

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 9 of 2013

BETWEEN: FIJI INDUSTRIES LIMITED

APPELLANT

AND: NATIONAL UNION OF FACTORY AND COMMERCIAL WORKERS

RESPONDENT

Appearances: Ms. B. Narayan for the Appellant.

Mr. D. Nair for the Respondent.

Date/Place of Judgment: Tuesday 1 December 2015 at Suva.

Coram: Hon. Madam Justice A. Wati.

JUDGMENT

Catchwords:

Employment Law – Appeal – should the employer pay wages for the period of not reinstating the employee after having obtained an order for stay of reinstatement and not being successful in challenging the order for reinstatement- procedure to bring applications for payment of wages in the tribunal- should the irregularity be challenged in the original court –the issue of payment of wages during the period when reinstatement was to be effected and not complied an issue that arises after non-compliance and therefore cannot be litigated at the time of ordering re-instatement: the issue thus not being res-judicata but an issue to be determined on compliance or enforcement application before the Court.

Legislation:

1. The Employment Relations Promulgation 2007 (“ERP”): ss. 24; 212 (1) (b); 242 (5) (e) (iii).

The Cause and Background

1. On 7 May 2007, the Arbitration Tribunal ("**AT**") made a finding that the summary dismissal of the employee Mr. Anisi Vaja was harsh and unreasonable and awarded the following remedies:
 - (i) ***That Mr. Vaja be reinstated with immediate effect not later than 14 days of the publication of the award.***
 - (ii) ***That Mr. Vaja be paid equivalent of 3 months' pay and the rest of the period of dismissal be treated as leave without pay.***
 - (iii) ***The employer is entitled to place a last warning on the employee's file for the incident.***
2. Aggrieved by the decision of the AT, the employer, on 18 May 2007 applied to the High for Judicial Review seeking to quash the award. The application for leave to apply for judicial review was heard on 30 May 2007 where an interim order was made to stay the award pending the outcome of the judicial review application.
3. On 7 October 2011, the High Court dismissed the employer's application for judicial review. Then on 13 December 2011, the employer proceeded to comply with the original orders of the AT. It reinstated the employee and paid him 3 months wages.
4. The employee then filed an application in the Employment Relations Tribunal ("**ERT**") by a notice of motion on 26 April 2012 asking that the order of the AT be complied in full in that the employer pays the employee wages for the period from the date on which the employee was supposed to be reinstated until the date of reinstatement.
5. The application of the employee was granted on 6 June 2013 in that the ERT ordered that the employer must pay the employee for the period he was out of employment due to the stay orders.
6. The ERT found that the High Court did not vary the award in any form and therefore the order of the AT should be applied in its original form.

7. Aggrieved at the decision of the ERT, the employer appealed raising five grounds of appeal.

Grounds of Appeal and Submissions

8. The first ground of appeal states that that the procedure to bring the application was wrong in law in that a Notice of Motion ought not to have been used.
9. In respect of this ground it was argued by Ms. Narayan that there is no provision in the ERP which prescribes for initiating proceedings so the appellant had to file one pursuant to the Magistrates' Courts Rules Cap. 14 ("**MCR**"). The MCR only allows interlocutory applications to be initiated by a notice of motion. The respondent's claim was not an interlocutory application. It wanted wages for the period he was not reinstated. The issue arose from a fully adjudicated matter and so the process to initiate was incorrect.
10. Mr. Nair argued that the appellant had the opportunity to argue before the ERT that the process used by the respondent to bring the proceedings was wrong and if that issue was raised the respondent would have had the opportunity to argue the issue of irregularity and the ERT would have ruled on the same. Having not argued the irregularity in the ERT, the appellant has waived its right to raise the issue of irregularity. It was said that it is grossly wrong on the part of the employer to raise the issue at the appeal level.
11. Be that as it may, the application before the ERT was that of a compliance application of the order of the AT and s. 212 of the ERP allows for the application to be filed by a motion and an affidavit.
12. The second ground of appeal alleges that the issue that the ERT decided was res-judicata. It was argued that in the initial award the AT had awarded payment for 3 month's pay only. Once it had made the decision that only 3 month's pay was to be given, the question of paying any further wages' becomes res-judicata. The matter had also gone to the High Court on Judicial Review and the Court did not make any changes to the award of the AT. The issue of whether the respondent should be paid the wages for the period he was not reinstated as per the order of the AT was therefore an issue that was already being determined.

13. The respondent had the opportunity at the High Court of asking for wages for the period in which he was not re-instated. He did not do so. He therefore has lost his chance to make the same application again. It is an abuse of the process for the respondent to raise the issue at the ERT.
14. It was further argued that the respondent could have asked for a conditional stay that he be paid the wages until the determination of the judicial review application but he did not do so. He is therefore not entitled to re-litigate the issues again.
15. Mr. Nair argued that the issue was not heard fresh or re-litigated. The issue that was before the ERT was that of the enforcement of the order. The specific question was never an issue that was determined by any Court.
16. Ground 3 alleges that the ERT erred in law in concluding that the effect of the judgment in the judicial review proceedings is that the respondent's reinstatement be effective 14 days from the date of the award and he be remunerated accordingly when no such order was made by the High Court in its judgment that the respondent be compensated to the time of the reinstatement.
17. It was argued that when the judicial review application was dismissed, the decision of the AT remained intact, unvaried and unscathed. This is what the ERT found in its judgment which the appellant says it agrees with it. If the decision of the AT remained intact, unvaried and unscathed then it must be complied with and that is what the appellant did. It reinstated the employee and paid it the wages as ordered. There was no order to pay for the period of reinstatement.
18. When the judicial review was dismissed, the AT award was to take effect from the date of dismissal of the judicial review proceedings and not from 7 May 2007 as it was originally intended. The decision that the order takes effect from 7 May 2007 is prejudicial to the appellant in that it hinders the rights of the parties to challenge the decision.
19. The effect of the stay was that the respondent could not enforce the judgment and therefore it cannot ask for accumulated wages for the period of non-reinstatement.
20. Mr. Nair argued that the High Court dismissed the judicial review proceeding. This means that the award of the AT was upheld. The award thus must be complied with fully and effective from the

date of the decision of the AT. There were no changes made to this order that reinstatement should take effect from the date of the dismissal of the judicial review proceedings.

21. The arguments under grounds 4 and 5 were more or less repetitive. I will not reproduce the same here but merely state what the grounds are as it contained the argument as well.
22. Ground 4 alleges that the ERT erred in law in failing to appreciate and hold that since the order for stay in the High Court was not made conditional upon the appellant to compensate the respondent to the time of reinstatement in the event the High Court dismissed the appellant's judicial review application and that it did not make any order for compensation as part of its judgment in the judicial review, the ERT did not have jurisdiction to make any such orders for compensation.
23. Ground 5 alleges that the order of the ERT for payment was not a compliance order; it was a new order altogether and thus there was no jurisdiction to make such an award.
24. Mr. Nair argued that the ERT did not make any fresh order. It merely ordered that the order of the AT be complied with in its full form. The question before the ERT was specific on the question of payment in lieu of reinstatement.

Law and Analysis

25. I must first of all very succinctly state the background of this matter. The respondent was ordered to be reinstated by the AT no later than 14 days of the award and also ordered to be paid 3 months' pay during the period of dismissal. The appellant brought a judicial review in the High and obtained a stay of the orders. The judicial review application was dismissed and the respondent was reinstated and paid the 3 month's wages. He was out of employment for 4 years because the employer had obtained a stay of the award.
26. The employee was not reinstated within 14 days as ordered by the AT and when the judicial review was dismissed, the question was whether the employee who had the benefit of the award of the AT in its original form was entitled to wages for the period of stay.

27. The employer could not enforce the order in its original form because the period of reinstatement had passed. The employee was deprived of his fruits of his judgment in that he was not being reinstated. The only issue therefore was what his entitlement was and the simple issue was whether he was entitled to be paid for the period he ought to have been reinstated.
28. This was a question that could not have been decided by the AT because at that time the issue did not even exist for consideration. This was an issue that arose out of the stay and the dismissal of the judicial review proceedings. For the appellant to say that the issue was fully litigated and was determined is wrong on the facts and law.
29. The AT did not ever have to determine the question of what will happen if the appellant was not reinstated as per the order of the Court due to the stay and the subsequent dismissal of the main cause of the judicial review proceedings pursuant to which the stay was granted.
30. Even the High Court could not determine this issue as it could not make a determination of that kind on a judicial review proceedings. In the judicial review proceedings, the question before the High Court was whether the procedure invoked in arriving at the decision was correct. The judicial review proceedings are not like an appeal where the High Court can make further changes to the order if it upholds the order or grant any clarification as the order in its original form will take effect.
31. Since the order took effect in its original form and the appellant accepts that it does, the appellant ought to reinstate the employee from the date of the order of the AT and since it now cannot, it should pay the employee the equivalent of the wages because the employer kept the employee out of employment because it sought a stay of the judgment.
32. No one is depriving the appellant of the right to seek a stay and file a judicial review or an appeal but if the final cause of judicial review and the appeal is not its favour then the orders must be enforced fully. In fact the appellant has exercised its right to have the judicial review filed and determined. It was not deprived in any way. Why then should the employee be deprived of the fruits of the judgment? If it was not for the stay, the respondent would have enjoyed the full effect of the order. Now that the judicial review proceeding is dismissed, the appellant should have the full benefit of the order.

33. The High did not make any changes to the order and for the appellant to conclude that the orders should take effect from the date of the dismissal of the judicial proceedings is erroneous in law and prejudicial to the respondent.
34. There was no order by the High Court that the order should take effect from the date of the dismissal of the High Court proceedings. The parties are therefore only left with the order of the AT to enforce and that is the final order of the Court which must be given effect.
35. As per the order of the AT, it was the duty of the employer to provide the employee work within 14 days of the award of the ERT and since the employer did not provide work due to its application for stay, it is now obligated to pay the employee for the period it failed to provide work.
36. I can at least find that duty to be a one that is prescribed by the statute but even if it was not provided, the duty of good faith which is implied in all contracts of employment is to provide work unless the contract is frustrated or for some reasons beyond the control of the employer, work cannot be provided. This duty is expressly provided for in s. 24 of the ERP.
37. The appellant asserts that it was the duty of the employee to have asked the High Court for wages for the period he was not employed. There was no reason for the employee to make such an application as it had the benefit of the order. If the employer wanted any changes in the order, it was to have made an application and sought the clarification. I doubt the High Court would have made any orders on the judicial review proceedings but the employer having accepted the order for dismissal of the judicial review proceedings has accepted the order of the AT which now it is bound to enforce in the form it exists.
38. The appellant also asserts that the employee should have asked for conditional stay that wages be paid for the period of reinstatement. If the appellant was prepared to pay the wages, it should have made that offer in Court. Further, why would it ask for a stay if it was prepared to pay the employee without work being performed? This would be more disadvantageous to the employer.

39. The employee has not by words or conduct waived his right to receive the full benefit of the order. It has asked for compliance at an appropriate time when the rights of the parties have been finally decided and the appropriate time was when the judicial review proceedings were finalized.
40. The issue that the ERT was asked to decide was an issue of compliance of the order of the AT. The issue was whether the order should be complied with from the date it was given or from the date of the dismissal of the judicial review proceeding and if it was from the date of the order of the AT, what was the employee's entitlement in lieu of the period he was not reinstated. This issue arose out of the employer's refusal to pay the employee for the period it did not reinstate the employee and so the issue specifically is an issue of compliance and enforcement of the orders. The issue was not res-judicata and perfectly within the powers and jurisdiction of the ERT to determine. The ERT did not decide the matter afresh.
41. S. 212(1) (b) of the ERP allows for such applications of compliance to be heard by the ERT. Such applications are always brought by motions in the ERT. That has been the practice so far and there is no reason why this case should be deprived of that established practice. There is no need for oral evidence in a matter of this kind so the appellant is not in any way prejudiced when the motion for compliance was filed. The originating motion or summons would achieve the same result. The appellant was given an opportunity to file affidavits and submissions and the issue of wrong procedure thus does not make the proceeding a nullity as both parties received the same due process they were entitled to if another procedure was invoked.
42. Even if the initiating process was wrong, the appellant ought to have raised the issue of irregularity as soon as possible at the court it appeared in the first instance and allowed the ERT an opportunity to either order the process to be begun in a proper form or to validate the proceedings which was improperly brought. To argue the issue of irregularity in the appeal court as a point of law is most improper. I have not been shown at the appeal level that this issue was raised and argued at the ERT. If it was, it was the duty of the appellant to avail me of that.
43. I therefore find that the issue of irregular form or proceedings has no basis.

44. The appellant asserted that the ERT had ordered “compensation” for the period of reinstatement. The term “compensation” used by the appellant denotes “remedy” and if it does, than, the ERT, I find, did no grant any additional remedy but an order for compliance of the original orders. The order by the ERT for payment of wages in lieu of reinstatement was a compliance order. The ERT has the jurisdiction and powers to enforce the order of the AT.
45. I have basically dealt with all the grounds of appeal. However I must say that since the decision is against an order for compliance given by the ERT, the appeal could not be brought without the leave of the Court or the Tribunal: **s. 242(5) (e) (iii) of the ERP**. No such leave having being obtained, the appeal must be struck out on that basis as well.

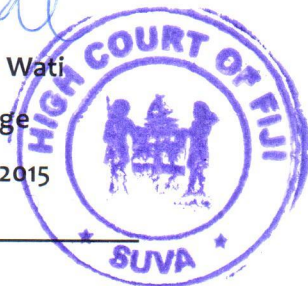
Final Orders

46. In the final analysis, I find that the appeal has no merits and I dismiss the same. The orders of the ERT are affirmed.
47. The employer is ordered to pay the employee all the wages for the period he was not reinstated pursuant to an award of the AT.
48. The employer is to pay the respondent the cost of the appeal proceedings which I summarily assess at \$2000.

Anjala Wati

Judge

01.12.2015



To:

1. **Lateef & Lateef Lawyers for the Appellant.**
2. **Mr. D. Nair for the Respondent.**
3. **File: Suva ERCA 9 of 2013.**