

IN THE EMPLOYMENT RELATIONS TRIBUNAL

AT SUVA

ERT Grievance No. 31 of 2011

BETWEEN : RONALD BIMLESH

Grevior

AND : SUNBEAM TRANSPORT LIMITED

Employer

Appearances:

Mr. I. Dave as Labour Officer for the Grievor

Mr. V. Kapadia for the Employer

Date of Hearing: 8th November 2011

Date of Judgment: 6th August, 2012

DETERMINATION OF THE EMPLOYMENT RELATIONS TRIBUNAL

1.0 Employment Relations Grievance

1.1 Background to the Grievance

This grievance was registered with Ministry of Labour on 29th June 2010. Mediation was attempted on 6th October and 7th December 2010 but was not successful. The mediator referred the grievance to the ERT in accordance with s194 (5) of ERP outlining the nature of unsettled employment grievance with the following terms of reference:-

“The grievance was referred as being on unfair dismissal of the worker Ronald Bimlesh from 30/05/10 by the employer Sunbeam Transport. During mediation the worker insisted as well on consideration of his claims for overtime, meal and subsistence allowances together with unfair termination. The worker is seeking appropriate amount as compensation”.

2.0 Cause before the ERT

2.1 In the Employment Relations Tribunal (or "the ERT"), the parties were directed to file preliminary submissions by the Hon. Chief Tribunal whereby the Employer filed its Preliminary Written Submissions on 10th May 2011 and Grievor filed his Preliminary Written Submissions on 27th July 2011. Employer filed further submissions on 17th August 2011.

2.2 Hearing was fixed for 8th November 2011 which commenced and completed on the same day. The parties also submitted their respective closing oral submissions and were given further time to file closing written submissions; however, only the grievor filed this written closing submissions on 21 November 2011.

3.0 Issue(s) before the ERT

3.1 The issues arising out of this grievance requires the Tribunal has to assess whether the summary dismissal was justified *substantially and procedurally* in accordance with the employment relationship that existed between the worker and the employer (implied or express), and whether the summary dismissal was in compliance with the Employment Relations Promulgation 2007 (or "the ERP 2007").

3.2 In nutshell, the following main issues will be determined by this Tribunal:-

- a) Whether the employer had justification for **gross misconduct** in substance to invoke **summary dismissal** against the Grevior pursuant to **section 33(1) of the ERP**; and
- b) Whether the grevior was discharged with dignity at the time of his dismissal without any humiliation, in that he was treated fairly and with appropriate respect and dignity [as per the dictum in the case of *Central Manufacturing Company Limited v Yashni Kant [Unreported Fiji Supreme Court Case Number CBV 0010 of 2002*, followed by the Employment Relations Court in the case of *Carpenters Fiji Limited v Isoa Latianara ERC No. 7 of 2011*].

4.0 Analysis of Evidence

4.1 Grevior, a bus conductor was cited by the employer on or about 1 June 2010 for stealing money from the Company which he had received from passengers but it is alleged that he had in fact failed to issue tickets to at least 5 people with an intention to pocket the same.

4.2 Since 12th April 2006, the grievor was entrusted with the conductor's duties and responsibilities to collect cash monies from passengers who upon getting on the bus are required under the law to be issued with a ticket or what is regarded as the first copy of a triplicate ticket book. Each passenger will then hand over the same to the bus driver when disembarking. The policy of the company required that the other two copies are to be retained by the conductor to be given to the company as evidence of collection of money. The original ticket issued to the passengers but later given back to the bus driver is also retained by the Company for the same reason.

- 4.3 It appears that there is a double-check system in place where both the conductor and the bus driver play an important role in proving to the company that tickets were properly issued to the passengers and correct bus fares collected.
- 4.4 Mr Kapadia attempted to explain that the said policy of the Company was in fact in line with the LTA or the Regulator's laws and policies to protect consumers where it is mandatory to issue tickets whilst at the same time decrease pilferage in the company and misuse of funds in the public transport sector. He produced two newspaper articles which are annexed to the employer's submissions dated 10th May 2011 as "A" and "B" to prove this.
- 4.5 The said incident occurred on 31st May 2010 when there was a complaint raised to the Company by one of the passengers that he was not issued with a ticket despite he had demanded one from the conductor. The driver of the bus, Mr Khan also gave evidence that he had lodged a similar complaint with the management when he was informed by at least five passengers that they were not issued with their tickets. Mr Khan said that it was the Company policy for the drivers to report such incidents immediately to the Company which he had adhered to.
- 4.6 The employer through Mr Haroon Ali, one of the directors directly involved in this matter testified that when a public member or a passenger raises a complaint, given the extent of awareness on the law by the Regulator, they have not only become vigilant but are in fact compelled to look into the concerns and complaints brought to the Company's attention.
- 4.7 Although there was no established internal investigation process other than what the employer stated was their usual practice of fact-finding process, Mr Ali proceeded to invite the grievor to his office to find out the truth in the complaint. Mr Ali then interviewed the driver to ascertain the truth in the report submitted by the driver to process whether the complaint was genuine before the Company could take an action to either report the matter to police or issue a warning if there was not enough evidence or the alleged offence was not verified. However, he stated that the Company could consider dismissal of the worker if the conduct was deemed serious or severe by them.
- 4.8 When the grievor appeared before the director on 1st June 2011, it was Mr Ali's testimony that he had put the grievor on notice that the company had received a report that he did not issue tickets to 5 passengers travelling between Korovou and Sigatoka. He also stated to the grievor that he did not carry out his duty according to what was required of him and that no passenger would complain unless there was a genuine case. He then told the grievor that if he was not honest he was going to dismiss him.
- 4.9 Mr Ali informed the Tribunal that the grievor told then him that there were no passengers on board from this destination and denied taking any money and not issuing tickets. He was then informed by Mr Ali to hand over all income to the cashier and that he will decide his fate next day.
- 4.10 According to Mr Ali, when the grievor appeared next day or thereafter, by this time Mr Ali had already spoken to the bus driver who had confirmed to him that the alleged incident had in fact taken place.

- 4.11 Mr Ali told the Tribunal that he had concluded from the driver's story that the grievor had failed to issue tickets to 5 passengers who had complained to him when they were unable to produce the same when demanded by the driver at the time they were getting off in Sigatoka. This was also confirmed by Mr Khan, the bus driver during his testimony.
- 4.12 Mr. Ali stated that the grievor, now knowing that it was serious matter attempted to apologize and seek forgiveness from him and pledged to work honestly when he saw him the next day or thereafter. Upon seeing the grievor, Mr Ali testified that he told Mr Binesh that *"I'm not going to take you back in the employment because you are not honest, we should have honest people here because we are getting a lot of complaints from the public now...whenever they pay bus fare they want ticket...we are very strict about this now..."*. Mr Ali, hereafter proceeded to dismiss him straightaway and told him to return his float money which was \$20.00.
- 4.13 The grievor admitted meeting with the employer on 1st June 2010 and discussing a complaint made against him and thereafter giving the float money, however he denied having a subsequent meeting with Mr Ali to admit the allegations or to seek his forgiveness. He maintained that he did not pocket the money he had received from five passengers as alleged. In fact, Mr Binesh stated that the passengers who got on the bus as alleged by the employer were those who had complimentary tickets from the directors which was the reason no cash was taken and no ticket was issued by him. He also attempted to explain that often passengers misplace or lose their tickets, in particular the drunkard ones.
- 4.14 There was no evidence from the bus driver that any, if not all of the five passengers were drunk to remember anything or had lost their tickets. I also see no reason why they would tell the driver that they had no tickets if they had been given complimentary tickets although none of the passengers was before the ERT to give evidence.
- 4.15 All the same, I was able to understand the employer's difficulty that public often lodge complaints to raise concerns when they are dissatisfied with customer service or their rights being violated by the bus company, here being denied a ticket which is mandatory under the law to be issued. They however, do not easily come forward where prosecution or court proceedings are concerned. That said, this fact was collaborated by the driver who had no reason to register a complaint with the employer if it was not true and whose evidence was credible in terms of him raising a complaint immediately as per the company policy. He also stated that none of the passengers was drunk or had lost their tickets on this occasion. I don't see a reason why he would lie as he has been an employee longer than the grievor working for the company for 30 years and it can be reasonably stated that he understood the expectation and policies of the company albeit there was no written policy before the ERT. There was also no evidence of animosity between the conductor or the driver to justify malice or vindictiveness here.
- 4.16 It is thus an uncontested fact that tickets are compulsory under the LTA laws to be issued to the commuters or passengers and therefore whether it was a written Company policy or not and whether the conductor or the grievor complied with this or not is a secondary issue. The primary issue is that a law must be complied with and here it seems the conductor breached both the law and the company policy after receiving money from five passengers and failing to issue a ticket.

4.17 It is then irrelevant at what point he disembarked the bus and changed his route to return to Suva as is a norm. This does not absolve him from breaching his duties and responsibilities that he has clearly done here. Simply put, he did not deny that he was not the conductor who had dealt with these five passengers when they got on the bus. In fact, at first he denied any such passengers getting on the bus as per the employer's evidence.

4.18 The issue is relatively simple in this grievance: if he had issued the passengers with their tickets upon payment as required under the law once they got onto the bus, the same passengers would not have told the bus driver that the conductor did not issue them with a ticket, even on demand. And here, there were five passengers with the same complaint.

4.19 Therefore even if the bus driver's evidence is that the grievor had got off the bus before he could ask him about the alleged incident whilst the grievor had stated otherwise; it does not drastically change the fact that the passengers were without tickets when they were disembarking. And following this incident when the driver had lodged his report with the employer, the driver was given an opportunity to come before the employer and explain his side of the story.

4.20 I am then satisfied that the employer had a *prima facie* reason or cause where the grievor has obviously failed to uphold and carry out his duties and responsibilities mandated under the law and the company policy such as issuing tickets and accounting the same with the employer as required.

5.0 Is Summary Dismissal Lawful and Fair in Substance and Procedure?

5.1 Whether the employer had a **lawful cause** under s34 of the ERP as opposed to just any cause to invoke summary dismissal on the grounds of "gross misconduct" (under s 33(1)(a) of the ERP) has to be assessed in the way the dismissal was carried out, substantially and procedurally.

5.2 Although the employer's defence is that they invoked section 33(1) of the ERP 2007 to carry out summary dismissal of the grievor, this ERT cannot overlook that the first point of reference for termination on the premise of **good faith** relationship is always the **contract of service** between the parties. This goes to the definition of an *employment; employer; and worker* in the ERP which all make reference to "contract of service" being a basis for an employment. Section 4 of the ERP is clear that:

"contract of service" means a written or oral contract, whether expressed or implied, to employ or to serve as a worker whether for a fixed or indefinite period, and includes a task, piecework or contract for service determined by the Tribunal as a contract of service".

5.3 Here, there was no contention from the employer's side that the grievor was not on a written contract of service and hence an oral contract existed.

5.4 This is not a good justification as the employer has fallen foul of s37 of the ERP where it is clear that certain contracts must be in writing where the worker has worked for duration in excess of one month. Both the employer and the grievor confirmed that he had worked for about 5 years with the company.

- 5.5 This is far too long a duration not to have a written contract of service in place, regardless of the position and nature of work conducted by an employee. Even the driver who has been working for more than 30 years did not have a written contract of service although the employer justified that this is now changing and the Company is issuing contracts.
- 5.6 The employer has however, agreed that there was verbal understanding at all times and the grievor also testified that he was aware of his duties and responsibilities although it is obvious that without any codified grievance procedures, the grievor is not expected to be reasonably aware of the Company policies on these matters. That said, I am curious that the grievor had not sought nor demanded a written contract of service from the employer at any time or come to Ministry of Labour for advice. Indeed the Labour Department has a surmountable task ahead of them to ensure that their mandatory annual inspection bring these matters to the attention of the employer to allow compliance as desired by the ERP.
- 5.7 The real essence of a written contract of service cannot be underestimated as it is pivotal to according an employee or worker his/her right to be dealt fairly under the grievance procedures of the company (see section 110 of the ERP), no matter how serious the offence or what are the penalties decided and accorded by the Company. This clearly puts an employee on reasonable notice as to the expectation of the company, the policies that guide the company's daily operations in terms of achieving the desired outputs and production and thus dealing with the employee if they offend or breach the company's terms and conditions.
- 5.8 The employment contract should also specify what constitutes a "gross misconduct", and what are the circumstances that can entitle a misconduct to fall within that category such as act of stealing, dishonesty, etc. It should also state the preferred company penalties such as summary dismissal and the procedures leading up to this in terms of finding the employee guilty of that particular offence and how the company would act to invoke that penalty in terms of no notice been given to the employee. This is because summary dismissal is declared the harshest and "last resort" penalty, especially where there is a first offence and the employee has no prior offences or warnings against him/her.
- 5.9 That said, applying the case of *Sinclair v Neighbour* [1967] 2 WLR 1 where the Court of Appeal ruled that *one act of dishonesty was sufficient to warrant summary dismissal* where it cautiously demarcated between placing less weight to the labeling of the act or misconduct with that of the facts that establish that misconduct, it can be said that even one very serious act or misconduct can give rise to summary dismissal.
- 5.10 It is then my duty to test the facts and evidence against the alleged misconduct and this is only possible by looking at the good faith relationship that has existed in this employment relationship before me. This was tested in the 1997 decision of the Supreme Court of Canada in *Wallace v United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 where the noted that:-

"... at minimum, ... in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive..." (at page 46).

- 5.11 What this means is that as long as the employer at the time of dismissal is honest, upfront and makes the employee aware of the path they are taking in terms of an action or misconduct of the worker which may led to dismissal, for whatever reason (lawful cause or no cause) which they are able to communicate to the worker in a dignified and fair manner without inflicting humiliation or misleading in terms of giving any false information, whether in writing or not, the requirement of "good faith" should suffice. I am thus going to assess in this instance whether the parties presented and fulfilled the essential good faith, which I must say goes both ways.
- 5.12 In this instance, while I have noted that employee did not have a written contract of service, there was overwhelming evidence that the money that was entrusted to the grievor to receive from the passengers in the form of bus fare was not properly accounted in terms of issuing tickets to the passengers.
- 5.13 This is because the grievor did not prove that the ticket was in fact issued by him but lost by the passengers and he still had the two other copies to verify the same. He stated he did not issue the ticket at all as the passengers were carrying complimentary tickets, and there is no evidence this was true. These are clearly contradictory statements from the grievor. Further the driver was told by the passengers that they had no ticket at all because the conductor did not give them one even on demand. Why would they say this if they had complementary tickets?
- 5.14 To that end, this ERT will not substitute its views for that of the employer in determining whether the employer acted reasonably; rather the Tribunal has a task to test objectively whether the employer acted reasonably: (see: **Michael Strouthos v London Underground Limited, England and Wales Court of Appeal (Civil) Decisions, [2004] (18 March 2004).**
- 5.15 I have also noted his Lordship Justice Gates (now the Hon. Chief Justice) decision in the case of **Philips Thomas v Fiji Electricity Authority [2004] FJHC 303** where he applied the ratio in the English Court of Appeal case of **X v Y [2004] EWCA Civ 662** as follows:-

“...the law on dismissal for conduct is clear. It has been said to be a four pronged test. The **Foley** test was cited with approval in **X v Y** (supra at para 18):-

“the employer must show that he believed that there had been misconduct by the employee; that there were reasonable grounds for that belief; that he had carried out as much investigation into the matter as reasonable in all the circumstance; and that the decision to dismiss him for that conduct reason was within the range of reasonable responses of a reasonable employer.”
- 5.16 The Tribunal is of the view that the employer had reasonably drawn conclusion that the grievor had deliberately not ticketed the bus fare received by him with an intention to pocket the cash he had received from the passengers. This was adequately proved by the independent evidence of the bus driver.

- 5.17 This then clearly establishes a basis for the employer's justification for alleging "gross misconduct" in terms of having a lawful cause where dishonesty, an act to defraud the Company, or theft of such nature can fall within the ambit of gross misconduct if employer has set down a standard of conduct where any form of theft is unacceptable. More so, in this instance there was an additional aspect of law making it compulsory for the company (through the conductor) to issue tickets to the passengers. Both, the laws of Fiji and policy of the employer were duly breached where the company and not the employee would have been held culpable if the Regulator was to take an action.
- 5.18 Thus the employer's main reason for dismissing the grievor was for a lawful cause. Accordingly, the employer to the satisfaction of this Tribunal has established that there was a gross misconduct on the part of the grievor where substantive allegations are concerned.
- 5.19 In the case of *Carpenters Fiji Limited v Isoa Latianara ERCA No. 7 of 2011*, Wati J has said that:-
- "...if there is serious misconduct, then it is the prerogative of the employer to terminate the employment immediately. If all these procedures of hearing and explanations are accorded to the employee, then the purpose of summary dismissal is lost..."*
- 5.20 I have already accepted that there is justification for "gross misconduct" in substance in that the grievor's conduct at the time of his dismissal was within a range of *reasonable responses* as alleged by the employer. *Isoa Latianara's* case alludes that once a serious (or gross) misconduct is established then procedural fairness or justice is not required. To end, the employer can immediately proceed to terminate the grievor.
- 5.21 Further under section 33 (2) of the ERP 2007 it is mandatory that *"the employer must provide the worker with reasons in writing for summary dismissal at the time he/she is dismissed."* (my emphasis). Time of dismissal is critical component to lawfully establishing "summary dismissal".
- 5.22 In this instance the grievor has stated that *"...on 30/05/06 the Director verbally sent me home without any valid reason. He promised to contact me. Since that time, there has never been any contact or phone call from the company..."* (as per Form ER1).
- 5.23 The grievor admitted that he had a meeting with the Director on 1 June 2010 where it is possible he may have known why he was considered for dismissal. However he denied any subsequent meeting where clearly any news of his termination would have been conveyed to him, even verbally as the employer did not present any evidence other than the director vaguely stating that it was day after 1 June 2006 or thereabout (4th June 2010 as per Preliminary Submissions) that he met with the grievor and told him he was terminated. This is not very convincing.
- 5.24 Notwithstanding the meeting with the director of 1 June 2006 where the grievor would have had some verbal understanding of the reasons why his dismissal was being considered, the employer has no doubt fallen short of his statutory duty under s33(2) of the ERP to provide these reasons in writing. More so, there is no evidence that the employer complied with s34 of the ERP by attempting to settle any dues outstanding to the grievor at the time of his dismissal.

5.25 The employer had stated that the grievor was a weekly permanent staff for 5 years. In a normal termination he would have been entitled to payment of unpaid wages, leave pay, any overtime pay and other dues although this was not before the ERT to properly assess. Instead Mr Binesh was asked to return his float money, which he did.

5.26 The case of *Central Manufacturing Company Limited v Yashni Kant [Unreported Fiji Supreme Court Case Number CBV 0010 of 2002]* clearly states that in carrying out the dismissal, the employer must treat the employee fairly and with appropriate respect and dignity. This was followed by Ladyship Wati. J in *Isoa Latianara's* case: here evidently Wati J considered that where the allegation of *unfair dismissal* is concerned:-

"...it is not the aspect of right to be heard that leads to unfair dismissal. It is the manner of treating the employee in carrying out the dismissal that must be considered. The employer's actions must be assessed to ascertain whether the employee was treated with fairness, respect and dignity in carrying out the dismissal" (emphasis added).

5.27 In this case, it has been established that the grievor was not given any reason for dismissal in writing under s33 (2) of the ERP. He also appeared to state that generally he did not know why he was terminated as reflected in his claim made under Form ER1. In that regard, while there is incontrovertible ground to justify gross misconduct to invoke summary dismissal against the grievor as a penalty for his wrongdoing, clearly the employer fell short of discharging the grievor from his employment with respect and dignity at the time they allegedly carried out summary dismissal.

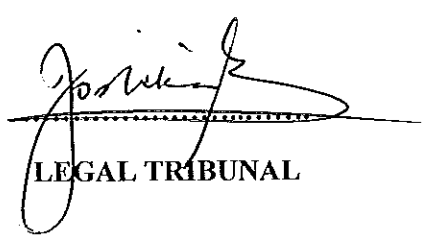
5.28 For this reason, I am persuaded by the grievor that for fair termination to persist, he is entitled to know why his means to livelihood is being snatched away from him without notice: here, not just through his statutory right to know under the ERP [in writing] but for simple transition from one moment having a job and losing it the next, meaning *the manner* in which he receives this information at the time he was sent home. Further both the grievor and the employer stated that this was his first offence in five years of employment and to treat him this way is not acceptable by any fair standards. He was also not paid any dues and the employer did not prove that the grievor was not owed anything by the company at the time of his dismissal. He was also denied a written contract of service which would have made his dues and entitlement easier to calculate by this Tribunal.

6.0 Decision and Orders:-

1. The Employer had lawful cause in substance to invoke summary dismissal on the grounds of gross misconduct. However, the Employer has failed to properly carry out summary dismissal, in procedure and law by failing to comply with s33(2) and s34 of the ERP.
2. The ERT is thus allowing for payment of wages in lieu of notice, being **one week's pay plus two week's wages** for denial of other dues such as meal allowance, overtime pay, leave pay, etc, in the absence of the employer proving that this was not owed to the grievor at the time of his dismissal as per his allegations. Clearly this was raised by the grievor in his preliminary submissions to be defended by the employer and they failed to do so.

3. Further, the Employer has unfairly carried out summary dismissal as they have failed to immediately inform the grievor of the Company's decision to summarily dismiss him, entitling him to be compensated for loss of dignity and injury to his feelings in terms of **one week's wages**.
4. Given that the grievor is a contributory factor to this grievance, I shall take off one week's pay and therefore in total the employer will pay the grievor **three week's pay** from date of this decision within 30days.
5. Each party will bear their own costs.

Dated at Suva this 6th day of August, 2012


LEGAL TRIBUNAL