IN THE EMPLOYMENT RELATIONS COURT
AT SUVA (APPELLATE JURISDICTION)

ERCA NO**. 29** OF **2017**

BETWEEN : **VOMO ISLAND RESORT**

APPELLANT
(ORIGINAL RESPONDENT/EMPLOYER)

AND : **MACIU LATABUA**

RESPONDENT

(ORIGINAL APPLICANT/GRIEVOR)

BEFORE : Justice M. Javed Mansoor

COUNSEL : Mr M. Kumar for the Appellant
: Mr J. Uludole for the Respondent

Date of Hearing : 17.06.2019
Date of Judgment : 15.08.2019

JUDGMENT

LAW OF EMPLOYMENT: Termination of employment – appeal – insulting words by an employee – evidence before the Employment Relations Tribunal – what constitutes evidence – tribunal making an investigation of its own – adversarial procedure – assessment of compensation – contributory conduct of employee – extempore judgment – rehearing – Employment Relations Promulgation 2007: Sections 28, 171, 210, 216 & 231.

Cases referred to:

a. Shell Fiji Ltd v Johnson
b. Fiji Public Service Association and Satish Kumar v the Arbitration Tribunal and Another
c. Jones v the National Coal Board
d. Yuill v Yuill
e. McNicol v Balfour Beatty Rail Maintenance Ltd
f. BW Holdings Ltd v Properties Pacific (Fiji) Ltd

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1. This is an appeal from the decision of the Employment Relations Tribunal (ERT) delivered on 15 November, 2017. The Respondent's employment was terminated on 10 September 2016. The employment grievance was referred for mediation on 15 November, 2016. The Notice of Appeal and the Grounds of Appeal were filed on 13 December, 2017.

2. The ERT held a hearing into the Respondent's grievance and also gave its decision on the same day, 15 November 2017, directing the Employer to pay the Respondent $5,115.90 within 21 days. The sum awarded was equal to the aggregate of six months of the Respondent's wages. This decision – which is sought to be set aside by the Appellant – was given extempore by the ERT.

3. In this case, the Respondent was accused of using "*unacceptable language on a fellow employee, an iTaukei man, in front of other workers*". The words complained of are "*macawa*" and ""*boci*", and these are said to be of an insulting nature, especially to an iTaukei male. The Appellant submitted that these words were uttered in a tense atmosphere, and not in a convivial context as suggested by the Respondent. The Appellant submitted that there was no evidence to suggest that "*macawa and boci*" are a common form of insult often used in a joking fashion.

4. The Appellant's five grounds of appeal are substantially on the following lines:

   a. *The Tribunal erred in its determination that "macawa", meaning useless, and "boci", meaning an uncircumcised male, are common forms of insult used by iTaukei men, often in a joking fashion when there was no evidence as such before the Tribunal.*

   b. *The Tribunal erred in concluding that the Grievor did not swear at Mr Lalakomacoi, when Mr Ratuvou's statement confirmed that the Grievor swore, which was corroborated by Mr Sovaia Rabukagaga's statement.*

   c. *The Tribunal erred in holding that the dismissal of the Grievor, in the circumstances, was not justified, when, in fact, the employment contract specifically provided that swearing was a ground for summary dismissal.*

   d. *The Tribunal erred in awarding compensation equivalent to 6 months of the Grievor's wages, and failed to consider the Respondent's contributory conduct in awarding compensation.*

   e. *The Tribunal's decision is wholly unreasonable and cannot be supported having regard to the evidence as a whole.*

5. The Appellant submitted that the common law right of summary dismissal was available in the situations contemplated by Section 28 (a) to (e), and drew the attention of Court to two decisions of the Court of Appeal in Shell Fiji Ltd v Johnson[1] and Fiji Public Service Association and Satish Kumar -v- the Arbitration Tribunal and Another[2]. The Appellant further submitted that the Tribunal failed to consider the contributory conduct of the employee. The Respondent admitted using the word "*macawa*", but contended that it meant useless, especially in the context in which it was said to have been uttered. The Respondent, however, denied using the term "*boci*".

[1] [2010] FJCA 54; ABU0012/2009 (23 September 2010)
[2] Unreported Civil Appeal No.13 of 1999 delivered on 19 February 2002

6. Submissions by the respective counsel were on the question whether the words complained of were uttered and whether the Respondent swore at his superior, Mr. Lalakomacoi, and whether the alleged words were abusive. The Appellant submitted that the Respondent was summarily dismissed only after an investigation was carried out and the union was informed of such investigation in terms of the applicable collective agreement. The reasons given in the termination letter refer to the using of foul language, swearing at another employee and the commission of a breach of contract by the Respondent. The Appellant submitted that the Tribunal erred in law and in fact in holding that the dismissal of the Respondent could not be justified when the employment contract specifically provided that swearing was a ground for dismissal and the evidence in proof of the offence was before the Tribunal.

7. But, a fundamental question seems to be at issue upon a perusal of the record of proceedings of the ERT. The question is whether the ERT went too far in investigating the Respondent's grievance, instead of allowing the parties to put forth the evidence and have it tested in the adversarial context. Neither counsel made oral submissions on the matter (except when questioned by the Court) and the grounds of appeal make no specific reference to this issue, and the written submissions of the Appellant makes only a brief and passing reference under the fifth ground of appeal. The Appellant's written submissions at paragraphs 36 & 37 state that proceedings before the Tribunal did not have witnesses who gave evidence on oath, and that each party's story was related from the bar table, and that no opportunity was given to the witnesses to give evidence from the witness box under oath or to cross examine them. The Respondent's response to those submissions was that the Appellant did not attend the hearing and, therefore, lost the opportunity to cross examine. But, it can be seen from the record that one Mr. Mani has represented the employer at the hearing on 15 November 2017, and responded to the questions posed by the Tribunal.

8. The record does not disclose that witnesses gave evidence on oath. Nor has the evidence of a witness been led. Consequently, there was no cross examination of any witness. What the record discloses, however, is a series of questions by the ERT from start to the end of proceedings in response to which various persons,

including the Respondent, have given answers. All of the interrogative questions are solely from the Tribunal. The ERT, it is clear, has embarked upon an investigation of its own motion. Why it did so is not easily understandable upon a perusal of the record.

9. The Tribunal's questions and comments during the proceedings included: "*Now the only other thing that I need to ask is in relation to the company policies and procedures within the Submission that has been filed by the Employer*"; "*Ok. Alright, is there anything else from either side because I am intending to make a determination this afternoon based on the material before me*"; "*So where is the termination letter? That's not in the material. Have you got a copy of the dismissal letter? So where is the dismissal letter? Alright, is there anything further from either party?*"; "*Well that's your saying because you are alleging that you were not even employed there at that time so I can't take evidence from you at the bar table either. Anything else from either side? Look I intend to make a decision in this matter and a copy of the decision will be made available to the parties*".

10. The material relied upon by the Tribunal in reaching the decision is described in this way: *the written Submissions of the Employer dated 19 June 2017; the written Submission of the Union on behalf of Mr Maciu Latabua filed on 18 July 2017; Two statements provided by the Employer, the first from Mr Vilise Ratuvou given on 31 August 2016 and the further statement provided by Mr Kitione Lalakomacoi on 30 August 2016; correspondence provided by the Employer that includes a copy of the policies and standard procedures that are the house rules and regulations applicable to all employees of Vomo Island Resort, a copy of which was signed by the Grievor on the 1 November 2013; correspondence relating to the suspension of the worker following the incident on 30 August 2013; that included the intention of Mr Mark Leslie, the General Manager, to commence investigations, the suspension of the worker dated 31 August 2103 and ultimately the dismissal letter that was sent to the Union on 10 September 2016; a statement provided from laundry attendant Mr Sovaia Rabukagaga on 31 August 2017; a statement from Mr Vilivi Sadrugu on 31st August 2016; and a statement from Mr. Krishna Nadan on 31 August 2016*.

11. The Tribunal states that "*in reaching the decision for the purpose of this Determinative Conference, the Tribunal has also questioned the Grievor in relation to his conduct and also Mr Ratuvou, who was present during the course of some of those discussions between the Grievor and Mr Lalakomacoi which were subject to the investigation by the Employer and gave rise to the ultimate dismissal decision*". Why the proceedings on that day were referred to as a

"Determinative Conference" is not clear. Nevertheless, these proceedings were followed by a decision of the Tribunal on the same day.

12. There is no doubt that the Tribunal should have the liberty to formulate its own procedure of how cases are heard. But this must be within the ambit of fair tribunal procedure and the tenets of natural justice. Failure to do so may not only cause a miscarriage of justice in a particular instance, but also, consequently, undermine the administration of justice. The parties in this case should have been at liberty to call, examine and cross examine witnesses. Natural justice requires that a party has a fair opportunity to contest the evidence that has been led. That did not come to pass. This is so even though the ERT is not bound by the strict rules of evidence[3].

13. The recommended procedure to be followed by a Tribunal is stated by Wade & Forsyth in the following manner: "*It is fundamental that the procedure before a tribunal, like that in a court of law, should be adversary and not inquisitorial. The Tribunal should have both sides of the case presented to it and should judge between them, without itself having to conduct an inquiry of its own motion, enter into the controversy, and call evidence for or against either party. If it allows itself to become involved in the investigation and argument, parties will quickly lose confidence in its impartiality, however fair minded it may be*"[4].

14. Fairness in proceedings before the ERT is a requirement imposed by statute itself. Section 216 (2) of the Employment Relations Promulgation 2007 (ERP) states that *in all proceedings, the Tribunal must act fairly*. Even where there is no such statutorily imposed duty, a tribunal has a duty to act fairly. The ERP has made it abundantly clear that there is a pervasive duty on the ERT to act fairly.

15. It is unfortunate that the record does not disclose an application on behalf of the respective parties to examine and cross examine the witnesses; the absence of the Respondent's representative may also have contributed to this. No is there any reference to an oath having been administered to a witness. The failure or neglect by a party to make an application to the Tribunal to lead the evidence of a

[3] Section 231 of the ERP
[4] Administrative Law, H. W. R Wade & C.F Forsyth, 8th edition, page 906

witness should not discharge the Tribunal's duty of facilitating a fair procedure that would maintain the norms of natural justice and ensure that the interests of justice are met.

16. The wisdom of judges usurping the role of counsel during legal proceedings has not met with the approval of the appellate courts. With lawyers representing parties, courts have reasoned, a tribunal is better advised to adjudicate solely on the grounds presented by the parties.

17. In Jones v the National Coal Board,[5] one of the grounds of appeal was that the judge had intervened in the examination in chief and cross examination of witnesses. The Court of Appeal explained the nature of the judge's intervention in these terms: "*No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence, he took them up himself with the witnesses from time to time. He was anxious that the case should be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases, and have done for centuries*".

18. Lord Denning, delivering the judgment of the Court of Appeal stated, "*Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a Judge is not a mere umpire to answer the question "How's that"? His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role*." (emphasis added)

[5] [1957] 2 QB 55

Continuing, the Court stated, at page 64, "*Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales – the "nicely calculated less or more" – but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties… so also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour once side or the other … And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost…..The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. <u>If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate</u>; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-turned cymbal'''* (emphasis added).

19. And in <u>Yuill v Yuill</u>[6] <u>[1945] 1 All ER 183</u>, which was referred to by Lord Denning in Jones v the National Coal Board, Lord Greene MR said this: "*A Judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge to what it is when he is being questioned by counsel,*

[6] [1945] All ER 15

particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue."

One of the arguments in this case was that the trial was unsatisfactory due to the fact that the judge took an undue part in the examination of witnesses.

Lord Greene stated, "*It was said that the judge put many more questions to witnesses than all the counsel in the case put together and that he in effect took the case out of counsel's hands to the embarrassment of counsel and the prejudice of his case*".

20. In McNicol v Balfour Beatty Rail Maintenance Ltd[7], the Court of Appeal observed,
"*As to the function of the tribunal it was submitted that it should adopt an inquisitorial and more pro-active role in disability discrimination cases, as they can be complex and involve applicants, whose impairment leads them to minimise or to offer inaccurate diagnoses of their conditions and of the effects of their impairment. I do not think that it would be helpful to describe the role of the Employment Tribunal as 'inquisitorial' or as 'pro-active'. Its role is to adjudicate on disputes between the parties on issues of fact and law. I agree with the guidance recently given by Lindsay J in Morgan v. Staffordshire University [2002] IRLR 190 in paragraph 20. The onus is on the applicant to prove the impairment on the conventional balance of probabilities. In many cases there will be no issue about impairment. If there is an issue on impairment, evidence will be needed to prove impairment. Some will be difficult borderline cases. It is not, however, the duty of the tribunal to obtain evidence or to ensure that adequate medical evidence is obtained by the parties. That is a matter for the parties and their advisers.*"(emphasis added)

21. The principles discussed in the above cases are fairly applicable to the ERT, which is not an investigative body. The functions of the ERT include adjudicating and determining any grievance or dispute between parties to employment contracts[8]. It is not bound by the strict rules of evidence; it can accept and admit evidence as it thinks fit, and can dispense with adducing evidence on matters on which all parties to the proceedings have agreed in writing. This does not mean that the Tribunal will cast aside all principles of evidence. Prudent norms of

[7] [2002] ICR 1498 at 1505
[8] Section 210 of the ERP

evidence and the evidentiary burden are matters that the Tribunal cannot completely lose sight of. In fact, Section 232 of the ERP has laid down provisions with respect to evidence in proceedings before the Tribunal or the Court. The duty of the ERT is to be fair in all aspects of proceedings before it, and to be just and equitable in its decisions. It has the duty to test the validity of claims of unfair dismissal. The Tribunal must not dispose matters without properly dealing with the merits as presented by the parties. In this matter, there is no evidence that the parties consented to the mode of inquiry adopted by the Tribunal. In this case, the ERT has not acted fairly in the manner in which the proceedings have been conducted and in disposing the matter.

22. As adverted to, the hearing in this case was on 15 November 2017. So was the Decision on the matter. Perhaps the Tribunal wished to conclude the matter expeditiously. It is noteworthy that the Tribunal must make its decision on a matter referred to it under the Promulgation without delay[9]. The record does not assist this Court in understanding the reason for the extempore decision to be made on the day of the hearing of the grievance except that the Tribunal made it very clear that it intended to conclude the matter on that day notwithstanding an application by the Respondent to postpone the matter on the basis that his representative was not present before the Tribunal. While an extempore decision is not always out of place, the words of caution by Justice John E Byrne in the Court of Appeal decision in BW Holdings Ltd v Properties Pacific (Fiji) Ltd[10] is apt. His Lordship stated, "*I have noticed since I returned to Fiji that more and more Extempore Judgments or rulings are being given and I agree with Sir Owen Dixon that it is quite possible when a Judge gives an Extempore Decision or Judgment immediately after the evidence and submissions conclude that he will overlook some important parts of the evidence*".

23. In these circumstances, the Decision of the Tribunal cannot be allowed to stand. However, there is not sufficient material for this Court to substitute its own order in place of the Tribunal's Decision. This is a matter on which evidence needs to

[9] Section 171 of the ERP
[10] [2009] FJCA 43; ABU 0080.2008 93 February 2009)

be led and tested. Therefore, the matter will be remitted to the Tribunal for a re-hearing.

24. In the aforesaid, the Court makes the following orders:

A. The Decision of the ERT dated 15 November 2017 is set aside;

B. The grievance of the Respondent is remitted to be heard and disposed without delay by the ERT presided by a judicial officer other than the judicial officer who heard the grievance originally;

C. The parties will bear their own costs.

Delivered at Suva this 15th day of August**, 2019.**

Justice M. Javed Mansoor
Judge of the High Court