IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 13 of 2016**
BETWEEN:	**BIOSECURITY AUTHORITY OF FIJI**
	APPELLANT
AND:	**TAITUSI NAIDUKI**
	1ST RESPONDENT
	THE CHIEF TRIBUNAL
	2ND RESPONDENT
Appearances:	*Ms. U. Kunatuba and N. Narayan for the Appellant.*
	Ms. T. Waqanika for the Respondents.
Date/Place of Judgment:	*Friday 11 August 2023 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

JUDGMENT

A. Catchwords:

Employment Law – Appeal – Unlawful and Unfair Dismissal Case – Trial on foot in tribunal- employer appeals the decision being aggrieved with the way the tribunal was proceeding to hear the cause- such appeals are discouraged and should not be allowed as it has the effect of impeding an efficient completion of the claim.

Cause

1. Mr. Taitusi Naiduki was terminated from his employment by Biosecurity Authority of Fiji. He filed a claim for unlawful and unfair dismissal from his employment. The matter

failed to settle and so was listed before the tribunal for hearing. The trial proceeded before tribunal Mr. See.

2. During the hearing of the employer's evidence, Mr. See was of the view that certain other witnesses, being the Executive Chairman and Station Supervisor Nadi be issued with summons to give evidence in the case although the employer chose not to call them as witnesses.

3. The employer objected to the tribunal on its decision to summon the above officers to give evidence. Together with that, certain other objections were raised which required the tribunal to rule on it. The nature of the objections against the tribunal were in the following form:

    1. *Issuance of the summons under s. 229(3) of the Employment Relations Act for the Executive Chairman and Station Supervisor, Nadi, Mr. Bolaitamana to be called as a witness as the said section provides no such authority and it is inconsistent with the adversarial system of judicial proceedings.*

    2. *The tribunal's pre-determination of the matter based on repeated suggestions for the employer to consider settlement such late in the proceedings.*

    3. *Repeated interjections by the tribunal particularly in Mr. Surend Pratap's evidence which extends beyond mere clarification which is inconsistent with the adversarial system and more inclined to towards the inquisitorial system.*

4. The tribunal overruled all the objections and gave its reasons for its findings in a written ruling of 11 October 2016. Aggrieved with the ruling, the employer appealed the interlocutory decision of the tribunal whilst the trial was still in progress.

5. The parties sought leave to appeal the interlocutory decision. Both the parties wanted leave to be granted and for the proceedings to be stayed on the grounds that it was going

to be prejudicial to continue with the proceedings. I will comment on the correctness of this procedure later.

6. The employer raised 4 grounds of appeal. It contends that the tribunal erred in law and in fact in:

   1. *Holding that it has the authority to summon the employer's Executive Chairman and Station Supervisor Nadi to give sworn testimony at the trial under section 229(3) of the Employment Relations Act.*

   2. *Dismissing the employer's objection to issue the summons for its Executive Chairman and Station Supervisor Nadi to give sworn testimony at the trial on the basis that such an act was inconsistent with the adversarial system of legal proceedings.*

   3. *Dismissing the employer's objection to the tribunal's pre-determination of the matter based on its repeated suggestion for the employer to consider settlement at a very late stage in the proceedings.*

   4. *Dismissing the employer's objection to the tribunal's interjections during the evidence of Mr. Surend Pratap on the basis that such enquiries extended beyond mere clarification which was inconsistent with the adversarial system and more inclined towards the inquisitorial system.*

Tribunal's Findings

7. In dealing with the first objection identified in paragraph 3 of this judgment, the tribunal found that the employer had failed to adduce material evidence pertaining to:

   (i) The drawing up of the misconduct allegations against the worker;
   (ii) The investigation and consideration of the information arising out of those allegations;
   (iii) The human resources processes that were observed at that time;

(iv) How, when and why the complaints were formulated against the worker;

(v) Who considered the worker's response to the allegations and a consideration of those issues?; and

(vi) Who formed the view that the worker should be terminated and the rationale for doing so?"

8. The tribunal stated that throughout the proceedings, the Executive Chairman Mr. Khan's name was a common thread within the evidence. It then formed the view that Mr. Khan's evidence was critical to the fair hearing of the matter to allow an informed decision to be reached, based on an understanding of all matters.

9. The tribunal said in its ruling that the employer is a statutory authority and it should be a "model litigant". It said that the employer had a duty to the tribunal to ensure that it did reach a decision, armed fully with the relevant facts and factors.

10. The tribunal said that the reason for issuing a summons to Mr. Seremaia Bolaitamana, the Station Supervisor of the Nadi Airport was that he was the person with administrative responsibilities for the maintenance of the Authority's records pertaining to customs clearance and related issues. His evidence was also seen as desirable.

11. On the law pertaining to its powers to issue the summons the tribunal found that the powers to conduct and oversee the grievance before the parties arise out of the Magistrates Court (Amendment) Decree 2011. The Employment Relations Tribunal is a designated Statutory Tribunal as designated by the Chief Justice in Gazette Notice dated 12 August 2011. The tribunal said that it should be noted that in accordance with Section 61(B) (4) of the Magistrates Court Act (Cap 14),

"Any order, award, decision, finding, judgment or ruling made by a magistrate in the exercise of the powers and performance of duties and functions of any statutory tribunal under this Part, shall be enforced or implemented in accordance with the written law...provided however that if the written law and any rules and regulations made therein

which established that statutory tribunal do not contain any provision for enforcement or implementation, then any such order, award, decision, finding, judgment or ruling made by a magistrate under this Part shall be enforced in accordance with the provisions of this Act."

12. The tribunal also reflected on s. 229(3) of the Employment Relations Act which states that *"The Tribunal or Court may order any person to appear or to be represented before it"."*

13. The tribunal found that the power to summon the witnesses to appear before it and give evidence is clear and unambiguous and follows the authority that is given to parties to proceedings at section 229(1) of the Employment Relations Act, where it provides that they "may produce before the Tribunal or the Court witnesses, documents, books, and other evidence as the party thinks fit". The tribunal said that the power to order a person to attend and give evidence, is one that is available to the Tribunal as well as the Court.

14. The tribunal went further and said that if there was any doubt that such a power is contained within the meaning of s. 229 (3) of the Employment Relations Act, which he had no doubts that he had, he said that a Magistrate while exercising powers within the Statutory Tribunal, could still rely on the implementation powers provided for within Section 61(B) (4) of the Magistrates Court Act (Cap 14).

15. The tribunal found that the source for that broader power exists at Section 52(1) of the Magistrates Court Act (Cap 14) that provides as follows:

"In any civil suit or matter, and at any stage thereof, a magistrate may, either of his own motion or on the application of any party, summon any person within Fiji to attend to give evidence, or to produce any document in his possession or power, subject to just exception."

16. The tribunal said that it had flagged to the counsel for the Employer that it intends to issue various notices to its employees in accordance with its powers. It said that there

is no impediment for this discretionary power to be exercised, where it is done with a purpose consistent with the objects of the Employment Relations Act.

17. The tribunal then went onto carefully explain by asking itself the following question which arose out of the objection by the employer: *"what is the nature of how evidence is to be adduced before the tribunal: Adversarial, Inquisitorial or somewhere in between?"*

18. The tribunal began by stating that there were a couple of salient points that the employer's counsel appeared to have not understood. The first was section 231(1) of the Employment Relations Act which provided that, *"in proceedings before the Tribunal, the Tribunal may accept and admit evidence as it thinks fit."* Further the Tribunal is not bound by the strict rules of evidence.

19. The tribunal stated that the employer's counsel claims that the calling of witnesses by the tribunal is inconsistent with the "adversarial system of judicial proceedings", is perhaps its first fundamental error. The tribunal said that these were not judicial proceedings. It said that while it was true that the proceedings in the case before it was closely drawn on a judicial model of representation and argument, the fact that the tribunal may accept and admit evidence as it thinks fit, rendered the operation of the tribunal more of a hybrid type that was described by ***Basten JA*** in ***Italiano v Carbone [2005] NSWCA 177 at [114]***. The tribunal said that the purpose of the statutory framework of the Employment Relations Act further supports that historical approach that can assist in the "efficient settlement of employment related disputes."

20. It went further and said that it is well recognized that a tribunal exercises discretion as to whether to inquire or refrain from making an inquiry. The most important factor out of all of that, the tribunal stated, is that it finds itself in a position where it can adjudicate on the critical jurisdictional facts before it and to do that in an environment that is fair and efficient to all parties.

21. The tribunal said that in the case, in the statutory determination as to whether a dismissal is just and fair, warrants additional information be adduced in evidence.

Some of that evidence that was needed had been reflected on by the tribunal. The tribunal said that based on the evidence before it, the attendance of the Executive Chairman, Mr. Khan was a critical component to that inquiry. It therefore was of the view that the notice to attend should be issued.

22. The tribunal also addressed the employer's objections that the tribunal has made repeated calls to ask the parties to consider resolving the matter. The tribunal said that this objection is also misconceived, where it claims that the tribunal has predetermined the matter *"based on repeated suggestions for the Respondent to consider settlement – this late in the proceedings"*.

23. The tribunal said that the invitation to the parties had been made approximately three times. The invitation was not to an individual party. To tribunal said that to suggest that it has "predetermined the matter" is simply wrong.

24. Section 210(2) of the Employment Relations Act was referred to. The tribunal stated that the section makes it clear that the tribunal may in relation to any matter, *"assist parties to amicably settle the matter and the settlement must be signed by the parties and endorsed by the Tribunal as a binding decision."*

25. It found that the ability to do so, is a general power provided to the tribunal, by virtue of Section 211(r) of the Act. It said that there is nothing that restricts the tribunal to reinforce the view that an agreed settlement between the parties may still be a more suitable outcome for all concerned while it is adjudicating a matter.

26. The tribunal said that that in no way seeks to diminish the respective positions of the parties, but merely flags the practical realities that a tribunal and parties face, when a matter is brought for trial. The tribunal said that invariably neither party's case may turn according to how it was planned. It also stated that the benefits that arise out of a privately settled mediation was well known.

27. On the final objection in relation to Mr. Surend Pratap, the Acting National Operations Manager being asked questions by the tribunal which the employer said has gone

"beyond mere clarification which is inconsistent with the adversarial system and more inclined towards the inquisitorial system, the tribunal said that that objection needs to be placed in some context.

28. It found that the employer had demonstrated no real achievements in providing the tribunal any supporting documentation that could assist in the interpretation of the evidence. It said that while it was inferred by the employer's counsel that the worker himself was the last person to have had access to any of the relevant documentation, that issue seemed difficult for the tribunal to understand.

29. The tribunal said that the counsel for the employer somewhat discourteously refers to the "repeated interjections" by the tribunal in relation to the giving of Mr. Pratap's evidence, the issue was more one of trying to reconcile why there was no relevant documentation that could be provided to the tribunal. The tribunal said that some of these issues again were quite critical to the evidence given by Dr. Watson, for example as it pertained to the manufacturer's certificate that apparently had been sent to her by the worker.

30. The tribunal said that what did transpire through the inquiries of the tribunal, was that Mr. Pratap admitted to having exited the worker out of the workplace on the day in which he was suspended from duties and further admitted that the worker had taken no documents with him. The further salient issue arising out of the questioning by the tribunal was that the witness had misled the tribunal in relation to the way in which the Inspection Certificate books had been utilized by staff at that time. That is, the witness claimed to have a state of knowledge, that when questioned fully, was found not to exist.

31. The tribunal said that while the employer may feel that the questioning was unnecessary and outside of the role of the tribunal, the fact remains that the evidence given by Mr. Pratap did appear inconsistent with that given by the earlier witness Ms. Raratabu. The tribunal said that it sought only to reconcile those concerns.

Analysis

32. I will deal with the first two grounds of the appeal together. They are the tribunal's powers to summons a witness without any legal powers which is inconsistent with the adversarial system of judicial proceedings.

33. The tribunal has very properly explained in its judgment the powers it has to summon a person to attend court and give evidence. I need not repeat that again. I do not find that it is bereft of such powers. It is also not bound by strict rules of evidence and it can makes enquiries in a case to fully understand the concept before it and to determine the real controversy.

34. The tribunal has clearly explained that there were some matters that needed clarification and it considered the two witnesses as important to give information on those matters. It thus decided to summon the witnesses to enable a fair hearing of the matter to allow an informed decision to be made. I do not see a reason why the employer the employer is aggrieved.

35. The tribunal had already identified the shortfall in the evidence which was going to affect the employer's case if not addressed. If the employer does not satisfy the tribunal on certain matters then it will not discharge its onus it has in law to establish that the termination was fair and lawful.

36. What the tribunal did was in fact assisting the employer to attend to the shortfall in the evidence. Some tribunal may not even provide that opportunity and rule against the employers for not having addressed important aspects in the evidence thus failing to satisfy it that the termination was lawful and fair. Instead of expressing concern and raising alarm, the employer should be glad that it has been given a chance to cover the shortfall in the evidence. The tribunal should be assisted by the employer.

37. On the aspect of questioning one if its witness, I am also concerned that the employer, by its actions, is not allowing the tribunal to perform its duties by seeking clarification from its witnesses certain matters which appears to be in contradiction to its earlier

witness's evidence. The employer may not prefer that these contradictions be addressed but the tribunal needs to know and understand how and why what happened. I do not find anything untoward about the tribunal making enquiries from the witness relevant procedure and processes. Why should it be so difficult for the witness to answer that? After all, he is expected to give a true account of matters that transpired in the termination of the worker. He is not asked self-incriminating questions.

38. I now refer to the aspect of the tribunal's suggestion to settle the matter. The suggestion was not made to the employer. It was a general suggestion. Since the suggestion was not made to any one party in particular, I find that there was no miscarriage of justice. I also do not find that the tribunal had pre-determined the matter for it to ask for a settlement. There was of course shortfall in the employer's evidence. The tribunal attempted to assist it by giving it an opportunity to call more witnesses to address that shortfall. If the tribunal had pre-determined the matter, it will not give directions assisting the employer to address the shortfall in the evidence.

39. I do not think it is proper procedure for trial counsel to appeal procedural issues arising in the trial and effectively throw a spanner in the works of the Tribunal. I would not have granted leave to appeal this interlocutory orders of the tribunal arising in the trial had it not been the consent of both parties to do so.

40. The filing of the appeal was improper when the trial was on foot. The employer should have complied with the orders of the tribunal. I do not see any real prejudice if the trial continued. The objections of the employer being overruled did not cause it any prejudice. The trial could have proceeded without any hindrance. If the employer's officers were being summoned to give evidence, they should have appeared in court. If they did not wish to answer any aspect or did not know about it they could have simply informed the tribunal. Further, the employer could have simply advised the tribunal that it will not settle the matter and proceed with the case instead of filing the appeal and expressing its concerns that the tribunal is asking it to settle the cause. The proceedings were also audio recorded. If the employer felt that it suffered any prejudice in the way questions were being asked of Mr. Suren Pratap, it could have raised it

objections and when ruled upon allowed the tribunal to continue the proceedings. After the judgment, if the employer felt that there was any miscarriage of justice due to the actions of the tribunal, it could have made it a ground of appeal.

41. This is one matter in which the employer should pay costs to the worker. It has improperly brought an appeal when the trial in the tribunal was on foot and effectively delayed the hearing of cause. Mr. See is now no longer on the bench and this matter will now have to be heard by a different Tribunal.

Final orders

42. I do not find any merits in the appeal and dismiss the same. I order the employer to pay costs to the worker in the sum of $$6,500.00.

43. I now send this matter to the tribunal for either completion of the proceedings or hearing de-novo. The tribunal can best decide the proper course. In any given situation, I direct that the matter be heard or completed within 3 months.

44. The Senior Court Officer of the High Court Civil Registry must inform the Registrar of the Tribunal of my directions for an early hearing. The original Employment Relations Tribunal file is to be returned to the Registrar.

.....

Hon. Madam Justice Anjala Wati

Judge

11.08.2023

To:

1. ***Biosecurity Authority of Fiji for the Appellant.***
2. ***Waqanika Law for the Respondent.***
3. ***File: Suva ERCA 13 of 2016.***