IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0025 of 2023
Court of Appeal No. ABU 009 of 2023

BETWEEN	:	**PACIFIC DESTINATION**
		Petitioner
AND	:	**TEVITA TIKOMAILEPANONI**
		Respondent

Coram	:	**The Hon. Mr. Justice Brian Keith** **Judge of the Supreme Court**
		The Hon. Mr. Justice Terence Arnold **Judge of the Supreme Court**
		The Hon. Mr. Justice William Young **Judge of the Supreme Court**
Counsel	:	**Mr. C. B. Young for the Petitioner** **Ms. P. Mataika and Mr. A. Prasad for the Respondent**
Date of Hearing	:	**8 April, 2025**
Date of Judgment	:	**30 April, 2025**

JUDGMENT

Keith, J

[1] I have read the judgment of Young J in draft. I agree with it. There is nothing I can usefully add.

Arnold, J

[2] I too agree with the judgment of Young J.

Young, J

Overview

[3] On 28 October 2011, the respondent, Tevita Tikomailepanoni, was "indefinitely suspended" by the petitioner, Pacific Destination, from his employment as a driver. This indefinite suspension was never reviewed. It is common ground that the respondent has been dismissed with that dismissal taking effect on 23 March 2012, the day on which he reported an employment grievance alleging unjustifiable dismissal and disadvantage to the Permanent Secretary of the Ministry of Employment, Productivity and Industrial Relations. The dispute was "accepted" by the Permanent Secretary under s 170(1) and (2) of the Employment Relations Act 2007. Following an unsuccessful attempt at mediation, the Ministry referred the grievance to the Employment Tribunal under cover of a letter of 8 June 2012. This reference was pursuant to s 170(4) of the Act.

[4] The Tribunal heard the grievance on 17 August 2012. It received final submissions from the petitioner on 31 August and from the respondent on 10 September that year.

[5] Section 171 of the Act provides:

> The Tribunal must make its decision on a matter referred to it … without delay and, in any case, within 60 days from the date of the completion of the hearing.

In breach of this section, the Tribunal did not "make its decision" on the respondent's grievance until 16 March 2015. In this decision, it upheld the grievance and awarded the respondent nine months' salary.

[6] The petitioner appealed to the Employment Relations Court against the Tribunal's decision. This appeal was heard, on the papers, in 2018. Prominent in the grounds of appeal were complaints as to the delay between the hearing before the Tribunal and

its decision. These complaints included, but were not confined to, the contention that once 60 days had elapsed since the hearing, the Tribunal no longer had jurisdiction to issue a decision and that, accordingly, the 16 March 2015 decision was invalid.

[7] A striking feature of the case is that despite the focus of the arguments advanced to it on the more than two years that the Tribunal took to deliver its decision, the Employment Relations Court did not deliver its own judgment until more than five years after the last submissions were filed. This judgment was in favour of the respondent.

[8] A subsequent appeal to the Court of Appeal by the petitioner was dismissed, save as to a minor issue relating to costs.

[9] The petitioner now seeks leave to appeal to this Court. Although its arguments before the Tribunal, Employment Relations Court and the Court of Appeal covered a range of issues, the only contention it wishes to pursue in this Court is the one already mentioned, that on the expiry of 60 days from the conclusion of the hearing, the Tribunal's jurisdiction to determine the grievance lapsed with the result that the 15 March 2015 decision is invalid. The same contention was advanced to, and rejected by, both the Employment Relations Court and the Court of Appeal. Both courts interpreted s 171 as not depriving the Tribunal of jurisdiction in event of breach of the 60-day time limit.

The merits of the proposed appeal

The general legal setting

[10] Section 171 of the Act imposes on the Tribunal what looks like an absolute time limit of 60 days from the conclusion of the hearing for the delivery of a decision. I say "looks like" because, as I will discuss shortly, the apparently absolute nature of the time limit is qualified by another section in the Act. As will be obvious, s 171 does not stipulate what is to happen if the Tribunal does not comply with the time limit.

[11] As Lord Steyn noted in *R v Soneji*:[1]

> A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation.

[12] Sometimes non-compliance with a statutory time limit invalidates any actions that occur after its expiry. By way of example, statutory rights of appeal are usually time limited. In this instance, the general approach of the courts is that in the absence of an expressly conferred power to extend time, there is no jurisdiction to entertain an appeal that is lodged out of time. The authorities as to this are reviewed in the judgment of the New Zealand Court of Appeal in *Hawkes Bay Hide Processors of Hasting Ltd v Commissioner of Inland Revenue*.[2]

[13] On the other hand, non-compliance with requirements that are expressed in apparently obligatory terms does not always invalidate everything that follows. This is illustrated by another New Zealand decision, *Simpson v Attorney-General*.[3] In issue was electoral legislation that provided time limits in relation to the steps to be taken to initiate general elections. The warrant of the Governor-General to the Clerk of the Writs to proceed with the 1946 general election should have been executed within seven days of the expiry of the outgoing Parliament (which was on 11 October 1946). It was not, however, executed until 6 November1946. On the basis of this slip, the plaintiff sought declarations:

> 1. That the General Election held on or about November 27, 1946, under the Electoral Act, 1927, and Amendments, is void and destitute of legal effect.
>
> 2. That all the Statute Laws made and enacted by the General Assembly constituted under the New Zealand Constitution Act, 1952, since that date are also void and of no effect.

Unsurprisingly, the courts concluded that the Governor-General's non-compliance with the seven-day time limit did not have the spectacular and distinctly awkward consequences contended for by the plaintiff.

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1 *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340 at [14].
2 *Hawkes Bay Hide Processors of Hasting Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 313.
3 *Simpson v Attorney-General* [1955] NZLR 271.

[14] In *Soneji*, Lord Steyn explained that the current approach to determining whether a statute requires automatic invalidation of all actions taken after expiry of a statutory time limit requires an intense focus:[4]

> … on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity.

As he explained

> In framing the question in this way, it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament.

What is the meaning of s 171?

[15] Section 171 does not address the consequences of non-compliance. This means that something which is important is missing from the section. So, whatever interpretation we place on s 171 will involve reading something into it which is not there – which was the point made by Lord Steyn in *Soneji* in the passage I have just cited (at [14], above).

[16] The interpretation of s 171 contended for by Mr Young, for the petitioner is that it should be construed as if it read:

> The Tribunal must make its decision on a matter referred to it … without delay and, in any case, within 60 days from the date of the completion of the hearing, *and, if it does not do so, the Tribunal no longer has jurisdiction to decide it.*

[17] The respondent's interpretation involves reading s 171 as if it said:

> The Tribunal must make its decision on a matter referred to it … without delay and, in any case, within 60 days from the date of the completion of the hearing, *but breach of these requirements does not deprive the Tribunal of the jurisdiction to decide the matter*.

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4 *Soneji,* at [15].

[18] Looking at the respondent's interpretation (set out in [17], above), if the italicised words – "but breach of these requirements does not deprive the Tribunal of the jurisdiction to decide the matter" – had been inserted in the section, it would have detracted somewhat from its exhortatory effect. For this reason, I do not attach much significance to their omission from the statutory text.

[19] Rather different considerations arise in relation to the petitioner's interpretation. If the legislative purpose was that decisions released in breach of the 60 day time limit are to be invalid, I would have expected that to be spelt out in s 171 and, indeed, for this to be in rather more detail than is provided by the italicised words set out in [16], above. This is because the postulated invalidity would raise obvious consequential issues that a sensible legislative scheme would address. For instance, could the Tribunal revive its jurisdiction by reconvening the hearing? If so, should the hearing be before a differently constituted tribunal? Alternatively, should non-compliance result in the proceedings before the Tribunal lapsing entirely (which is what Mr Young for the petitioner contended). If so, does this mean that the whole process of reporting the grievance to the Permanent Secretary would have to start again and how would this affect other statutory time limits, such as a six-month period allowed for by s 170(6) for reporting disputes to the Permanent Secretary? So, if the legislative purpose was that breach of s 171 deprived the Tribunal of its decision-making power, I would have expected the consequences of such deprivation to be spelt out. That s 171 has not spelt out those consequences is therefore a strong pointer against automatic invalidation.

[20] Not referred to in the judgments of the Employment Relations Court and Court of Appeal, or indeed in the written submissions of counsel, is s 234 of the Act. This provides:

> (1) If anything, which is required or authorised to be done by this Promulgation is not done within the required time limit, or is done informally, the Court or the Tribunal may, if the matter is within its jurisdiction, on the application of a person interested, order—
>
> (a) the extension of time within which the thing may be done; or
>
> (b) the validation of the thing informally done.

(2) The power under subsection (1) does not include the power to make an order in respect of judicial proceedings already instituted in another court of law, other than the Court.

As it happens, no one has applied (at least yet) to the Tribunal for it to extend the 60-day time limit for the giving of its decision. So, the section is not directly engaged, at least at the moment. It is, however, of significance to my assessment of the scheme and purpose of the relevant provisions of the Act.

[21] Section 234 was pointed out to Mr Young during oral argument. He conceded that extension or validation could be provided retrospectively but fell back on an argument that breach of the 60-day time limit deprives the Tribunal of jurisdiction in all circumstances other than where there has been an extension or validation under s 234. I regard this interpretation as artificial. Instead, I see s 234 as strongly supporting the view that automatic invalidation would not be consistent with the scheme and purpose of the legislation.

[22] One other consideration that strongly favours the respondent's interpretation was referred to by Prematilaka RJA in the Court of Appeal. Where an entitlement is conferred on an individual (such as a right of appeal), there may be nothing inherently unfair in a Court holding that enjoyment of that entitlement is dependent on that individual complying with all relevant legislative preconditions (such as for instance filing a timely appeal). It would be a very different thing to conclude that non-compliance by an official (in this case, the Tribunal) should deprive the respondent (who has done everything correctly) of what would otherwise be his rights. In the present context, automatic invalidation would produce a result so unfair as to be outside the legislative purpose of s 171.

[23] Accordingly, I would interpret s 171 in the manner proposed by the respondent.

Disposition

[24] I see the case as raising an important point of law of general importance and for this reason would grant leave to appeal. But, for the reasons given, I would dismiss the appeal. The parties having agreed not to seek costs, there should be no order for costs.

Orders of the Court

1. *Leave to appeal is granted.*
2. *The appeal is dismissed.*

The Hon. Mr. Justice Brian Keith
Judge of the Supreme Court

The Hon. Mr. Justice Terence Arnold
Judge of the Supreme Court

The Hon. Mr. Justice William Young
Judge of the Supreme Court