IN THE EMPLOYMENT RELATIONS COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: **ERCA 15 of 2024**

BETWEEN: **CONSTRUCTION EQUIPMENT HIRE LIMITED**

APPLICANT

AND: **GYANANDRA SWAMY**

RESPONDENT

Appearances: *Ms. L. Lazel for the Applicant.*

Mr. A. Chand for the Respondent.

Date/Place of Judgment: *Wednesday 5 March 2025 at Suva.*

Coram: *Hon. Madam Justice Anjala Wati.*

RULING

(Leave to Appeal Out of Time)

A. Catchwords:

EMPLOYMENT LAW – leave to appeal out of time- factors to examine the application: are the reasons for the failure to file the appeal within time reasonable; the length of the delay; whether there is any merit in the grounds of appeal; and whether any party will be prejudiced if leave to appeal is granted or refused.

B. Legislation:

1. ***Employment Relations Act 2007 ("ERA"): ss: 107; 234; and 242***

Application

1. The applicant has filed an application seeking leave to appeal the decision of the Tribunal of 21 August 2024. The application was filed on 31 October 2024.

2. The affidavit of the applicant states that it had filed a notice of appeal initially and its appeal was assigned Case Number ABU 9 of 2024. After that, a notice of compliance was issued by the High

Court on 3 October 2024. The applicant then says that it is seeking to refile the notice of appeal. No other material fact is stated in the affidavit.

Law and Analysis

3. The application for leave to appeal is not the proper application in this instance. The judgment issued by the Tribunal was a final judgment and not an interlocutory one to seek leave to appeal.

4. S 242(4) of the ERA states that subject to subsection 2, an appeal lies as of right to the Employment Court from any first instance decision of the Tribunal.

5. The proper application before the court ought to have been an application under s. 234(1) (a) of the ERA for leave to appeal out of time. There is no application for leave to appeal out of time before me and as such I strike out the application for leave to appeal on this basis alone.

6. Even if I were to treat the application before me as an application for leave to appeal out of time under s.234(1)(a) of the ERA, whether the application will be successful needs examination on various factors:

   (a) The reason for the failure to file the appeal within time;
   (b) the length of the delay;
   (c) whether there is any merit in the grounds of appeal; and
   (d) will there be unfair prejudice to any party if leave to appeal out of time is granted/ refused.

7. On the reason for the delay, the applicant submitted that it had earlier filed an appeal and was seeking to re-file again. There is no explanation in the affidavit in support why the initial appeal was not proceeded with and why there is a need to re-file the same.

8. The affidavit indicates that the earlier appeal was granted Case No. ABU 9 of 2024. This cannot be correct as all appeals in Employment Court are granted the acronym ERCA and not ABU as projected by the applicant.

9. Nevertheless, if the applicant had in fact filed an appeal then a copy of the same ought to have been attached to the affidavit.

10. Ms. Lazel says from the bar table that the reason the first appeal was not proceeded with was because the appeal papers had errors and the registry had returned the same to the applicant.

11. She says that when the appeal papers were returned via the email to the applicant, it decided to correct the errors and file again. By that time, the time had expired. She sought to tender the initial appeal documents from the bar table. I refused it, as those documents could have been properly attached to the affidavit in support.

12. I asked Ms. Lazel why she did not provide that information in the affidavit, she said that they had not received the returned documents by then. I do not find that to be true. If the documents returned by the registry had not reached the applicant, it will not choose to re-file the appeal but wait for the initial appeal papers to be issued by the registry as that initial appeal was within time. It is only upon receipt of the returned documents could then a decision to refile could be made. In that case, the applicant should have attached the initial appeal documents to the affidavit.

13. The applicant has chosen not to put all the information properly before the court and this deprives the respondent from adequately addressing the issues. The last minute information or the evidence from the bar table cannot be properly attended to by counsel for the respondent and as such the evidence from the bar table is rejected. I therefore do not find that the applicant has adequately explained the reason for filing the appeal late.

14. On the issue of the length of delay, the judgment was delivered on 21 August 2024. The delay is for a month. In absence of any reliable evidence on why the appeal could not be filed on time, I find the delay to be inordinate.

15. I now turn to the merits of the appeal. The employee in this case was laid off by a letter of 21 January 2022. The lay-off was effective since 27 January 2022. The letter was received by the worker on 23 January 2022. The letter reads:

*"**Re:** **Notice of Layoff***

Dear Gyanandra

It's a matter of regret to inform you that as you are no doubt aware, that the recent spread of COVID 19 had placed a significant strain on our company ability to conduct business. We have taken serious

efforts to reduce our spending and sustain our profit throughout this situation as earlier in few meetings that the company has informed and indicated regarding the above subject matter.

Since the company had no operations going on after the 2nd wave of Covid 19 in April 2021. You were hired to work on contract basis for Waste Management Solutions (Fiji) Pte Ltd since January this year.

We regret to inform you that with this unforeseeable event. The directors have decided to windup the company in near future. Construction Equipment Hire Pte Ltd has tried every effort to avoid layoff but it is necessary for the company.

You will be laid off effective from 27th January 2022.

Thank you for your continued contribution to the company and express our hope for your continued success".

16. The Tribunal found that the reason provided by the employer for the lay-off was basically economic as a result of the impact of COVID 19. The company said that it was struggling financially during this time and therefore had to lay-off some workers which included the grievor. The Tribunal found that it was evidently clear that the employer had chosen redundancy to terminate the worker in which case the employer ought to have followed the redundancy procedures for termination.

17. The Tribunal said that under the ERA, the employer was to provide the grievor or his representative including the Permanent Secretary for Employment, 30 days' notice before carrying out the termination. The notice was to include the contemplated reasons for the termination, and provide an opportunity for consultation on measures to be taken to avert or minimize the termination as well as measures to mitigate the adverse effects of the termination.

18. The Tribunal found that none of the requirements of the law was followed by the employer. The employer was therefore in breach of s. 107(1) (a) and (b) of the ERA and its actions in terminating the grievor was consequently unlawful.

19. The Tribunal also found that the employer could also have recruited the grievor in its sister company as he used to work there too. The Tribunal found that this could have averted the termination. .However, the employer refused to consider this option.

20. The Tribunal found that the action of the employer in terminating the grievor therefore was considered unlawful and unfair given that it did not abide by the requirements of the law.

21. On the issue of what ought to be the appropriate remedy, the Tribunal referred to s.108 of the ERA which requires that in cases of redundancy, the employer pays to the worker one week's wages for each completed year of service. The worker was not even paid this amount.

22. The Tribunal also found that the employer had also fallen short of discharging the grievor from his employment with respect and dignity at the time the company allegedly carried out his dismissal.

23. The Tribunal therefore considered the following remedies to be appropriate in this case:

    (i) compensation of $4,800 to be paid by the employer given the severity of the actions of the employer to be paid within 21 days.

    (ii) $600 summarily assessed as loss of benefit which the worker might reasonably expect to obtain if the employment grievance had not occurred. This sum too was to be paid within 21 days

24. The employer states in its notice of appeal that the letter of 21 January 2022 gave the employee reasons for the lay-off which complied with the law to give reasons for the termination. It is also raised that the employer did not have a duty to provide the worker with work due to the pandemic which was an Act of God. The employer is also challenging the award of remedies as unreasonable.

25. It is clear from the evidence of the employer vide the letter of 21 January 2022 that the worker was laid off for economic reasons which is acceptable in law as long as the provisions of s.107 of the ERA was complied with.

26. There was no evidence before the Tribunal that there was compliance of s.107. The Tribunal was therefore correct in holding that the worker's termination was unlawful. The termination was unlawful for non-compliance of s.107 of the ERA.

27. The termination was unfair because the company had not given a proper reflection about the future status of the Company. The principle of good faith was disregarded by the employer. Both parties were required to deal with each other in good faith when the employment relationship persisted and when it was being ended.

28. The employer stated in the letter of termination that the Company will be wound up soon. There is no evidence of the company being wound up. Further, the company had been employing the worker in its

sister company. If it was genuine, it could have minimized the effect of the termination by asking the worker to continue work in its sister company. It just did not even offer that option to the worker.

29. Ms. Lazel says that due to COVID 19 pandemic, the applicant company has ceased operations if not wound up. There is nothing in the evidence to establish that the company has ceased operations. At least the company's financials could have been produced to establish that the company had ceased operations.

30. Ms. Lazel's reliance on the law which provides that the applicant did not have a duty to provide work to the worker during COVID 19 pandemic is correct. At that time when the pandemic affected the employers, the employers did not have a duty to provide work to the workers. In this case, the situation is different. The worker was at work after the pandemic. He even worked for the sister company. There is no evidence that there was no work for him in the sister company. There is therefore no basis to hide behind Covid 19 Pandemic.

31. I do not find the compensation to be excessive for unlawful and unfair termination. The worker lost wages due to not being employed. The amount of $4,800 does not even represent 6 months wages in his case. It will take a worker some time up till 6 to 9 months to find suitable work. He could not find work due to lack of a certificate of service by the employer.

32. He also lost benefits. If the worker was employed, the employer would have contributed for the benefit of the worker the statutory contribution to the Fiji National Provident Fund. The worker would get interest on that amount too. Due to unemployment, the worker lost that benefit.

33. For unfair termination, workers normally get compensation in lump sum amount. No particular award was made for unfair termination specifically. It was included in the award of $4,800. If a careful analysis is made, there is actually no award being made for unfair termination. The sum of $4,800 only represents loss of wages for 4 months. The award of remedies, to my mind, was on the lower end. There is no room for complaint by the employer.

34. The worker has been laid off from 2022. It is over 6 month that he has not realized the fruits of the judgment. The applicant chose to delay payment by filing this application for leave to appeal on the proposed grounds of appeal which I find has no merits. I find the prejudice greater to the respondent than the applicant if leave to appeal out of time is allowed.

Final Orders

35. In the final analysis, I make the following orders:

   a. ***The application for leave to appeal or the leave to appeal out of time is dismissed.***

   b. ***There shall be costs to the respondent in the sum of $1,500 to be paid within 21 days.***

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Hon. Madam Justice Anjala Wati

Judge

5.03.2025

To:

1. *Lazel Lawyers, Barristers & Solicitors for the Applicant.*
2. *Amrit Chand Lawyers for the Respondent.*
3. *File: Suva ERCA 15 of 2024.*