, the charges and the supporting documents. The tribunal concluded that the termination of the worker's employment was lawful, saying that, "the actions of the worker in dispensing the fuel back into the underground fuel tank did give rise to a lawful reason for the termination of the worker's services".

31. The applicant has not satisfied this court that the tribunal's findings are without basis or that he has a real prospect of success on the merits of the case. The factual findings made by the tribunal have not been challenged. Even if they were challenged the court sitting in appeal needs to be satisfied that the resident magistrate's findings cannot be supported by evidence. That is not the applicant's contention. The complaint against the tribunal is on the basis that article 26 B of the master agreement was not rightly applied, and that the tribunal failed to take notice of that omission.

32. The others reasons urged by the applicant are that he had no knowledge of the procedures related to appeals, and that he was not in a position to retain a solicitor to pursue the appeal. The court cannot accept these explanations for the delay in filing the appeal papers. That is not to say such representations by a party seeking to appeal out of time can never be validly entertained. In the circumstances of this case, the applicant has not satisfied court that he acted with proper diligence and

expended efforts to file the appeal, if not within time, at the earliest possible stage. There is no evidence of such efforts. His affidavit does not say much on those matters. Had there been such evidence, these explanations could have been factors for consideration, to be weighed alongside other factors, in balancing the court's discretion. If the court were to accept such explanations without regard to the attendant circumstances and evidence of the applicant's diligence to prosecute the appeal, that may, in turn, lead to hampering the administration of justice. As stated in *Ratnam v Cumarasamy* there must be some material upon which the court can exercise its discretion.

33. The applicant submitted that the respondent would not be prejudiced. Even if that is true, this factor alone will not influence the court's decision. The court is mindful that its resources are scarce and they have to be competed for by a large number of litigants. Courts have acknowledged that allowing the court's time to be taken by cases with little prospects of success impedes the administration of justice.

34. In these circumstances, the court will not grant leave to extend the time for filing of the appeal. This decision was ready for delivery some time ago, but was held back until the applicant could be asked to take notice of the decision. That process took time as the applicant's contact details were not available to the registry, and the applicant's solicitor on record was not in a position to make an appearance for him.

ORDER

A. The applicant's summons filed on 5 March 2019 is struck off

B. The parties will bear their own costs

Delivered at **Lautoka** this 23rd day of **June, 2022**

M. Javed Mansoor
Judge

HIGH COURT OF FIJI
LAUTOKA