

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:

ERCA 13 of 2014

BETWEEN:

BISCUIT COMPANY OF FIJI LIMITED

APPELLANT

AND:

SALENDRA ROBIN KUMAR

RESPONDENT

Appearances:

Mr. N. Tofinga for the Appellant.

Mr. Serulagilagi for the Respondent.

Date/Place of Judgment:

Monday 30 January 2017 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

Catchwords:

*Employment Law – Unlawful and Unfair Dismissal – The employer to establish that it had lawful reasons to dismiss the employee and that it followed proper procedure in doing so – to establish that the dismissal was fair, the manner of carrying out the dismissal must be fair, dignified and proper – when is the remedy of reinstatement proper- whether the employee is entitled to additional remedy of compensation for loss of wages – how to assess the compensation – whether the employee's action contributed towards the situation that gave rise to the grievance and whether those actions should be used to reduce the remedies.*

Cases:

1. *Williams v. Printers Trade Services (1984) IR 82 at 84.*

Legislation:

1. *The Employment Relations Promulgation 2007 ("ERP"): ss. 171, 230.*

***Cause/Background***

1. The employer appeals against the decision of the Employment Relations Tribunal ("**ERT**") of 19 November 2014 wherein it found that the employee Salendra Robin Kumar ("**SRK**") was unlawfully and unfairly dismissed from employment.
2. Upon the finding of unlawful and unfair dismissal, the ERT ordered that the employee be reinstated to his employment with compensation for unlawful and unfair dismissal assessed at \$10,000 which was to be paid to the employee within 30 days.
3. SRK was summarily dismissed from work on 11 July 2012. At the time of his dismissal, he was employed as a Process Worker. He began his employment on 20 September 2010.
4. The reason for the dismissal of SRK arose out of an incident which occurred on 5 July 2012 in the maintenance room of the factory. On the day in question, SRK had gone in the maintenance room to bring boiled water for tea for him and his colleagues to have tea. They were working night shift on the day.
5. After 1 hour 40 minutes of SRK leaving the tea room, the urn exploded and caused fire to the maintenance room. The sprinkler in the room was used to keep fire under control. The fire was confined quickly and did not spread.
6. The summary dismissal letter of 11 July 2012 to the employee states the reasons for the dismissal, the pertinent parts of which are:

***"It is noted with much concern that you have failed to carry out your duties and responsibilities as expected of a reliable employee. Despite being well versed with the Companies Code of Conduct, Policies and Procedures you have failed to comply with these regulations:***

***It has been established that:***



1. *You and other three (3) of your colleagues on 05/07/12, during your night shift, had negligently caused for the fire at the Maintenance tea room, which could have caused the whole factory and near companies to be burnt down.*
2. *You and other three (3) of your colleagues have knowingly been drinking tea inside the PLC room for the last 3 months, where as it is prohibited to eat or drink inside the factory.*
3. *You and other three (3) of your colleagues have caused risk to the life's of other employees, as well as to the company property.*
4. *You and other three (3) of your colleagues have without your actions caused a probable risk to life and property, which was due to unauthorized action of yours, putting the company at a risk of losing all its assets and investments.*
5. *You and other three (3) of your colleagues have knowingly and willfully breached the company policy and procedures to an extent of the whole area being burnt down in flames. The company has lost its trust and confidence in you.*

*Therefore, in accordance with Section 33(1) (a) of the Employment Relations Promulgation 2007, you are summarily dismissed from employment with immediate effective; 11 July, 2012. You shall be paid all outstanding dues accrued to this date".*

7. Before the dismissal, the employee wrote to the employer and apologized for his mistake. The employee says that this was done in the expectation that he would get his job back and was not an admission of any fault on his part.

### ***Appeal***

8. Aggrieved at the decision of the ERT, the employer appealed on the grounds that the ERT erred (as summarized by me):



1. *in law in giving a decision more than 60 days after hearing the case on 27 November 2013.*
2. *in law and in fact in determining that the employer had no lawful and fair cause to terminate the employee under the provisions of the contract and the ERP.*
3. *in law and in fact in awarding the remedies of reinstatement and compensation and in doing so failing to have regard to s. 230(2) (a) and (b) of the ERP.*

*Submissions/Law and Analysis*

9. In determining the grounds of appeal, I will address each ground specifically, after outlining the findings of the ERT and the concerns of each party regarding the finding.

*Ground 1: Delay in Judgment*

10. Mr. Tofinga argued that s. 171 of the ERP says that the ERT must make a decision on the matter referred before it without delay and in any case within 60 days from the date of the completion of the hearing. The provision, it was argued, was mandatory and ought to have been followed. However there was delay of 11 months in getting the matter finalized.
11. Mr. Tofinga added that when one looks at the notes of the hearing, it is not word to word of what was said during the hearing. Further, the notes of the proceedings were not transcribed so the delay has affected the quality of the judgment.
12. Mr. Serulagilagi argued that despite the delay and non-compliance with the statutory period, the appellant has not shown that the conclusions of the Tribunal are unsafe. A serious delay does not automatically render the judgment unsafe. The appeal judge has to consider whether the trial judge was plainly wrong in findings facts, bearing in mind the special advantage the trial court has in seeing the witnesses give evidence.



13. It was argued by Mr. Serulagilagi that the appeal court must first find that the trial courts recollection of the evidence was at fault on any material point having regard to the diminished advantage of the trial judge's special advantage in the interpretation of the evidence.
14. As far as the time limitation in giving the judgments is concerned, Mr. Tofinga is correct in saying that the judgments must be delivered no later than 60 days from the date of hearing as required by s. 171 of the ERP. The question for the Court is what happens to that judgment if it is delivered outside the 60 day period. Does it automatically become bad and unsafe and sent back for re-trial?
15. This is the stage where I must speak a little on the volume of work faced by the ERT and lack of resources to administer the volume. My comments in no way should be taken as endorsing the delay that occurred in giving the judgment. Since the legislature has set a time frame, the judicial officers must attempt in each and every case to comply with the time limitation. This may mean that the judicial officer will have to work on the judgment at his or her own time. This may also mean that some hearings cannot be taken up because the pending judgments have to be delivered first.
16. It is a well-known fact of the users of the Tribunal that the ERT is inundated with work and most of the judgments are not in compliance with the 60 day period enshrined in the statute. If the position is that all the judgments are automatically rendered unsafe then all must go back to the ERT for re-hearing. In the public interest this is a detrimental step. There will not be any time to hear the fresh cases. All the ERT will then be doing will be rehearing the cases which are not in compliance of the 60 day rule. The cycle can be ongoing and disastrous.
17. I agree with Mr. Serulagilagi that the appellant needs to show that the trial judge's findings on the evidence are incorrect or that the judge's recollection of the evidence on a material point is flawed. This issue cannot be addressed in isolation without looking at the other



grounds of appeal in which it must be shown that the findings are not supported by the evidence or that the evidence has been improperly analysed. This then requires me to examine the rest of the grounds.

***Ground 2: Was the termination lawful and fair?***

18. Mr. Tofinga argued that from the storage or tearoom that the employee used the urn to get the boiling water was only meant for the Fitters and forbidden to anyone else. The evidence of the employer was that the employee knew that the storage or tea room was out of his bounds. He knew the reasons why it was so. There was also a notice on the door that reminded the trespassers that it was a restricted area. These warnings and restrictions were ignored by the employee who went and used the urn and caused fire to the place and endangered the lives of the workers and other people.
19. In his submissions, Mr. Tofinga said that the urn that was used was defective and was left there for the fitters to repair it. When it was used and the power point not turned off, the flames started and caused the fire.
20. Mr. Tofinga argued that even if there was no fire, the fact that the employee went in an unauthorized area was sufficient for summary dismissal. The ERT's findings on what was the cause and place of the fire were not relevant matters which ought to have been considered. This irrelevant consideration arose as the result of the delayed judgment. The quality of the judgment was compromised.
21. It was further contended on behalf of the appellant that the CCTV footage revealed that the employee used the urn and that the urn had burst into flames an hour and 40 minutes after. No one else had used the urn and more importantly the footage placed the employee in a forbidden place. These matters were never in dispute. If the ERT had questions surrounding the CCTV, it should have been raised at the time of the hearing.



22. Mr. Tofinga contended that the employee had admitted that he had entered the prohibited premises several times. Instead of using that information against the employee, the ERT used it against the employer by finding that it was in the knowledge of the management that the prohibited area was being used by others frequently. This evidence should have been used in favour of the employer to establish the cause of the termination. The finding therefore is incorrect and compromised by the delay in the judgment.
23. Mr. Serulagilagi argued that there were 5 reasons why the employee was dismissed. These reasons appear in the letter of 11 July 2012. The first reason was that the employee and three of his other colleagues had on 5 July 2012, during their night shift, had negligently caused fire at the maintenance room which could have caused the whole factory and the ones nearby to be burnt down.
24. Mr. Serulagilagi argued that the employer could not establish that the fire was caused due to the negligence of the employee. The National Fire Authority had investigated the issue but did not address the aspect of the cause of fire or how it started. In absence of any proof from the experts on fire, the blame could not be laid on the employee. That is what the ERT correctly found and cannot be flawed by the appellate Court as it was not established to the satisfaction of the ERT that the employee caused the fire.
25. The second reason for termination was that the employee and his colleagues had been drinking tea inside the prohibited room for the last three months when the area was prohibited for entry, eating and drinking.
26. Mr. Serulagilagi argued that the employer failed to prove that it was by practice a prohibited area to eat and drink inside the factory. The provision of a tea room and urn inside the factory could not be sufficiently explained by the appellant's witness Ms. Goundar. She admitted that each factory has its own provision for making tea and that she did not know what provision was there for this employee in the year 2012.



27. Ms. Goundar also showed to the ERT that the employee had attended an induction course and shown the prohibited areas. What she failed to show was the designated authorized and unauthorized areas. There was CCTV camera at the premises and if the employee was using the prohibited area for the last three months, why the actions went undetected was the concern of the ERT. The ERT found it hard to believe that the area was prohibited, used by the people and not addressed by the employer. The second ground therefore could not be established either.
28. The third and fourth reasons for the termination were that due to the actions of the employee and others, other workers life, the property of the employer and the factory's investment was put at risk. Mr. Serulagilagi said that these reasons could not be established in absence of a report from the National Fire Authority as to who caused the fire. The employer breached the contract by not investigating properly the cause of the fire.
29. The evidence adduced by the employer was that the defective urn caused the fire. It thus is proper to presume that fire was the probable outcome if the urn was left there to be used. The employee could not be blamed for using the urn.
30. The final reason for termination was that the employee had knowingly breached the company's policy and procedure which could have led the entire burning down of the factory and as a result the company has lost trust on the employee.
31. Mr. Serulagilagi said that under this ground, the employer must establish that the employee's action has caused the loss to the employer. The ERT found that the employee was just having a cup of tea as his entitlement under the minimum standards of labour law and practice and he did not deliberately cheat the employer. To consider it to be so is neither feasible nor a worthy risk. Since the final reason could not be established the employer failed to justify the proper cause for the termination.



32. As regards whether the cause to terminate was fair, it was not, because the employer had failed to carry out proper investigations to establish the cause of the fire and terminating the employee without that constitutes an unfair treatment.
33. I agree with Mr. Serulagilagi that the onus to establish that the dismissal of the employee was lawful is on the employer. The employer had to establish that it had a lawful and fair cause to terminate the employee. For this the employer has to establish that the reason(s) for which the employee was terminated was justified: ***Williams v Printers Trade Services (1984) IR 82 at 84.***
34. The reasons for termination are stated in the letter of 11 July 2012. The main reasons for termination are basically two. The first is that the employee had by his negligent actions caused fire in the factory's maintenance room. The second is that he had breached the company's policy by entering an unauthorized area on the day of the fire and for the previous 3 months preceding the date of the fire. The other reasons are basically an extension of the two main reasons why the termination was effected.
35. On the question of whether the employee was negligent in causing the fire, I find that the ERT did not make any error in finding that the employer could not establish that the fire was caused by the employee or through his negligence.
36. The evidence was that the maintenance tea room had an urn and it was used for tea by the Fitters. The fire started from the urn. If the urn was used by the maintenance staff, it would have caused fire irrespective of who used it.
37. There was no evidence that the urn was defective and left there for repairing by the maintenance people. Mr. Tofinga's submission on this issue is evidence from the bar table and not supported by evidence properly adduced at trial.
38. Further, if the maintenance tea room had an urn and was used by the others, my concern is the same as that of the ERT; why could not this particular employee use the urn and what



was the alternate provision for him to have tea? If everyone else had provisions as the evidence unfolded, why was this particular person not given and shown the place where he could have tea. In absence of a designated place for him, he could use the urn that he could access.

39. It is improper for the employer to deprive this employee of his rights to have tea when it makes provisions for everyone else to have tea. I agree with the ERT that that is his basic right under the minimum labour standards.
40. It was also open to the ERT to accept the uncontradicted evidence of the employee that he used to access the room for work purposes as well.
41. The CCTV footage based on which the employer's witness Mr. Karan gave evidence that the last person to access the tea room was this employee and that the fire started after an hour and forty minutes was not produced in evidence. That evidence was material evidence and ought to have been produced before the ERT to at least establish that the employee was the last person to use the urn. Establishing this will not necessary mean that he would have to shoulder the blame. What the employer had to establish is what caused the fire.
42. Urns are nowadays used in almost all departments and they are kept on. It cuts off automatically when water is heated to the required level. What the employer needed to establish was how the fire started from the urn kept in the tea room. If the urn was defective, then it is for employer to take the responsibility to remove it until it is repaired or to replace it with a new one.
43. If all others were using the urn, the act of putting it on and taking hot water for tea certainly not one which on the balance of probability is such serious misconduct giving the employer the right to terminate the employee summarily.
44. The National Fire Authority had investigated the matter and it was the responsibility of the employer to have found out the cause of the fire because it is asserting the employee's



negligence as having caused it. How can it do so without the National Fire Authority saying that the employee's deliberate or negligent act caused the fire?

45. There is no evidence that the employee was told that the urn was defective and that urns are not to be used in the premises or that that particular urn was not to be used or left on. On the evidence, it was open for the ERT to find that the cause of the fire was not established and that in absence of that it was not established that the fire occurred as a result of the employee's negligence.
46. The other reasons for the termination associated with the reason that the employee was negligent in causing the fire was that he put everyone's life, the property and the investment of the company at risk will only be established if it was established that he was negligent in causing the fire and that he breached the companies policy by entering and using an unauthorized area.
47. I have already found that there is no basis on which I can interfere with the finding of the ERT that the employer had established to the satisfaction of the ERT that the employee had acted negligently and that his actions caused the fire. It is now pertinent to determine whether the employee had breached the policies of the company by entering a restricted area.
48. The induction certificate of the employee was tendered in evidence which shows that the employee was informed about the prohibited areas but the induction sheet does not say that the maintenance tea room was a prohibited area for this employee. It may have had a notice but whether the notice was meant for trespassers or this employee was not established clearly on the evidence. Why would this employee be prohibited in the area when others used to access it and he used to access it when there were problems to be attended to in that room?



49. I find that the employer could not establish to the satisfaction of the ERT that the employee had breached the policy of the company in any way by entering the tea room to get water for himself and his colleagues. He was instructed by his seniors to get water and if the area was prohibited for access it ought to have been locked and keys given to those who are authorized. The cause for termination therefore was unlawful.
50. The next issue is whether the termination was unfair. The ERT found that since proper investigation was not carried out, to send an employee home without a lawful cause, constitutes unfair treatment making the dismissal unfair.
51. The ERT found that the employee's feelings would be hurt if he was sent home not knowing whether he was at fault for the issue.
52. I find that the ERT has confused itself once again as to what could cause unfair treatment. If lawful reason is not established with fair procedure invoked for carrying out the termination, the dismissal becomes unlawful. It is still under the head of the lawfulness of the dismissal that the question of procedure must be examined.
53. To determine whether the termination was fair, the manner of treating the employee whilst carrying out the dismissal should be the consideration. There was no evidence on the aspect that the employee was not treated fairly or with dignity when the dismissal was carried out.
54. To that end the ERT was wrong in finding that the dismissal was unfair. I now turn to the last ground which discusses the issue of remedies.

***Grounds 3 and 4: The Award of Remedies: Is it justified?***

55. Under this ground I am required to ascertain whether the remedies awarded by the ERT was fair and whether the ERT ought to have taken into account s. 230 (2) (a) and (b) of the ERP which states that in deciding the nature and extent of the remedies, the ERT may



consider the extent to which the actions of the worker contributed towards the situation that gave rise to the employment grievance and if those actions so require, reduce the remedies that otherwise would have been decided accordingly.

56. I will address the remedies separately. The first remedy was an order for reinstatement. The ERT found that the reinstatement must take place no later than 30 days from the date of the order.
57. The reason for ordering reinstatement was well justified in the judgment. The ERT stated that this was feasible and sustainable as the grievor's actions were not so serious to warrant summary dismissal. He had also accepted his mistake in all humility. The ERT also found that there was no altercation with the employer of any sort relating to this grievance or the dismissal that normally damages and severs the good faith relationship for any future consideration for employment.
58. The remedy of reinstatement is provided for by s. 230(1) (a) of the ERP which is titled employment grievance remedies. There were some concerns shown whether these remedies are applicable to employment disputes as well. The ERP does not have a separate provision which outlines the remedies for the employment disputes. There are no reasons why these same remedies cannot be applicable to employment disputes. If I were not to apply the provisions of s. 230 remedies to disputes then the aggrieved employees, despite having established a case in their favour, will not be awarded any remedies as the ERP is silent on the same.
59. The issue then is whether the remedy of reinstatement is appropriate. The ERT is correct that when the dismissal occurred followed by the fire incident, the employer and the employee did not have any row about the same. The employee was dismissed and that was the end of him at employment. There was no damage to any trust and confidence as such and damage to the working relationship which would otherwise make the remedy of reinstatement unfeasible.



60. The contract of employment which was terminated was done so wrongly and unlawfully. It further does not have a termination date. This contract is also not one which is domestic in nature or one where the employer and employee have to be with each other and meet and greet often. This is a very large company and there are so many workers. In fact everyone at the place is a worker in some form. The employer and employee do not have to work in one particular environment to brew bitterness. This is one case where the remedy of reinstatement cannot be flawed.
61. Since the order for reinstatement was made, I believe that the employee was not reinstated. The reinstatement ought to have occurred on or before 18 December 2014. This is despite the fact that an appeal was pending: *s. 230 (3) of the ERP*.
62. Since I find that the order for reinstatement cannot be flawed, I have to now determine in the interest of justice what would happen to the employee's rights in lieu of reinstatement when it ought to have occurred. The only fair way to address the employee's deprived right is to order the employer to pay the employee all the wages from the date he ought to have been reinstated, that is from 18 December, 2014 until he is reinstated.
63. The next is to assess whether the compensation of \$10,000 as lost wages is fair and justified. This sum represents 16 months of wages including his entitlement for leave, present and future earnings and FNPf benefits.
64. The ERT found that there was at least 16 months from the date of dismissal until the date of hearing that went by without the employee having found work for himself. The ERT had therefore ordered the entire of the wages lost as a result of the grievance. The sum of \$10,000 also includes compensation for unfair dismissal.
65. I must first say that the remedy of unfair dismissal was not proper as it could not be established on evidence that the dismissal was unfair. The damages must thus be reduced. Moreover, it was incumbent on the employee to have found work for himself in at least the



6 months that he was not employed. There was no evidence why he did not find any work for himself and why he waited so long. Even if he expected the reinstatement, he ought to have safely undertaken some temporary work.

66. If I were to remove the damages awarded for unfair dismissal I would come to the conclusion that the employee should fairly be paid wages for 6 months for being unlawfully dismissed. At the rate of \$120 per week, his 6 monthly wages would amount to \$2880. On the whole a sum of \$3000 would be fair as the employee has also lost out on his Fiji National Provident Fund contribution and leave benefits.
67. The last issue for my consideration is whether the remedy should be reduced because of the employee's conduct which contributed to the grievance. I do not find that this employee had deliberately caused an act which could have contributed towards the grievance. He was in need of tea and he accessed the tea area only for a cup of tea. He has been using that area since no other premises had been allocated to him. It was also not established by he would be prohibited when he used to go there for work purpose.
68. It is unfair by the employer to treat an employee in a manner which is less advantageous in a way that it treats other employees. I am surprised that having deprived the employee of the right to access hot water from this maintenance room, he was not assigned any other alternative place to access hot water. This is not a relationship of good faith shown by the employer.
69. It is solely the actions of the employer that led to the fire and not the employee. I find this based on the evidence that the employee had only accessed hot water from the tea room and was exercising his rights as a worker.

### ***Final Orders***

70. In the final analysis, I dismiss the appeal on all grounds except that I find that the ERT erred in law in finding that the dismissal was unfair. I order that the employee be reinstated

forthwith and be paid wages from 18 December 2014 in lieu of being reinstated. This wages should be paid either as a lump sum or in instalments with his current pay. All the statutory dues are to be paid from the wages as well and the employer must pay all contributions it is obligated to pay to the Fiji National Provident Fund.

71. I further set aside the sum of \$10,000 as compensation for unlawful dismissal and order that a sum of \$3,000 be paid instead within 7 days to the employee.

72. Since the appeal is partly successful, there shall not be any order for costs against the employer except that the employer is to pay the costs ordered by the ERT to the employee within 7 days as well.

  
Anjala Wati

Judge

30.1.2017



To:

1. Mr. Noel Tofinga for the Appellant.
2. Mr. Serulagilagi for the Respondent.
3. File: Suva ERCA 13 of 2014.