

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 17 of 2016

BETWEEN: **LAND TRANSPORT AUTHORITY**
APPELLANT

AND: **FIJI PUBLIC SERVICE ASSOCIATION** for ALIPATE
QALOMAIWASA
RESPONDENT

Appearances: Mr. G.A. Stephens for the Appellant.
Mr. R. Singh (Union Rep) for the Respondent.

Date/Place of Judgment: Wednesday 16 May 2018 at Suva.

Coram: Hon. Madam Justice A. Wati.

A. Catchwords:

Employment Law – Appeal against refusal to set aside the judgment obtained in absence of a party – whether the employer should be allowed a chance to defend the matter – why it did not partake in the hearing despite being given a chance: is the explanation for its failure acceptable and genuine? – even if it was allowed to defend the matter, is there sufficient evidence to justify that it had a lawful cause to carry out the termination despite an unsuccessful criminal charge brought arising out of the allegations based on which the termination was carried out? – the limits of the powers of natural justice – incoherent grounds of appeal; the effect on the merits – the prejudicial effect on each party upon the grant or refusal of the application.

B. References:

(i). Legislation

- 1. *The Employment Relations Act 2007 ("ERA"): s. 230(3) and 233.***

Cause and Background

1. The employer appeals against the decision of the Employment Relations Tribunal ("**ERT**") of 1 December 2016. In its decision, the ERT had refused to set aside its judgment of 23 January 2015 which was heard and granted in absence of the employer. It had also ordered that its initial order for reinstatement of the employee be carried out within 30 days. Cost of \$500 for the application was also ordered against the employer.
2. Mr. Alipate Qalomaiwasa ("**Alipate**") was employed as a prosecutions officer in the Land Transport Authority ("**LTA**"). He was terminated from employment on 27 July 2006 on the basis that he was involved in corrupt practices. He was charged by the employer for four counts.
3. It was alleged that Mr. Alipate had acted dishonestly and without integrity on two separate instances. He was also charged for providing false or misleading information to the licensing section of LTA on two separate instances.
4. The summary of the facts giving rise to the charges can be shortly stated. There were two persons by the names of Amal Dip Singh and Kaifu Dean. They were issued with Traffic Infringement Notices. They needed to have the fines ordered by the court to be cleared before they could renew their licenses. That is the standard operating procedure of the LTA.
5. According to statements obtained by LTA from Mr. Amal Dip Singh and Mr. Illias Dean (*son of Kaifu Dean*), one Mr. Joji from LTA had taken some money from them and assured them that their fines would be cleared. They also gave statements that Joji had told them that the money would be paid to Mr. Alipate who would clear the fines.
6. Apparently the fine sheet printed by the LTA then showed some notations to the effect that the fines have been paid. Some receipt numbers were noted on the fine sheet by

someone. These receipts numbers, according to the Magistrates' Court in Lautoka, was not issued by the court.

7. Mr. Alipate is in essence accused of having provided false receipt numbers to the LTA indicating that the accused persons have paid the fine in full enable the accused persons get a clearance. It is understood that this would have been done after Mr. Alipate used up all the monies given to him by the two accused persons.
8. Mr. Alipate was also criminally charged for offences arising out of the same allegations. He was acquitted by the Magistrates' Court on all counts. The court had found that there was no case for Mr. Alipate to answer. There is no appeal against this decision of the Magistrates' Court.
9. Subsequently, I believe (*as I do not know the date of the acquittal*), Mr. Alipate had filed in the ERT proceedings regarding his termination. The matter was listed for hearing in Court and the employer failed to appear and tender evidence. This was not the first time for the employer to fail to appear in court. The employer had been absenting itself from court on various court dates.
10. When the employer did not turn up for the hearing, the ERT heard the matter in its absence and made a finding of unlawful dismissal and ordered that the employee be reinstated without loss of benefits.
11. Following the judgment, an application was made for the setting aside of the same which was refused on the following basis:
 1. ***The LTA did not explain sufficiently why it did not appear in court for 7 consecutive court dates and why it did not appear at the hearing to defend the cause. It had failed to take advantage of due process which was afforded and it cannot complain that there was breach of natural justice.***

2. *There was no evidence or convincing material that the LTA would be able to justify the dismissal of the employee based on corrupt practices as the court had acquitted the employee of all charges.*
3. *The prejudice to the employee was very great in that he has been without work for 9 years post termination.*

12. Aggrieved, the employer filed the appeal raising the following grounds:

1. *The tribunal erred in law in striking out the application for default judgment and ordering the employer to comply with its orders.*
2. *The tribunal erred in law in not performing its powers correctly when hearing and determining the application for setting aside the default judgment.*
3. *The employee's union should pay the costs of the appeal.*
4. *The tribunal erred in not holding that the employer was denied natural justice.*
5. *The tribunal erred in holding that the employer was dealt with fairly by the employee.*

13. I do not understand the basis for grounds 1, 3 and 5. Firstly, the application for setting aside was not struck out but heard on merits and dismissed. Secondly, the employer is asking for costs of this appeal and is urging that as an error on the part of the tribunal. How the aspect of costs of the appeal can be pleaded as an error on the tribunal's part does not make any sense to me. I wish it did and that the employer's counsel took the opportunity of explaining that to me. Thirdly, the counsel has stated in the grounds of appeal that the tribunal erred in holding that the appellant was treated fairly by the respondent. There was no such issue before the tribunal. Further, there was no finding to this effect.

14. The manner in which the grounds of appeal are developed leaves a lot of questions in my mind on the seriousness of the appeal. The employer has an in house legal department and it employs fully flashed lawyers. A document containing majority of the grounds of appeal which makes no sense is basically a reflection of lack of interest in prosecuting the matter with due diligence. I make these comments on purpose. I only can hope for a better reflection in other matters.

Submissions/Law/Analysis

15. The employer's first argument centers on the dismissal of the application for setting aside. The counsel for the employer argued that the tribunal did not follow the procedural rules in considering the application for setting aside the decision. It was not identified as to what rule was not followed.

16. Another limb of the employer's argument was that the ERT should have considered that the employer always had its city agents to appear in court and its failure to appear on several occasions were due to the fact that it was not informed of the court dates. The counsel argued that the ERT had stated in its findings that the notices of the court dates were sent to Valelelevu but no mention was made as to where it was sent and whether there was any confirmation of receipt of such notices.

17. Mr. Stephens also argued that the employer had afforded the employee all due process before terminating his employment. It was contended that the employee was to appear before the management on 26 June 2006 and explain his case. He failed to turn up and provided a sick sheet after 17 days. His non-appearance to defend the matter established his guilt and on that basis the application for setting aside should have been allowed. The employer had shown that it had reasons to terminate the employment of Mr. Alipate.

18. I sincerely do not follow Mr. Stephen's argument on non-compliance of the procedural rules by the ERT. What rule of procedure was the ERT to follow in considering the application? It allowed both the parties to file the affidavits and heard the application. No

oral evidence was required and so the application was heard on papers. I do not find any error of law in terms of procedural compliance on the ERT's part.

19. The employer ought to have been present in court on the date of the hearing. The employer knew about the existence of the case and it had also made appearances in court. With that knowledge, it was always the continuing duty of the employer to find out from the court about the future court dates. It cannot blame anyone for this mishap.
20. The employer continues to allege that the ERT did not give any notices about the court dates. The court is not obliged to give notices for every adjournment when a party fails to appear. It is the duty of the parties to find out about the next court date. In cases where the court does not sit as scheduled, the procedure normally is that parties are told of the next date. That does not absolve the parties from neglecting to find out about the future directions and court dates.
21. There is no explanation why the employer did not care to find out from the court about the court dates. It continually failed to appear in court and did not show any desire to take part in the proceedings. A litigant who demonstrates such reprehensible attitude does not deserve to put forward an argument about natural justice and the right to be heard. These rights are not absolute and must be respected when the opportunities are given.
22. Further, it was the employer's duty to establish that there was a lawful cause to terminate the employee in that it had to establish that the employee was engaged in corrupt practices and also that the procedure invoked in carrying out the termination was proper.
23. The employer says that the employee was engaged in corrupt practices. He was even criminally charged for the said offences but that was not established in the court. The employee was acquitted. On the face of the acquittal, I have not been shown any material in the setting aside application based on which the employer asserts that it had lawful reasons to terminate the employee.

24. Mr. Alipate's non-attendance before the management to explain his defence, on the facts of this case, does not constitute admission of the charges. There was enough evidence before the ERT to hold that Mr. Alipate was genuinely sick and he was not able to walk properly to make his way to the meeting. He had given prior notice to the management regarding his illness. I have no reasons to hold otherwise that Mr. Alipate had admitted his guilt by not appearing and explaining his defence.
25. Further, the application for setting aside included only the statements from one Amal Dip Singh and Illias Dean based on which the employer says that the corrupt practice on behalf of Mr. Alipate can be established. The affidavit indicates that the statements were annexed but I could not find any such annexures. However, I fortunately obtained those documents from the court records which was compiled by the ERT and consented for use by the parties.
26. None of the statements contain an allegation that the two accused person had paid Mr. Alipate the monies to get their fines cleared. They categorically mentioned that the monies were paid to one Joji who had informed that he will give the money to Mr. Alipate. There is no material before the court to link the allegation to Mr. Alipate. His name was taken by Joji but there is no statement by Joji to confirm that Alipate had taken the money. In light of that, no weight can be placed on the statements to make a finding against Mr. Alipate.
27. The ERT found that there was no merits based on which the setting aside could be granted. I cannot agree more. I cannot find any convincing material to come to a conclusion that the employer will be able to establish the malpractices it alleges Mr. Alipate to have been engaged in.
28. The written document by the Lautoka Magistrates' court stating that the receipt numbers endorsed on the clearance form does not belong to the court is also not sufficient to make a finding of malpractice on Mr. Alipate's part. The two statements indicate that the

accused persons never paid any monies in the court registry so definitely the receipt numbers cannot be verified by the court.

29. The monies were allegedly paid to one officer Mr. Joji. No evidence has been put forward in any form in the setting aside application that the receipts for the corresponding numbers do not belong to LTA. Even if there was evidence, that still has to be linked to Mr. Alipate that he issued the false clearance. No one has given that statement that the clearance was given by Mr. Alipate. I therefore cannot agree with Mr. Stephens that the employer has evidence to prove malpractice on the part of the employee and that in the face of the acquittal; an opportunity should be granted to establish that.
30. The employer also raised the ground that the ERT did not perform its powers correctly when hearing and determining the application. It argued that the employer had taken adequate time to file the setting aside application because they were not aware of the default judgment for 2 months post-delivery of the same.
31. I do not know why the employer is even raising that issue when the ERT did not consider the time within which the application for setting aside was brought. The employer was not penalized for the late filing of the application. It was penalized for not appearing in court and rightfully so, there was no acceptable explanation provided. Even I do not find the employer's assertion to be convincing to lay the blame on its city agents and the court for not informing it of the court date. The employer must understand and appreciate that the court is not its practicing agent. On the facts of the case, I do not find any reason why the court should be informing the employer of new court dates every time the matter was allocated one.
32. Finally the employer argues that even on the date on which the matter was listed for hearing, seeing that there was no appearance from the employer, the matter ought to have been adjourned to allow the employer to be in court. I know of no such rule where the court must only consider the interest of the absent party when no excuses have been given for

the failure why there was no appearance in court. Swift and expeditious completion of a case is a right of every party and the employer definitely did not want to enjoy its rights. Its failure to appear in court was so common that there is nothing wrong in finding that it had no interest in presenting its case to the court.

33. If the court was to indefinitely wait for people to come to court to complete matters, the system would collapse in no time. No litigant will ever see the end of litigation and those who wish to be vindictive will never turn up to court. Everyone must treat the business of the court seriously. Those who do not, will end up neglecting their rights and find themselves in difficulty in their attempts to resurrect the proceedings completed on an undefended basis.
34. S. 233 of the ERA allows the tribunal and the court to proceed in absence of a party if one party does not appear without showing good cause. This provision does not support the contention of Mr. Stephens.
35. The employee is greatly prejudiced by the dismissal and the delay in the proceedings. He was terminated in 2006. He was ordered to be reinstated in 2015. It is post 12 years since his termination and 3 years post the order for reinstatement. There is no compliance of the orders only on the basis that the appeal was pending. A pending appeal does not entitle the reinstatement orders to be stayed unless stay is granted by the court or the tribunal: **s. 230(3) of the ERA**. There was no order for stay in this case.
36. The employer has not argued that reinstatement is not the best remedy that suits the circumstances of the case. There was indeed a substantial lapse of time from the date of dismissal to the date of the judgment but that has not been raised as an issue before the court for any determination to be comprehensively made. It will therefore not be prudent for this court to make discovery of new arguments.

Final Orders.

37. In final analysis:

(a). I dismiss the appeal.

(b). I order that the employer pays the costs of the appeal in the sum of \$1,500 within 7 days.

In essence, the employer must now proceed to comply with the ERT's orders. For the period of non-compliance (from the date of the ERT's judgment to the date of the appeal judgment) the employee must be paid the wages due to him.




Anjala Wati
Judge
16. 05. 2018

To:

1. ***Land Transport Authority - Legal Department- for the Appellant.***
2. ***FPSA for the Respondent.***
3. ***File: Suva ERCA 17 of 2016.***