IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: **ERCA NO. 11 OF 2012**

BETWEEN: **LAND TRANSPORT AUTHORITY**

APPELLANT

AND: **MATAIASI LABAIBURE, MESAKE TAMANI, SETOKI CEINATURAGA, MOSESE GIVAKI AND LITIANA NAYAVUSOATA**

RESPONDENTS

Appearances: **Ms. F. Kinivuwai for the Appellant.**

Mr. K. Tunidau for the Respondents.

Date and Place of Judgment: **Monday 03 March, 2014 at Suva.**

Coram: **The Hon. Justice Anjala Wati.**

JUDGMENT

Catchwords:

Termination of employment – the procedures to be invoked under the contract of employment in terminating the employees- were the procedures accorded before termination- unfair dismissal: what is it, appropriate remedies under the ERP, when is reinstatement not an appropriate remedy- factors to be considered when the remedy is being determined.

Cases:

Automart Limited v. Waqa Rokotuinasau [unreported] ERCA No. 09 of 2012.

Legislation:

The Employment Relations Promulgation 2007 ("ERP"): ss. 22(2); 242(3) (b), (c); 230; 234(1), (b).

The Cause

1. Five employees of the Land Transport Authority ***("LTA")***, employed in the Western Division, were summarily dismissed by their employer on 7 January 2011.

2. The particulars of the employees are as follows:-

Name of Grievor	**Terms and conditions of Employment**	**Job Title**	**LTA Office**
Mataiasi Labaibure	Collective Agreement ***("CA')***	Senior Road Safety Officer	Nadi
Mesake Tamani	CA	Public Service Vehicle Officer	Nadi
Setoki Ceinaturaga	Partnership Agreement ***("PA")***	Public Service Vehicle Officer	Lautoka
Mosese Givaki	PA	Road Safety Officer	Nadi
Litiana Nayavusoata	PA	Public Service Vehicle Officer	Lautoka

3. All of them brought an action in the ERT pertaining to their dismissal. Their basic claim was that the procedure outlined in the disciplinary provisions of their contract was not followed and that after their dismissal, they lodged an appeal with the employer, which appeal was not heard.

The Findings of the ERT

4. The ERT found that the grievors were unjustifiably and unfairly terminated in that the LTA did not follow fair procedures in terminating the employees, in particular, the employees were not given a right to be heard.

5. In coming to that conclusion, the ERT stated that it had to find on the following issues:

i. ***Whether the employer had followed the correct procedures of discipline when dismissing the grievors;***

ii. ***Whether the Special Investigation Report from the Ministry's investigations team can be used by the employer in its process to dismiss the grievors considering that the Special Investigation Team from the Ministry is a government entity as the LTA is a statutory authority;***

iii. ***Whether the employer had followed the principles of natural justice, specifically, the right to be heard when it dismissed the grievors;***

iv. ***Whether the employer had complied with the terms and conditions of the CA, specifically, clause 8.2.4 in holding an independent inquiry; and***

v. ***Whether the employer breached the rights of the grievors when it failed to establish and convene the Appeals Committee under the CA.***

6. Issue (ii) was answered in the affirmative.

7. Issue (iii) was answered in the negative. The ERT stated that the employees ought to have been given a chance to cross-examine the witnesses who gave evidence against them.

8. The ERT also found that there should have been an independent inquiry of the allegations against the employees under clause 8.2.4 of the CA but there was none.

9. In answering issue (v), the ERT formed that the LTA had breached clause 8.2. 10 of the CA in that it failed to acknowledge the appeal lodged by the employees post the employer's decision to dismiss them and to provide the employees with the right to appeal.

10. The ERT thus found that answer to issue (i) is in the negative in that the LTA did not follow correct procedures of discipline when dismissing the grievors.

The Remedies awarded by the ERT

11. The remedies provided by the ERT were as follows:

" i. Under section 230 (1) (a) of the Employment Relations Promulgation 2007, the Tribunal orders the immediate reinstatement of all the grievors including those that did not attend the mitigation meeting with the LTA to former positions or positions no less advantageous to the grievors;

ii. Under section 230 (1) (b) of the Employment Relations Promulgation 2007, the Tribunal orders the reimbursement to the grievors of 15 months wages lost as the result of the grievance;

iii. Under section 230 (1) (c) of the Employment Relations Promulgation 2007, the Tribunal orders the payment of 12 months compensation for humiliation, lost of dignity and injury to the feelings of the grievors as they are well know to the local communities; and.

iv. Under section 230 (2) (a) & (b) reduce the compensation at paragraph (iii) above by 6 months in consideration of the extent to which the grievors actions contributed to the situation that gave rise to the employment grievance".

The background facts leading to termination

12. On 20 July 2010 the employer wrote to the employees and advised that it had been advised by the Ministry of Works, Transport and Public Utilities of certain allegations against them individually and that it was suspending the employees in order to facilitate the investigations without delay or interference.

13. Whilst the grievors were on suspension, an investigation report was prepared by the Special Investigation and Disciplinary Unit of the Ministry of Works, Transport and Public Utilities and forwarded to the LTA. Upon considering the contents of the investigation report, the LTA drafted charges and forwarded them to the grievors giving them 14 days to admit or deny the charges and to give such explanations to enable proper consideration.

14. All the grievors replied to the charges. By a memorandum of 24 December 2010, the LTA informed the employees that it was satisfied of the truth of the charges and in that

regard required them to appear before the employer for mitigation. The content of the memorandum is as follows:

"You are hereby notified that the Land Transport Authority is satisfied as to the truth of the allegations against you considering the report from the Special Investigation & Discipline Unit (Ministry of Works, Transport and Public Utilities), the allegations put forth by the Authority and your reply to the allegations.

As a result you are further notified to attend before the Land Transport Authority Management on 4th January 2011 at 10. 30 am at LTA Board Room – HQ for mitigation purposes, which shall aid the Authority in meting out the appropriate penalty".

15. Only Mesake Tamani, Setoki Ceinaturaga and Litiana Nayavusoata attended the mitigation session with the management.

16. The LTA opined that the actions it took as outlined were in conformity with clause 8.2.4 of the CA and clause 12.2 (d) of the PA. In that connection, the LTA, after considering the investigation report, the reply to the charges and the mitigation, terminated the employment of all the grievors.

17. The letter of termination is identical for all employees. It reads as follows:

"There are sufficient evidence to prove your actions do not warrant counseling or warning and that it only warrants dismissal. You have breached the Authority's Code of Conduct and rules and regulations specified in the Land Transport Authority Act."

The Grounds of Appeal

18. The appellant filed two sets of appeal. The first one was filed on 20 June 2012. It states that the ERT erred in law and in fact:

    1. ***When it determined that the grievors were denied access to the disciplinary enquiry;***
    2. ***When it found that the employer did not follow the correct procedures when dismissing the grievors;***

3. ***When it determined that the dismissal was unjustified and unfair dismissal without conducting a proper hearing to find the facts of the case;***

4. ***When it determined that the employer did not accord the grievors all the fair procedures as laid down in the case of NZ Food Processing IUOW v. Unilever New Zealand Ltd (1990) I NZLR 35;***

5. ***When it established that the employer did not give the grievors an opportunity to be heard;***

6. ***When it determined the remedies awarded to the grievors;*** and

7. ***In assessing the compensation to the grievors.***

19. The other set of appeal was raised by another document filed on 28 August 2012. The grounds are:

1. ***The Learned Tribunal erred in law and in fact in ordering compensation for humiliation, loss of dignity and injury to the feelings of the grievors on the grounds that they are well known to the local communities.***

2. ***That the Learned Tribunal found that the actions of the grievors contributed to the situation and thus it should have held that the dismissal was lawful.***

3. ***That the Learned Tribunal erred in law in ordering remedy for humiliation, loss of dignity and injury to the feelings of grievors, as an employment court only deals with the employment issues and not general damages.***

4. ***That the Learned Tribunal erred in law in determining general damages without following the proper process of assessment of damages.***

20. In the submissions the appellant raised the following issues.

1. ***That there was error of law and fact in determining that the employer did not follow fair procedures especially the right to be heard.***

2. ***That there was error of law and fact in interpreting clauses 8.2.4 and 8. 2. 10 of the CA.***

3. ***That there was error of law and fact in determining the remedies against the employer.***

4. ***That the remedy of reinstatement was unjustified.***

21. I will deal with the appeal as outlined in the submissions of the appellant. Other grounds are deemed abandoned as there is no prosecution of those grounds at the hearing.

The Submissions of the Appellant

22. Ms. Kinivuwai submitted that the grievors terms and conditions of the employment are contained in the CA or the PA. All of them were dismissed pursuant to the procedures in their contract. The employer complied with the procedures set out in the contract of the grievors and the principles of natural justice in terminating the employment of the grievors.

23. By a memorandum, the employer was notified of the allegations against the grievors. The allegation was that the grievors were receiving monies and threatening vehicle owners. Upon receiving this notification, by a memorandum of 2 August 2010, the employer suspended the grievors pursuant to clause 8.2.3 of the CA. Whilst the grievors were on suspension, an investigation report was prepared by the Ministry of Works, Transport and Public Utilities Special Investigation Team and forwarded to the employer. When the employer received the report, it considered the contents and laid disciplinary charges against the said employees in accordance with clause 8.2.1 of the CA.

24. The employees were given a chance to reply to the charges and upon considering the answers, the employer was satisfied as to the truth of the charges. It then notified the grievors to appear and mitigate. Only 3 of the grievors attended the mitigation with the employer.

25. Ms. Kinivuwai submitted that clause 8.2.4 of the CA stipulates that "*on receipt of the written explanation of the employee as required under Article 8.2.1, the Authority shall, if it considers necessary to establish the truth of the charge and to find facts, request for an*

independent inquiry to be made into the alleged breach of Conduct of Conduct. The independent person appointed in consultation with Union to conduct inquiry shall submit a report of the findings thereon and forward to the Authority with the report and copy of all evidence received. The cost shall be borne by the Authority."

26. It was submitted that clause 8.2.4 gives the Authority the discretion to request for an independent inquiry if it considers necessary to establish the truth of the charges and to find facts. In this instance, the Authority did not consider it necessary and therefore made a decision.

27. Ms. Kinivuwai submitted that the employer could not list the appeal for determination because the Appeals Committee currently does not exist as there have been no appointments by the Minister.

28. In respect of the remedies, the appellant submitted that reinstatement is not justified because the element of trust and confidence has broken down between the parties. It was also submitted that there was no evidence to support that the manner of dismissal was undignified or humiliating which could have given rise to remedies for humiliation, loss of dignity and injury to feelings.

The Submissions of the Respondents.

29. Mr. Tunidau submitted that the appellant filed two separate sets of appeal, one on 20 June 2012 and the other on 28 August 2012. The latter set did not show whether it was an amended or further grounds of appeal to the former. This is misleading and confusing to the respondents.

30. Mr. Tunidau further argued that the notice of appeal contravenes section 242 (3) (b) and (c) of the ERP for lack of specificity and thus the appeal is irregular. Mr. Tunidau argued that the provision says that:

"(3) A notice of appeal must specify-

(a) the grounds of appeal;

(b) the decision or the part of the decision appealed from; and

(c) the precise form of the order which the appellant proposes to seek from the Court."

31. The respondents counsel further submitted that the employees were not given an opportunity to be heard under clause 8.2.4 of the CA and the PA.

32. Mr. Tunidau argued that at the ERT, both parties had agreed that the ERT hears the matters on submissions and thus one cannot argue that there was no finding of facts.

33. Mr. Tunidau also submitted that s.230 empowers the ERT to grant the remedies it did. The ERT used its discretion and as such the assertion on the remedies being improper is wholly unmeritorious.

The Law and Analysis

34. It is clear from the facts of the case that the grievous had only challenged the procedure leading to their dismissal and as such it was not necessary as submitted by both parties to conduct a trial but make findings on the written submissions. No party had objected to this modus operandi.

35. The central question was whether the procedure leading to dismissal was justified.

36. At the ERT, no one challenged the cause for the termination.

37. The employees were terminated for various allegations:

    i. Demanding cash from drivers who were booked;

    ii. Seizing of driving license and third party policy when drivers were booked. Cash was being demanded before the two documents were released to the owners otherwise drivers were being threatened that their vehicles will be impounded;

    iii. Drivers whose vehicles were being impounded were asked to pay more than the normal impounding fees. No records or receipts were kept for those cars being impounded.

iv. Cash amounting to $1000.00 were to be arranged by applicants applying for LM, LH and RSL License. In return, the applicants were promised that their applications would be processed quickly.

vi. Officers intentionally failed to provide correct documents to allow the board and the management to give a true, correct and fair decision.

38. Indisputably the 1st and the 2nd employees are covered by the CA whilst the 3rd to 5th are covered by the PA.

39. The disciplinary procedures are outlined in clauses 8.2.1 to 8.2.7 of the CA which reads as follows:

"DISCIPLINARY PROCEEDINGS

8.2.1 Serving of Disciplinary Charges/ Replies

An employee who commits a breach of Code of Conduct shall be served the original document of the charges laid against the employee. The employee will be required to state in writing with fourteen (14) days of the receipt of the charges whether the employee admits or denies and to give any explanation that will enable proper consideration to be given to the alleged offence. Failure by an employee so charged to reply within fourteen (14) days shall be assumed by the Authority to be an admission of guilt. The period of fourteen (14) days stipulated herein may be extended where considered reasonable by the authority. The employee against whom charges are brought may make written submission or by oral representation by a colleague or a representative of the Association/ Union.

8.2.2 Suspension/Criminal Charges.

An employee may be suspended from duty if the Authority believes that a criminal act has been committed in accordance with clause 8.2.9 and charges are laid against the employee, provided that the charges are of a serious nature which is likely to adversely affect the employee's employment with the Authority.

8.2.3 Suspension/ Breach of Discipline

Whilst any breach of discipline, notification of which has been given to the employee, is being investigated and where it becomes necessary in the Public interest, the Authority may either suspend the employee at once from the exercise and functions of office, or place the employee on other duties.

8. 2. 4 Disciplinary Inquiry

On receipt of the written explanation of the employee as required under Article 8.2.1 above, the Authority shall, if it considers necessary to establish the truth of the charge and to find facts, request for an independent inquiry to be made into the alleged breach of Code of Conduct. The Independent person appointed in consultation with Union to conduct the inquiry shall submit a report of the findings thereon and forward it to the Authority with the report and copy of all evidence received. The cost shall be borne by the Authority.

8. 2. 5 Presentation of the Case

At any inquiry held under the provisions of paragraph 8.2.4 the employee charged with the breach of Code of Conduct shall be entitled to be present and to be assisted in the presentation of the case by another employee, Barrister and Solicitor or Association/Union.

8.2.6 Witnesses

If witnesses are examined by the person conducting the inquiry, the employee charged shall be permitted to examine those witnesses. The Employee charged shall also be allowed to call witnesses on employee's own behalf.

8.2.7 Disciplinary Penalties

If the charge is admitted by the employee concerned, or after considering the report relating to the charge and any reply together with the report of the inquiry, if necessary, the Authority is satisfied as to the truth of the charge, it may after taking into account the service record of the employee, impose one of the following penalties:

(i) Caution and reprimand the employee in writing;

(ii) Impose a penalty up to a sum of not exceeding a fortnight's gross salary;

(iii) Reduce the employee's salary with a consequent reduction in the employee's grading;

(iv) Dismiss the employee".

40. The appeals procedure is clause 8.2.10 of the CA reads as follows:-

"8.2.10 Appeal Against Disciplinary Action

Any disciplinary action decided upon shall be communicated to the employee as soon as practicable and the employee shall be given the right to appeal against such decision within fourteen (14) days from the date of receipt thereof".

41. The disciplinary procedure in the PA is outlined in clause 12.2 of the same. It reads as follows:

"12. 2 An employee who commits any offence(s) in Article 12.1 above may be disciplined as follows:-

a. Verbal warning may be given for incompetence, lateness, absenteeism or in-subordination. If such warning is to held against an employee it must be confirmed in writing.

b. Where a written warning is contemplated, the employee affected shall be given full details of the alleged offence(s) that he has committed and will be given every opportunity to state his case in writing.

c. Written warning shall not be made until the steps outlined in (b) above have been exhausted;

d. Cases involving serious disciplinary offences where authority is not satisfied with the facts of the charges shall be subject to enquiry with adequate opportunity given for employee's representation;

e. Where it is considered necessary, the employee may be relieved of his/ her duty to facilitate the enquiry;

f. If as a result of any inquiry in paragraph (d) above, the Authority considers that he employee be disciplined, it shall, taking into account his service record, impose any of the following penalties:-

i. Caution and reprimand the employee in writing.

ii. Impose a penalty not limited to suspension, warning, reduction of salary, reduction of benefit etc.

iii. Demote the employee.

iv. Dismiss the employee".

42. Looking at the relevant disciplinary clauses, it is clear that an independent inquiry will only ensue if the Authority considers necessary to find facts or establish the truth of the charge. If the LTA does not consider it necessary and believes that the truth of the charge has been established, then there is no need for an independent inquiry. It is only at the independent enquiry where the employees are entitled to be present and assisted in the presentation of the case by another employee or a barrister and solicitor. The employee can then call its witnesses and cross-examine the employer's witnesses.

43. The right for an independent inquiry is not automatic under any disciplinary procedure outlined in any agreement.

44. The ERT's finding that the employees were not granted natural justice is incorrect. The fact that they were asked to explain the charges is in fact their right which was given to them to be heard. The hearing was in fact done.

45. Unlike the ERT, I do not find that there was any breach of the procedures that ought to have been accorded to the employees. The LTA made a sincere attempt to grant the employees the due procedure.

46. The question of appeal and giving the employees the right to appeal then kicks in. The appeal is quite a separate right from being given the right to invoke disciplinary procedures. The disciplinary procedures are pre-dismissal and the appeal is post dismissal. One cannot equate the two. One cannot say that if the right to appeal is not given the procedure leading to dismissal becomes unjustified.

47. The reason why the right to appeal was not accorded is that the Minister has not made any appointments to the Appeals Committee. It is not the fault of the employer although in Article 1, it undertakes that it shall observe all the provisions of the agreement and

shall not take any action which shall be in breach thereof. If the appeals committee is not in existence, the grievors have the right to then come to the court of law to have their dismissal determined.

48. By not being given a right to appeal under the CA or the PA, the dismissal does not became unfair as I have said that the right to appeal is a right which accrues post dismissal. In lieu of that appeal, a party can without prejudice, bring the matter to court. I do acknowledge that there may be financial prejudices and delay but that can be adequately taken care of by orders of costs and appropriate remedy under s.230 of the ERP.

49. Having said all that, I still wish to comment that there was no evidence that the manner of dismissal was unfair in that the treatment leading to dismissal was humiliating, undignified and caused injury to the feelings of the workers.

50. That remedy therefore was not based on any proper facts of the case. One cannot say that employees who are well known in the community should be automatically given damages or compensation for humiliation, embarrassment, and injury to feelings.

51. Dismissal to any employee is humiliating, embarrassing and its hurts ones feelings irrespective of the nature of employment, but that does not mean that all employees should get that remedy. The remedy will only be given if the dismissal by the employer is not carried out with respect, humility and dignity.

52. In this case there was no such evidence to award that remedy.

53. I would also like to comment on the remedy of reinstatement. The employees were public servants in its literal meaning in that they looked after the affairs of the public. They were found to be rude to the public, cheating them and demanding money from them.

54. That gives an immense bad reflection on the institution they represent. If this is allowed, any employer will lose respect. The employer would not wish to employ someone who robs the citizens of their valued possessions and hard earned money.

55. The employer viewed this offence as a very serious one and dismissed the employees because it did not want dishonest people. It had lost all trust and confidence and where

that is lacking the courts must be slow to award the remedy of reinstatement. This surely was one case where the employees should not have been reinstated because in their respective positions the people of the country are suffering.

56. I find that the remedy of reinstatement was not properly founded on the facts of the case.

57. The employees of LTA are lucky to have gotten terms and conditions which are better than s.33 of the ERP: ***S. 22 (2) of the ERP.*** Otherwise the nature of the offence would have entailed on spot dismissal with only written reasons for dismissal and up to date pay given to the employees. There would have been no right to any procedure under s.33 on a misconduct of the kind which led to their termination.

58. Finally in awarding the remedies, the ERT must always consider certain factors. That I had already outlined in my case of ***Automart Ltd. v Waqa Rokotuinasau [unreported] ERCA 9 of 2012***. I would repeat the same:

" A lot of factors need to be considered in granting the remedy. It is not possible 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.

59. When counsel present their case and their closing submission, it is important that they address all the above factors as well as those that are relevant to their case and the ERT must consider the relevant factors such as above in granting the remedies. Good reasons for awarding remedies are also necessary. I find that lacking in the judgment of the ERT.

60. I would finally comment on Mr. Tunidau's submissions that the two sets of appeal presented by the appellant is confusing in that he does not know which one is pursued. Ms. Kinivuwai makes it clearer in her submissions the grounds that she would be relying on. It was for Mr. Tunidau then to respond to the appropriate grounds. I do not

find that he is being prejudiced in any form. If he was confused and wanted more time to file his submissions he should have made that request to Court.

61. The other issue that was raised by Mr. Tunidau was under s. 242 (3), (b) and (c) of the ERP in that the notice of appeal does not state the decision or parts of the decision appealed from and the precise form of the order which the appellant proposes to seek from the Court. Infact the appeal does not comply with the mandatory provision of the ERP in that it does not contain the decision or parts of the decision appealed from and the precise order which the appellant seeks from the Court. Mr. Tunidau is correct in saying that the notice is not in its proper. Although there is no clear indication of the parts of the decision appealed from, from the reading of the grounds it becomes clearer what findings are under challenge. On a broader reading it is apparent that the appellant is asking for the judgment of the ERT to be set aside. I am prepared to, under s. 234(1) (b) of the ERP; validate what has been informally done. I only do this because I do not find that the respondents are prejudiced in presenting their case.

Final Orders

62. In the final analysis, I find that the termination was just and fair. I thus allow the appeal and wholly set aside the decision of the ERT.

63. I will not make any order as to costs against the employees.

Anjala Wati

Judge

03.03.2014

To:

1. ***Ms. Kinivuwai for the Appellant.***
2. ***Mr. Tunidau for the the Respondents.***
3. ***File: ERCA No. 11 of 2012.***