IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA NO. 09 OF 2012**
BETWEEN:	**AUTOMART LIMITED**
	APPELLANT
AND:	**WAQA ROKOTUINASAU**
	RESPONDENT
Appearances:	**Ms. Drova for the Appellant.**
	Mr. Senitiki for the Respondent.
Date and Place of Judgment:	**Friday 26th April 2013 at Suva.**
Judgment of:	**The Hon. Justice Anjala Wati.**

JUDGMENT

CATCHWORDS:

EMPLOYMENT LAW – Summary Dismissal – Procedure for termination – The appropriate remedy if procedure for summary dismissal not followed properly – will it be same if the cause for summary dismissal was unlawful –factors to be considered when awarding remedies- awarding remedies for humiliation, loss of dignity and injury to feelings without claim and evidence.

LEGISLATION:

THE EMPLOYMENT RELATIONS PROMULGATION 2007 ("THE ERP"): SS: 33, 230.

The Cause

[1]. The employer appeals against the decision of the Employment Relations Tribunal ***("ERT")*** of 17 September 2011.

[2]. The terms of reference before the ERT was in the following form:

"The grievance is over the termination of service of watchman (security), Mr. Waqa Rokotuinasau without a valid reason with effect from 12th September 2008. The grievor alleges that his employer, Automart Limited verbally terminated his services without giving written notice. The grievor views that the action taken by his employer are unfair, unjustified, unreasonable and therefore demands to be reinstated without loss of pay and other benefits from the date of termination and/or any other relief deemed appropriate".

[3]. The ERT made a finding that the grievor was only complaining against the improper procedure in terminating him. In determining the issue the ERT came to a finding that it was undisputed by the employer that it had carried out summary dismissal under s.33 of the ERP and that no written reasons were provided at the time of the dismissal. The ERT also found that the employer did not dispute that the leave pay was not given to the employee. The ERT held that the dismissal was procedurally unjustified and unfair in that the employee was not given a chance to be heard and refute allegations against him or be represented in any disciplinary process. According to the ERT, the procedure that the employer ought to have followed in dismissing the grievor was as per the procedure outlined in one New Zealand case which was that the grievor ought to have been given:

(a) notice of the specific allegation and its gravity and possible outcome;

(b) an opportunity to refute the allegations (with an opportunity to have a representative, not simply a witness, present); and

(c) an unbiased consideration of the employee's explanation.

[4]. The ERT therefore found that the appropriate remedy was 2 years wages for the grievance and further 6 months wages as compensation for humiliation, loss of

dignity and injury to his feelings and that the outstanding leave be paid to the grievor. A time frame of 28 days was given for the payment.

The Grounds of Appeal

[5]. The employer raised 6 grounds of appeal as follows:

> ***"1. The Tribunal erred in considering that it was improper for the Appellant to verbally terminate the services of the respondent when during cross examination the respondent admitted to actions of gross misconduct;***
>
> ***2. The Tribunal erred in failing to give consideration to the evidence and submissions presented by the appellant and failed to assess this in the decision delivered on 17 September 2011;***
>
> ***3. The Tribunal erred in considering that the employer made no attempt to accord the respondent all the fair procedure;***
>
> ***4. The Tribunal erred in failing to give consideration to the contradictory evidence given by the respondent and his witness and should have discredited the evidence and submissions given on its behalf;***
>
> ***5. The Tribunal erred in its decision in awarding the respondent a reimbursement for the wages for 2 years lost as the result of grievance and further 6 months of wages as compensation. The damages awarded are manifestly excessive and failed to take in to account the appellant's evidence and submission; and***
>
> ***6. The Learned Tribunal erred in determining a case of summary dismissal on principles applicable for termination of employment for cause".***

Submissions

[6]. In respect of grounds 1 and 2, Ms. Drova argued that there never existed a dispute on the ground or cause of termination. The only disputed aspect was the procedure to be followed in carrying out summary dismissal under s.33 of the ERP. Ms. Drova

contended that on the day of the termination, the grievor was verbally given reasons for the termination. There was therefore no reason or basis for the ERT to hold that the employer did not act fairly procedurally or that it acted in a draconian way.

[7]. In respect of grounds 3 and 6, Ms. Drova contended that if the procedures outlined by the ERT were to be followed in cases of summary dismissal, the purpose or the privilege of terminating an employee summarily on proper grounds as provided for by the statute would be lost.

[8]. In respect of grounds 4 and 5, Ms. Drova contended that the employee gave contradictory evidence. He stated that he was terminated on 7 September 2008 when indisputably the termination occurred on 12 of that month. The lawfulness of the cause of termination was not challenged so the employee is only entitled to outstanding leave pay.

[9]. Ms. Drova agreed that at no point in time was the employee given written reasons for the termination.

[10]. Mr. Senitiki appearing on behalf of the employee argued that the grievor was terminated without any reasonable cause and without the due process of natural justice in that he was not given an opportunity to be heard and given reasons for termination. The unfair dismissal was thus established and the ERT was correct in granting a remedy under s.230 of the ERP.

[11]. It was further argued that as a result of such termination, the employee's future projection felt apart, he lost all his hire purchase goods, his children's education were badly affected, and his name was placed on record with Data Bureau. He had pain and suffering and so the remedy awarded for humiliation, loss of dignity and injury to feelings is well and truly justified in law on the facts of the case.

The Law and Analysis

[12]. Before I deal with any ground of appeal I must state that in this case I had granted extension of time to bring the appeal. At that stage Mr. Singh who appeared for the employer had argued that the grievance was filed in breach of s.111 of the ERP in

that the grievance must be raised with the employer within 6 months and if it is not done the only way a grievance can be filed outside the time frame is if the employer consents to extend the time period or the Tribunal grants an extension.

[13]. At the hearing of the appeal proper no such ground was raised. Even if it was, I would be very slow to allow an argument on procedural delay when the same was not argued at the ERT. The employer's taking part in the proceeding without raising an objection at the ERT is deemed to be its consent to extend the period within which a grievance can be raised with it. The appellants cannot raise what they did not argue at ERT.

[14]. Having said that I find that the only place where this delay can be appropriately argued now is when the issue on quantum is raised. The conduct of the parties in the proceeding is sometimes an appropriate consideration to determine the appropriate remedy. I will deal with this aspect later in my judgment.

[15]. The first ground of appeal complains that the ERT should have not found that it was improper for the employer to verbally terminate the employment. The employee had outlined his details of grievance in form 1. From his explanation the only complaint I can discern is that he was verbally terminated and no written reasons was given to him. The terms of reference by form ER4 also outlines the only issue to be that of the procedure involved in terminating the employee.

[16]. The ERT was therefore correct in identifying from the terms of reference that the only issue before it was whether proper procedure was followed in terminating the employee. There was no question of the lawfulness of the cause for dismissal as that was never a discernible issue from any reading of the grievor's complaint or the terms of reference.

[17]. The question at the appellate stage as apparent from ground 1 is whether a notice of termination was required and whether the employee was entitled to written reasons. The dismissal was indeed indisputably a summary dismissal.

[18]. S.33 of the ERP outlines the procedure for summary dismissal. S. 33 reads:

"33. (1) No employer may dismiss a worker without notice except in the following circumstances-

(a) where a worker is guilty of gross misconduct;

(b) for wilful disobedience to lawful orders given by the employer;

(c) for lack of skill or qualification which the worker expressly or by implication warrants to possess;

(d) for habitual or substantial neglect of the worker's duties; or

(e) for continual or habitual absence from work without the permission of the employer and without other reasonable excuse.

(2) The employer must, provide the worker with reasons, in writing, for the summary dismissal at the time he or she is dismissed".

Underlining is Mine

The section therefore unequivocally states that no notice is required but written reasons at the time of dismissal is required. The employer accepts that it did not give written reasons for the dismissal at the time it dismissed the employee.

[19]. It is therefore apparent that a procedure mandated by the statute was not followed. The dismissal was procedurally unjustified. This does not mean that the employee was entitled to be given an opportunity to be heard on the reasons and an opportunity to defend himself as the ERT found in its verdict.

[20]. The only procedure that is required under the statute is the requirement to give written reasons for dismissal. By s. 34 the ERP also requires that "if a worker is summarily dismissed for a lawful cause, the worker must be paid on dismissal the wages due up to the time of the worker's dismissal". The employer did not pay the employee any annual leave pay which should have been paid. It agreed that leave pay was outstanding.

[21]. The ERT followed a New Zealand case to state that an opportunity to be heard was required. Unfortunately the New Zealand case is not applicable in our summary dismissal cases as our law is unambiguous and clear that no opportunity to be heard is required in summary dismissal cases. The prerogative of an employer to summarily dismiss an employee on statutory grounds is lost if these processes were to be followed.

[22]. Albeit for a different reason than found by ERT, I find that the employee's summarily dismissal was procedurally unjustified in that he was not, as a mandatory requirement, given any written reasons for his termination at the time he was dismissed.

[23]. I will not allow ground 1 to succeed in the circumstances.

[24]. Grounds 2 complains that the ERT failed to give consideration to the evidence and submissions presented by the appellant and failed to assess this in the decision. This ground was not substantiated by any proper submission. Counsel must be diligent in framing their grounds of appeal. They must be specific in what evidence and submission was not considered by the ERT. If the grounds are not specific at least there ought to be some sensible submission to help the ground. Ground 2 is bound to be dismissed.

[25]. Ground 3 complains that the ERT erred in considering that the employer made no attempt to accord the respondent all the fair procedure. Indeed in my analysis of ground 3 I am of the finding that the employer did not attempt to accord the respondent the fair procedure of written reasons. I do not agree that the procedure outlined by ERT ought to be followed but the statutory procedure was mandatory and inescapable.

[26]. Ground 4 complains that the ERT erred in failing to give consideration to the contradictory evidence given by the respondent and his witness and should have discredited the evidence and submissions given on its behalf.

[27]. To support ground 4 the only submission that was put forward was that the grievor gave evidence that he was terminated on 7 September 2008 when the termination occurred on 12 September 2008 as per his complaint by Form 1.

[28]. The difference in the date of termination had no bearing on the issue of procedural justification of termination. Even if the ERT did not comment on this discrepancy, which was irrelevant to the issue, there was no miscarriage of justice. I find this ground a one to beautify the notice of appeal. It carries no substance.

[29]. Ground 5 is a complaint on the remedy. The appellant states that the grievor is only entitled to outstanding leave pay and nothing else. At the ERT the employer was of the view that the most the ERT can do is to ask the employer to now issue a letter containing the reasons for the termination. Let me first deal with the appropriate remedy under s.230.

> ***230. – (1)*** *If the Tribunal or the Court determines that a worker has an employment grievance, it may, in settling the grievance, order one or more of the following remedies –*
>
> ***(a)*** *reinstatement of the worker in the worker's former position or a position no less advantageous to the worker;*
>
> ***(b)*** *the reimbursement to the worker of a sum equal to the whole or any part of the wages or other money lost by the worker as a result of the grievance;*
>
> ***(c)*** *the payment to the worker of compensation by the worker's employer, including compensation for –*
>
> ***(i)*** *humiliation, loss of dignity and injury to the feelings of the worker;*
>
> ***(ii)*** *loss of any benefit, whether or not of a monetary kind, which the worker might reasonably expect to obtain if the employment grievance had not occurred; or*
>
> ***(iii)*** *loss of any personal property.*

> ***(2) If the Tribunal or Court determines that a worker has an employment grievance by reason of being unjustifiably or unfairly dismissed, the Tribunal or Court may –***
>
> ***(a) in deciding the nature and extent of the remedies to be provided in respect of the employment grievance, consider the extent to which the actions of the worker contributed towards the situation that gave rise to the employment grievance; and***
>
> ***(b) if those actions so require, reduce the remedies that would otherwise have been decided accordingly.***
>
> ***(3) If the remedy of reinstatement is provided by the Tribunal or the Court, the worker must be reinstated immediately or on such a date as is specified by the Tribunal or the Court and, notwithstanding an appeal against the determination of the Tribunal or the Court, the provisions for reinstatement must, unless the Tribunal or the Court otherwise orders, remains in force pending the determination of the appeal".***

[30]. The remedy outlined in s.230 is for summary dismissal too. There is no power to order written reasons to be subsequently given to the employee as a remedy for procedurally unjustified dismissal. The employer's contention is therefore baseless and ill founded.

[31]. The question now is whether the award of wages for 2 years is appropriate in the circumstances.

[32]. A lot of factors need to be considered in granting the remedy. It is impossible to outline an exhaustive list but in this case at least the following ought to have been considered:

(a) the cause for termination;

(b) the conduct of the parties in bringing and dealing with the proceeding;

(c) whether the employee mitigated his loss; and

(d) what was the employer's conduct which assisted or hindered the employee in mitigating his loss.

[33]. Let me analyse each one of the above factors. It was necessary to consider the cause of termination because under s. 230 (2) of the ERP, the ERT may in deciding the nature and extent of the remedies consider the extent to which the actions of the worker contributed towards the situation that gave rise to the employment grievance ad if those actions so require, reduce the remedies that would otherwise have been decided accordingly.

[34]. The employee was terminated for misappropriation of funds and not reporting to work on time. The actions of employee were the cause of the termination. If the employer had provided written reasons for dismissal at the time of the dismissal instead of the verbal reasons, the employee would not be entitled to any remedy. If the cause for termination was unjustified I would have no hesitation in awarding the full or part of wages lost as a result of the grievance bearing in mind the factors described above and giving appropriate discount where there was a need.

[35]. This is however a case where the procedure was not followed properly in that written reasons were not given to the employee at the time of dismissal. In my assessment an employee's remedy in terms of giving wages lost as a result of the grievance if the cause for termination is unjustified is naturally higher than when the procedure is not followed under s.33 because if the cause for termination is lawful, than the employee is deemed to have substantially contributed towards the situation which gave rise to the grievance.

[36]. I am firmly of the view that the remedy of wages of 2 years ought to be reduced. Before I grant an appropriate reduction I would need to see whether the 2 years granted initially was correct on the facts of the case. This takes me to the aspect of mitigation of damages. It was for the employee and the employer to conclude finally whether the employee had mitigated his loss at an earliest opportunity but both the parties did not extract any evidence on this aspect except for the evidence of the

employee that he had recently found a job. The date when the employee found the job was not extracted in evidence.

[37]. There was default judgment entered against the employer as it had not been attending the case at the ERT. The employer applied for setting aside which was granted. The initial delay however was the employee's in lodging the dispute late. When the judgment by default was granted, the ERT had awarded 14 months wages as part of lost wages and 4 months wages as compensation for humiliation, loss of dignity and injury to the feelings. The justification for awarding 14 months was based on the length of service and the period of unemployment. It is evident from the findings of the ERT that the employee was unemployed for 14 months. The maximum loss of wages therefore could not exceed 14 months. How the 2 years was later increased is unjustified. If the employee found a job after 14 months there is no question of granting him 2 years lost wages.

[38]. I now look at the conduct of the parties. The employee was initially late in lodging the dispute. He was terminated on 12 September 2008. He should have lodged his grievance by 12 February 2009 but he lodged it on 5 May 2009, some 3months late. Then when the proceedings were on foot, the employer delayed the proceedings and that is how even the default judgment was entered against it and later set aside on its application.

[39]. I therefore find that the delay is more attributable to the employer than the employee. Even if I work at the 2 years wages that the ERT has granted instead of the 14 months which it granted at the time of granting judgment after an undefended hearing, the substantial amount of the remedy must be reduced for the employee's conduct in causing the grievance and a minimal discount must be given for the late filing of the dispute. From the award of 24 months at least 1 year 6 months ought to be reduced for the employee's conduct that gave rise to the grievance. From the balance 6 months, another 3 months ought to be reduced for the late lodgement of the dispute. The balance 3 months is the appropriate remedy for procedurally unjustified termination.

[40]. I do not agree with Ms. Drova that the employee only needs to be paid his outstanding leave as he was given verbal reasons for the dismissal. The statute

requires written reasons for dismissal to be given and that is mandatory. This is not a fanciful requirement and any breach of the statue will attract a remedy under s. 230 of the ERP.

[41]. Now the question is whether the salary of 6 months was necessary for humiliation, loss of dignity and injury to feelings. There was no claim for humiliation, loss of dignity and injury to feelings and no evidence to that effect as well. I cannot understand the basis on which the 6 months salary was awarded under the head of humiliation, loss of dignity and injury to feeling. This award ought to be set aside.

[42]. The employer had agreed that it had not paid the employee the annual leave pay. The order therefore to pay all outstanding leave is proper on the facts of the case.

[43]. Ground 6 alleges that the ERT erred in determining a case of summary dismissal on principles applicable for termination of employment for cause. The ground and submissions by Ms. Drova hardly made any sense. I dismiss this ground for efficacy.

Final Orders.

[44]. The appeal is allowed on the grounds of quantum. The award of the ERT is set aside in part in that the award of 2 years wages lost as a result of the grievance is set aside and substituted with 3 months. The 6 months wages granted for humiliation, loss of dignity and injury to feelings is totally set aside. The order to pay all outstanding leave is affirmed.

[45]. Finally, the employer is ordered to pay the following:-

(a) ***3 months salary for procedurally unfair summary dismissal; and***

(b) ***all outstanding pay.***

All payments to be made within 48 hours of the date of judgment.

[46]. The appeal succeeds in part only so each party is to bear its own cost of the appellate proceeding.

Anjala Wati

Judge

26.04.2013

To:

1. *Ms. Drova, counsel for the appellant.*
2. *Mr. Senitiki, for the respondent.*
3. *File: ERCA No. 09 of 2012.*