

**IN THE HIGH COURT OF FIJI**  
**[WESTERN DIVISION] AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CIVIL ACTION NO. HBM 19 OF 2018**

**IN THE MATTER OF** an appeal from  
the decision of the **EMPLOYMENT**  
**TRIBUNAL** Civil Case No. ERT WC  
97 of 2016.

**BETWEEN** : **DAYAL'S LOGGING & EARTHMOVING CONTRACTORS**

**APPLICANT/RESPONDENT**

**AND** : **MINISTRY OF LABOUR**

**RESPONDENT/APPLICANT**

**Appearances** : Applicant present in-person  
Ms R. Kadavu for the respondent

**Date of Hearing:** 11 July 2018

**Date of Ruling** : 11 July 2018

**R U L I N G**

[Leave to appeal out of time]

[01] This is an application seeking an enlargement of time to appeal a decision of 6 February 2018, delivered by the Employment Relations Tribunal ('ERT'). The ERT ordered the applicant to pay the sum of \$36,142.08 on account of worker's compensation for death arising out of the accident occurred at a work site. The application is supported by an affidavit of Mr Atwan Ashik Dayal, the applicant sworn on 26 June 2018.

[02] By his notice of motion dated and filed in person on 2 July 2018 (*'the application'*), the applicant seeks an order for leave to appeal out of time. The application does not state the law which the application is filed under.

[03] Ms Kadavu of counsel appearing for the respondent argues that the applicant cannot file his application for leave to appeal out of time in this court. He has to file such an application in the ERT, which has jurisdiction to hear and determine employment related matters. Essentially, her argument is to strike out the application.

[04] In *Hazelman v Fiji Hardwood Corporation Ltd* [2014] FJHC 101; HBC79.2010 (25 February 2014), the plaintiff instituted an action in 2010 against the defendant in the High Court for a claim based on breach of employment contract. In the statement of claim, no mention of Employment Relations Promulgation and the claim was based on the common law contractual obligation between the parties. The Defendant raised a preliminary objection to the jurisdiction, Amaratunga, J delivering his ruling said (at paras 8-10):

*“8. The Section 220(1) (h) confers general jurisdiction of the Employment Relations Court regarding the ‘actions founded on employment contract’. The jurisdiction of matters found in Section 220(1) (a) to (n) spelt out the jurisdiction of the Employment Court but more importantly, it does not confer exclusive jurisdiction regarding any of the matters stated in Section 220(1) (a) to (h). (Emphasis supplied)*

*9. The exclusivity given in Section 220(3) is only when a matter is before the Employment Tribunal and not prior to that. That means the matters that confer jurisdiction to the Employment Court are not exclusive and the person instituting the action can either file an action under Employment Relations Court or under common law in any court that exercises civil jurisdiction if it involves a breach of employment contract. If he had already filed an action in Employment Relations Court, then the jurisdiction of the said court becomes exclusive for that matter before it, and that exclusivity is confined to that matter which is before the Employment Relations Court only. This exclusivity to deal with specific matter is gained after the matter is before the said court and not prior to the matter is brought before the Employment Relation Court. If not, there is no reason to restrict the exclusive jurisdiction of the Employment Relation Court in the manner of Section 220(3) only to ‘matters before it’.*

*10. So, I reject the Defendant’s contention that Section 220(h) confers an exclusive jurisdiction to Employment Relations Court, so that all the matters instituted in High Court by virtue of said provision is deemed an action instituted under Employment Relations Promulgation 2007.*

[05] There is nothing in the Employment Relations Act 2007 ('ERA') to suggest that only the ERT or the Employment Relations Court ('ERC') has exclusive jurisdiction to hear an application for leave to appeal a decision of the ERT out of time. I agree with Amaratunga, J that section 220 (1) of the ERA does not confer exclusive jurisdiction (on the ERC) regarding any of the matters stated in that section.

[06] Therefore, I reject the contention that the applicant can only file his application for enlargement of time to appeal the decision of the ERT.

[07] I would consider this as an application filed under O 37, R 4 of the Magistrates' Courts Rules 1945 ('MCR'). Rule 4 provides:

*"Effect of failure to file grounds of appeal*

*4. On the appellant failing to file the grounds of appeal within the prescribed time, he or she shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time." (Emphasis supplied)*

[08] In deciding whether to give the applicant more time to appeal the decision, the court will consider the following factors:

1. Length of the delay;
2. Reason for the delay;
3. Chance of appeal succeeding if the time for appeal is extended; and
4. The degree of prejudice to the respondent if the application is granted.

[09] I have carefully considered the affidavit in support filed by the applicant. The applicant did not attach his grounds of appeal with his affidavit or at least the affidavit does not disclose the grounds of appeal which he proposes to challenge the decision. The only ground of appeal the applicant had stated in his affidavit is that the tribunal did not explain that he had 28 days to appeal the decision. The explanation that the applicant had 28 days to appeal was not necessary because the applicant was represented by counsel at the hearing before the tribunal. Perhaps, such an explanation would have been needed if the applicant were unrepresented.

[10] In the absence of the proposed grounds of appeal, I am not in a position to assess whether the appeal has merit or not. Therefore, the applicant fails to satisfy the court that there is a chance of his appeal succeeding if the time for appeal is extended.

- [11] The impugned order has been made on 6 February 2018. The applicant had 28 days to appeal from the date of the decision. He has filed the current application on 2 July 2018. He is about 4 months late in filing his appeal. The delay has been substantial and it remains unexplained.
- [12] The supporting affidavit does not disclose the grounds of appeal. The substantial delay has not been explained. The applicant does not demonstrate his genuine intention to appeal. It appears to me that this application has been filed with a view to delaying the enforcement of the decision. In the circumstances, I find that prejudice would be caused to the respondent if this application is granted.
- [13] For the foregoing reasons, I would dismiss and strike out the application with no order as to costs.

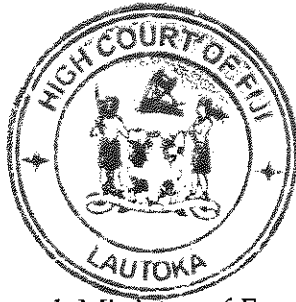
**The outcome**

1. Application to extend the time to appeal dismissed.
2. No order as to costs.

*M.H. Mohamed Ajmeer*  
11/7/18

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**M.H. Mohamed Ajmeer**  
**JUDGE**

At Lautoka  
11 July 2018



Solicitors:

For the applicant: in person

For the respondent: in house counsel, Ministry of Employment, Productivity and Industrial Relations