

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 2 of 2015

BETWEEN: CARPENTERS FIJI LIMITED
APPELLANT

AND: BP (SS) CO. LTD & WR CARPENTER GROUPS SALARIED
STAFF ASSOCIATION (on behalf of Vijay Kumar)
RESPONDENT

Appearances: Mr. E. Narayan for the Appellant.
Respondent Mr. Vijay Kumar in Person.

Date/Place of Oral Judgment: Friday 06 May 2016 at Suva.

Date/Place of Written Judgment: Friday 20 May 2016 at Suva.

Coram: Hon. Madam Justice A. Wati.

Catchwords:

Employment Law – method of termination: summary or contractual provision to terminate upon payment in lieu of notice?: open to trial Court to examine the circumstances surrounding the termination and make a finding- whether cause for summary dismissal established- procedure for termination- assessing the remedies- whether the payment of wages justified.

Legislation:

1. *The Employment Relations Promulgation 2007 ("ERP"): s. 33(2) and s. 34.*
-
-

Cause

1. The employer appeals against the decision of the Employment Relations Tribunal ("**ERT**") of 4 December 2014 wherein it held that the employee Mr. Vijay Kumar was unlawfully and unfairly terminated from employment and awarded the employee compensation equivalent to 3 ½ years of wages on the grounds that ordinarily the employee was entitled to be reinstated but that he had been out of employment for almost 7 years.

2. The grounds of appeal are that the ERT:
 - (i) *erred in law and in fact in finding that Mr. Vijay Kumar's summary dismissal was unjustified, unfair and wrong.*

 - (ii) *erred in law and in fact in not holding on the evidence adduced that the employer had established sufficient justification and grounds for the substantive dismissal and that it had acted as a fair and reasonable employer in adopting of fair process leading up to the dismissal.*

 - (iii) *erred in law in its analysis and/or application of the established legal principles pertaining to dismissal including its application of the established case authorities in all the circumstances pertaining to the dismissal.*

 - (iv) *erred in law and in fact in awarding reimbursement of three and half years wages.*

3. The appeal is opposed by the employee.

Background: Termination and ERT's Findings

4. Mr. Vijay Kumar started his employment with this employer on 22 September 1997 as a Machine Bicycle Assembler.

5. He rose to the rank of a Transport Controller at the time of dismissal.
6. The employee was initially suspended on 9 March 2007. The letter of suspension reads:

"Dear Vijay,

It has been alleged that on 13 December 2006 you failed to adhere to company policies and procedures which has led to the missing of 100bags x 50kg brown sugar consigned to Food Processors Fiji Limited.

This letter therefore serves to suspend your services with pay from 9th March 2007 pending our internal investigation.

We will advise you of the result of the investigation in due course".

7. Followed by the suspension, the employee was termination on 21 March 2007. His termination letter reads:

"Dear Vijay

We have completed our investigation on the allegation against you and we have found out that on 13th December 2006 you raised Branch Load Summary Number 350474 for 100 bags x 50kg Brown Sugar. You then wrote the driver's name (Dip), the truck registration number DA 211 and signed on behalf of the security officer in charge namely Ben Lanyon on the above mentioned BLS docket which was ready for delivery to Foods Processors Fiji Limited.

Later it was confirmed that Foods Processors Fiji Limited did not receive the said goods on the day in question and have cancelled the order respectively.

Subsequently on 9th February you removed six tyres- the property of Morris Hedstrom from MH Warehouse. Upon inquiry by security officer namely Lido Tewa at the dispatch gate you then on the strength of a falsified Branch Load Summary docket no 351691 which was raised by you succeeded in taking the said items outside the company premises.

It was later confirmed that the above said items was sold to Fiji Bandag Limited for \$200.00 and the said amount was used by you for personal gain.

You have also admitted committing the above two offences during the course of the investigation.

After serious considerations by senior management it was decided that your contract of employment shall be terminated with immediate effect and one month's salary shall be paid in lieu of notice.

By a copy of this letter the Staff Salaries Clerk is advised to pay all monies due to you after the necessary clearances are completed".

8. On 18 March 2008, the union reported a dispute over the termination. The dispute went for mediation and was unsuccessful after which the same was sent to the ERT for determination.
9. The terms of reference was:

"The dispute is over the termination of employment of Mr. Vijay Kumar who was employed at Morris Hedstrom (Warehouse) with effect from 21st March 2007. The union contends that the actions taken by the Company was unjust, unfair, harsh and wrong and that he should be reinstated to his former position without loss of salary or benefits from the date of termination".

10. The employer had only called one witness. The employer's position was that it terminated the employment under the clause which provided the employer to do so on payment of one month's salary in lieu of notice. This was done as a softer approach in view of the employee's long standing employment with the company and his active involvement in Church as a Pastor.
11. The employer did not call any evidence to justify the cause of the termination. The evidence of course indicated that a panel of five managers had met to investigate the alleged conduct prior to the dismissal and they only looked at the summary of the investigation report. The employee was not interviewed nor was any other witness. It was agreed by the employer that the panel did not follow the agreed disciplinary procedures and did not allow for mitigation.
12. The ERT found that the employer had summarily dismissed the employee and also used the hybrid method of termination when it used the termination clause and the provisions of the Master Agreement to terminate the employment on payment of one month's salary in lieu of notice.
13. The ERT found that having conducted an investigation against the employee and having labeled him a thief and having used the reasons of his dishonesty to terminate the employment, the employer then could not use the provisions of the contract to terminate on payment of salary in lieu of notice.
14. It was found that the employer was not able to justify the cause for termination and therefore the termination was unlawful.
15. The termination was also found to be unfair in that the employee should have been provided an opportunity to comment on the information received by the employer. This

was not done and the termination was further complicated by the employer opting to use the hybrid method of termination.

Submissions

16. Mr. Narayan argued that the employer's position has always been that the employee was not summarily dismissed but was terminated pursuant to the contractual provision and the Master agreement which provided that the employer could terminate the employment on payment of one month's salary in lieu of notice.
17. It was asserted that the employee was paid one month's notice and there was compliance with the contract of employment.
18. For the ERT to hold that there was summary dismissal was an error of fact which was not supported by any evidence produced in the ERT.
19. Mr. Narayan also argued that there was no justification awarded why the employee was paid 3 ½ years compensation. He relied on various cases of this Court to state that proper considerations for such an award to be made should be given.
20. The employee's only submission to the Court was that he is not guilty of the allegations based on which he was terminated and that the ERT was correct in holding that the reason for which he was terminated was wrong. This made the termination unlawful and unfair.

Law and Analysis

21. The employer's first complaint on appeal is that the ERT was wrong in making a finding that the employee was summarily dismissed. It says that it terminated the employee but the same was not summary dismissal but that it exercised its rights under the contract to terminate upon payment of one month's salary in lieu of notice.

22. It is not disputed that the contract of employment gave the employer powers to terminate the employment upon payment of one month's salary in lieu of notice. It is also not disputed that the employee was paid the one month's salary in lieu of notice. The issue is however not as simple as the employer makes it out to be by saying that it has a right to terminate upon payment of salary in lieu of notice.
23. To assess the lawfulness of the termination the employer's actions surrounding the dismissal must be looked into. It initially suspended the employee on the allegation that the employee had failed to follow the company procedures which had led to the missing of 100 bags x 50kg brown sugar to be consigned to Food Processors Fiji Limited.
24. The basis on which the employee was later terminated was for a cause and the cause was his misconduct in that he failed to follow company procedures leading to the missing of the 100 bags of sugar and that the employee had sold 6 tyres belonging to the company and using the money for personal gain.
25. Whilst carrying out the termination for a cause, the employer also paid one month's salary in lieu of notice. The termination was therefore not a straight out termination under the Master Agreement which provided for termination with pay in lieu of notice.
26. The termination was for a cause and the law provides that any termination with a cause and without notice is summary dismissal. The employer definitely terminated the employment for a cause and that is very clear from the termination letter.
27. Since there was a reason why the termination occurred, the ERT was correct in its finding that the cause for termination was not justified. There ought not to be any notice for summary dismissal or payment in lieu of notice but the employer had given the salary in lieu of notice which gave the employer the opportunity to change its stance at the ERT and say that it did not dismiss the employee summarily.

28. The employer's change in its stance on the basis on which the termination occurred does not bind the ERT. It was open to the ERT to examine the termination letter and make a finding on whether the termination letter indicated that there was summary dismissal or dismissal under the contract on the provision for payment of salary in lieu of notice.
29. The employer could not establish the cause for which it terminated the employee. Had it not been for the cause alleged, the employer would not have terminated the employee.
30. I therefore find that the ERT was correct in finding that the employer could not employ a hybrid method of termination after having made serious allegations and using those allegations as the basis of the termination. I would perhaps deviate from this position if the termination letter did not state the reasons why the employee was terminated but it clearly stipulated the reasons and those reasons were not made out in evidence.
31. I therefore find that the employee was summarily dismissed for which the cause was not established. There is no complaint that the procedure under the law was not followed which is that the employee must be given written reasons for the termination and up to date pay.
32. The termination was only unlawful for want of a proper cause.
33. I do not find that the ERT was correct in holding that the employee was entitled to access to all information gathered by the ERT and an opportunity to comment on the same as part of the required procedures for summary dismissal. That procedure is not required by s. 33 (2) or s. 34 which sets the procedural aspect of summary dismissal.
34. On the question of remedies, the ERT gave 3 ½ year salary and this was justified on the basis that ordinarily he should have been reinstated but since he had been out of employment from 2007 to 2014, payment of compensation was the alternative better option.

35. If the employee was reinstated, he would have been entitled to all the salary due and owing to him as well as the future payments. The reinstatement was not ordered because of the long period for which the employee was out of employment.
36. The initial delay in bringing the case was due to the employee's late reporting of the dispute. The other reasons for the delay are not known but since it was decided that compensation was the best remedy, the ERT ought to have taken into account the delay by the employee. The employee was also to mitigate his loss. In the records, I could not find any evidence of the employee mitigating his loss and the reason why the employee could not find a paid employment with his vast experience.
37. I however also find that the employee could have been reinstated but for the length of time for which he was out of work. The delay in having the matter heard is not all his fault and if he was reinstated he would have been paid salary for all the years' of lost wages. In that regard the 3 ½ salary can only be flawed on the basis that the employee's delay in bringing the case should be considered.
38. I therefore reduce the remedy by one year's wages for the employee's delay in bringing the matter to Court.

Final Analysis

39. I find that the employer had summarily dismissed the employment of Mr. Vijay Kumar and the cause for dismissal had not been established by the employer making the dismissal unlawful. The employee is therefore entitled to the 2 ½ years remedy which is reduced from the 3 ½ years originally ordered by the ERT on the basis that the employee had delayed bringing the dispute for the first year.
40. Together with 2 ½ years of wages, the employee is entitled to costs of \$2000 for the appeal proceedings.

41. The compliance of the orders shall be within 21 days of the written judgment.

42. The time to appeal against this decision begins from the date of the written judgment.



Anjala Wati

Judge

20.05.2016



To:

1. *Patel Sharma Lawyers for the Appellant.*
2. *Mr. Vijay Kumar- the Respondent.*
3. *File: Suva ERCA 02 of 2015.*