IN THE EMPLOYMENT RELATIONS COURT

AT LAUTOKA

ORIGINAL JURISDICTION

CASE NUMBER: **ERCC 01 of 2015**

BETWEEN: **LESLIE EDWARD ARTHUR WHALE**

PLAINTIFF

AND: **ADRENALIN WATERSPORTS (FIJI) LIMITED**

DEFENDANT

Appearances: *Ms. N. Khan for the Plaintiff.*

Ms. Low for the Defendant.

Date/Place of Judgment: *Friday 10 July 2020 at Suva.*

Coram: *Hon. Madam Justice Anjala Wati.*

RULING

A. Catchwords:

Employment Law – Termination of Employment – employer asserts it rights to terminate the contract under the provision of the contract which allowed for termination " without cause" upon 2 months' notice or payment in lieu - employee says that "without cause" termination is not permitted in law and as such the provision is invalid – employee raises that such legal contention is based on the requirement of the ERA that when an employee is dismissed, he must be provided with notice containing a written statement setting out the reasons for termination – employee also raises non-payment of benefits under the contract upon termination – provision of ERA analysed requiring a notice with written statement setting out the reasons for termination – found that such a provision does not mean that the employer cannot rely on a contractual provision to terminate "without cause" but to mean that if termination "without cause" is carried out as per the contract then that reason must be identified in the notice which

on the evidence was found to be complied with – finding made on evidence that one of the benefits due under the contract not paid to the employee – as a result of non-payment of the benefit, the termination was procedurally wrong – evidence also established that the termination was not carried out fairly – termination held to be unlawful and unfair – proper damages worked out.

B. Legislation:

1. The Employment Relations Act 2007 ("ERA"): ss. 4; 29; 30(1); 30(6); 33(2); and 114;

Cause

1. The plaintiff's claim arises from the termination of his employment on 5 May 2015. It is contended that the termination is unlawful and unfair.

2. The plaintiff says that he was terminated from his employment *"without cause"* pursuant to clause 15 of the employment contract. He asserts that that provision of the contract which allows for termination *"without cause"* is invalid as it is a requirement under the law by virtue of the provisions of s. 33(2) of the ERA to provide the worker with reasons in writing for the summary dismissal.

3. The plaintiff also claims that the termination under clause 15 of the contract was maliciously designed to avoid payment of the yearly bonus to him under the Annual Incentive Program as provided for by clause 11 of the contract of employment.

4. It is also claimed that when the termination was carried out, the plaintiff was not accorded proper procedures mandated under the contract and by the law and that the termination was unfair in that the conduct of the person carrying out the dismissal was improper and caused the plaintiff humiliation, embarrassment and injury to his feelings.

5. In terms of breach of procedure, the plaintiff states that the defendant breached the contract in the following manner:

   a. By not paying him NZD 4,000 which the plaintiff was entitled to under clause. 15.3 and clause 26 of the contract of employment;

b. *By not paying him a sum of $12,000 as his entitlement for use of Yacht Riv 1 Vessel; and*

c. *By not reviewing his salary in January 2015.*

6. The plaintiff therefore seeks the following remedies:

(i) *A declaration that clause 15 of the employment contract dated 21 May 2014 is ultra vires as it breached the ERA.*

(ii) *Loss of salary for the balance term of the employment contract.*

(iii) *Unpaid yearly bonus entitlement under the Annual Incentive Program.*

(iv) *FNPF Contributions.*

(v) *Damages for discriminatory treatment, mental and emotional trauma; loss of benefits and loss of personal property;*

(vi) *Punitive damages.*

(vii) *Interests and costs on solicitor client indemnity basis.*

Background

7. The plaintiff came from New Zealand to work in Fiji for the defendant company as its General Manager. He entered into a contract of employment with the defendant on 21 May 2014. He started work on 11 August 2014. He was terminated from employment on 5 May 2015.

8. If I were to calculate from 11 August 2014, the plaintiff had worked for the defendant company for almost 9 months. He was terminated pursuant to a provision in the contract that he can be terminated *"without cause"* upon 2 months' notice or pay in lieu of notice.

9. The defendant carries on the business of water sporting in Fiji. The business is largely tourism based and provides variety of water sporting games.

10. On the day of the termination, two of the defendant's employees in Australia had come to Fiji to hand over the termination letter to the plaintiff. The termination was on the instructions of the Managing Director Mr. Paul Cook.

Employer's Position

11. The employer's position is simply that the employee was terminated as per the provisions of the contract which allows for termination *"without cause"*. The employer did not have to provide any reasons for the termination.

12. On the issue of procedure, the employer's position is that the shipment costs of NZ$4,000 as per clause 26 would have been provided if the employee had tendered invoices evidencing shipment. The employer also says that the benefit for the use of the yacht cannot be exchanged for cash as that was not agreed upon. The employee either uses it or not, that is the only agreed benefit in the contract of employment. The salary review was not an accrued entitlement and would only activate if the company made profits.

13. In respect of the issue of unfair termination leading to humiliation and embarrassment of the employee, the employer refutes that and asserts that the termination was carried out with respect and dignity.

Issues/Analysis

14. I must remark that the parties have not filed a Pre Trial Conference ***("PTC")*** minutes despite my directions to do so since 5 December 2016. The court records will show that when my orders were not complied with for 6 months, I had to fix the trial date dispensing with the requirements of the Pre-Trial Conference on the condition that if the trial prolonged for want of a PTC, the legal office representing the parties were going to be asked to show cause as to why they should not personally pay the costs of the proceedings. The PTC was dispensed with as I did not want the conduct of the counsel to affect the plaintiff's ability to have his case tried.

15. I would also remark that the parties have not provided any assistance to the Court in attempting to identify the issues that needs to be determined by the Court. I have attempted to collate the same as the evidence has unfolded before me. If for some reason, a question bothering the minds of the parties and the counsel is not attended to, it is because the same has not been identified clearly in the proceedings papers, the evidence and the submissions. To that end, the counsel have only themselves to blame.

16. The issues to my mind are:

1. ***Was the plaintiff's contract terminated lawfully? In determining this issue I will examine the basis on which the termination was carried out and whether the termination could be carried out on that basis together with an examination on the proper procedure that ought to have been invoked whilst the dismissal was carried out.***

2. ***Was the manner of dismissal or the conduct of the employer and/or its agents such that when carrying out the dismissal, the employee suffered humiliation, loss of dignity and injury to his feelings – in other words whether the termination was carried out fairly?***

3. ***If I find that the termination was not carried out lawfully or fairly, I will assess the damages that ought to be paid by the employer.***

17. I will deal with each issue under a different sub-heading. I will make reference to parts of the evidence necessary for determination of the issues. I need not refer to the evidence of the parties in verbatim.

A. Was the termination lawful?

18. The employee is of the view that despite the provision in the contract of employment that the employer could terminate the contract *"without cause"*, he was entitled to be provided with written reasons for his dismissal under s. 33 (2) of the ERA. In absence of the reasons being provided, the termination becomes unlawful.

19. I have examined the provisions of clause 15 of the employment contract. It reads as follows:

> *" 15.0 Termination on Notice (Without Cause)*
>
> *15.1 The Employer many terminate this contract without cause by giving not less than two (2) months' notice in writing to the Employee of their intention to terminate this Contract, or by making payment of two (2) months' basic salary to the Employee in lieu of such notice.*
>
> *15.2 The Employee may also voluntarily terminate this Contract without cause by giving not less than two (2) months' notice in writing to the Employer of his or her intention to terminate this Contract, or by making payment of two (2) months' basic salary to the Employer in lieu of such notice.*
>
> *15.3 Should the Employer terminate the Employee's contract of employment for any reasons listed in clauses 14, 15, 16 and 17 herein, the Employer shall be responsible for costs referred to in clause 26 herein."*

20. It is clear from the above clause that the parties had agreed that the contract could come to an end even when there is no cause to bring it to an end. The benefit of the provision was not only extended to the employer but to the employee as well.

21. The parties had voluntarily agreed to enter into such terms. They are bound by the same and if the employer has relied on that provision, the employee cannot require that other reasons be given to him. There is no requirement for the employer to provide the employee with another reason under clause 15 of the ERA.

22. The plaintiff's position is that it is the requirement of the law that the reasons be provided and since the law has not been complied with, clause 15 ought to be declared invalid in the contract. Let me examine the provisions of the law. The provision that the plaintiff says has not been complied with is s. 33(2) of the ERA.

23. S. 33(2) of the ERA states that when the employer is summarily dismissing an employee, written reasons of the dismissal must be provided to the employee at the time of the dismissal. This provision is limited to circumstances of summary dismissal. It applies to situations where the employer is terminating the employee for a lawful cause.

24. In this case, the plaintiff was not terminated for any cause. The employer had exercised its right to terminate the employee under the provisions of the contract for *"no cause"*. I cannot find any provision in the ERA that forbids an employment contract from having a provision where the parties can bring an employment contract to an end for *"no cause"*. The plaintiff has not brought any provision to my attention either.

25. I am also aware of the provisions of s. 114 of the ERA. It reads as follows:

"If a worker is dismissed, the employer must, when dismissing the worker provide to the worker with a written statement setting out the reasons for the dismissal".

26. S. 114 uses the word *"dismissal"*. *"Dismissal"* is defined by s. 4 of the ERA to mean *"any termination of employment by employer including those under s. 33"*. The definition indicates two distinct matters.

27. The first is that the provision in s. 114 extends to termination of all forms and is not restricted to summary dismissal cases. The second is that the ERA recognizes that summary dismissal is not the only way in which the contracts of employment can come to an end. It will not be legally erroneous to conclude that since summary dismissal can take place without notice, the ERA also contemplates that there could be dismissals with notice. Summary dismissal is for a cause and other forms of termination can include *"no cause"* termination if the parties have specifically agreed to it in the contract of employment.

28. I am fortified in my view when I look at s. 29 of the ERA. This is a provision which states that contracts for indefinite periods can, in the absence of a specific agreement between the parties, be terminated on notice. This provision insinuates that even if there is no cause, the termination

can be effective on notice. It also insinuates that parties can specifically agree on how contracts can be terminated.

29. The plaintiff was dismissed with notice. Was he provided with a written statement which set out the reasons for his termination? I find that it is undisputed that the plaintiff was given a termination letter dated 5 May 2015. The letter of termination was tendered in as evidence.

30. The letter sets out the reason for the termination and the reason itself is that the employer has decided to exercise its contractual right to terminate the employment *"without cause"*. The letter sets out clause 15 of the contract thus giving the employee the reason for the termination.

31. I do not think that the term *"reason"* in clause 114 means *"a cause"* for which termination was made. If the plaintiff was not provided with a written statement setting out the basis for his termination, I will find that s. 114 has not been met. However, the requirement for a notice in writing indicating the reasons for the termination has been met.

32. S. 114 does in no way preclude the parties from entering into a contract of service which can be terminated *"without cause"*. It is a provision which relates to the employee being informed of the reason for the termination which could also be to inform the employee that he or she is being dismissed for *"no cause"* as per the contract. That could be sufficient reason.

33. Procedurally, the statute sets out another requirement to be followed at the time an employee is dismissed. The requirement is for a certificate of service to be provided to the employee. This is outlined by s. 30(6) of the ERA. It states that *"upon termination of a worker's contract or dismissal of a worker, the employer must provide a certificate to the worker stating the nature of employment and the period of service."* None of the parties have taken issue on this aspect and as such no evidence on this point was tendered, tested or tried. It would be improper for me to make a conclusive finding on this aspect.

34. I need to now look at the plaintiff's complaint that he was entitled to be paid all wages and benefits due to him. Let me first start from the statutory requirement to pay all wages and benefits due to the worker. S. 30(1) of the ERA states that *"upon termination of a contract of service, the employer must pay to the worker all wages and benefits then due to the worker by*

end of the following working day." The ERA also allows for payment in lieu of the notice period which in this case was 2 months.

35. There is no complaint in the evidence that the plaintiff was not paid his wages due to him up till the time of dismissal or payment in lieu of notice. The plaintiff is complaining about three matters on the issue of non-payment of the benefits. The first is that he was to be paid up to NZD 4,000 under clause 15.3 and clause 26. This sum of money was classified as the shipping costs.

36. The amount of NZD 4,000 is derived from clause 26. There is no dispute that the employer is obligated to pay the said money and that until date, the said sum is not paid. The employer's position is that the sum is outstanding to be paid because the employee had not provided to it an invoice as evidence that he had shipped items to NZ.

37. The employee's evidence is that on 29 March 2016 he had sent an email to the employer's agents and enclosed receipt dated 16 November 2015 by Movements International Fiji which showed that a sum of $12,822 was spent in shipping the goods. The receipt was tendered in evidence as *P. Ex – 4*. The employer took issue with this invoice because it showed that the goods were sent from Auckland to Lautoka. It is contended that this invoice was for when the plaintiff brought in the items to Fiji.

38. The plaintiff says that the place of origin and the destination could have been entered wrongly but that the invoice was for shipping the goods back to New Zealand. He also pointed my attention to the date of the transaction which shows that it was shipped on 3 November 2015 after he was terminated from the employment. I accept the evidence that the invoice/receipt relates to shipping costs from Fiji to New Zealand.

39. I accept the evidence of the plaintiff that he had sent the emails with the receipt to one Chiara Soceio and Jack Latanis. There is no direct dispute by these two individuals who indisputably are agents of the employer that the emails with the invoice /receipt showing the shipping cost was sent to them.

40. Further, I do not find that payment of the shipping costs was conditional upon a receipt or invoice being provided. The amount was set by the contract as NZD 4,000 irrespective of what the costs of the shipping would be. It was contemplated and agreed by the parties that NZD 4,000 would be an appropriate amount. To that end, the employer was not entitled to any evidence of shipping or the amount that the employee had incurred in getting the goods shipped. If the amount was more or less, it was not going to change the contractual entitlement to be paid and to be paid the amount that was agreed upon. I find that by disregarding its obligation to pay under the contract, the employer has breached the employee's rights on termination. This amount should have been paid to the plaintiff at the end of 6 May 2015 as required by law.

41. It is expected and obvious that a person who has relocated to Fiji, as the evidence unfolded that the plaintiff did, will bring his personal belongings and household effects. If he is to return after 9 months, there would be items to be shipped back. He cannot go without taking his items. He needed the shipment costs. It is not rocket science that the employer does not understand such practical aspects of life.

42. The second benefit the employee says that he was entitled to arises from the letter dated 19 May 2014. It is the plaintiff's contention that the said letter offers the plaintiff two benefits. The first is outlined in paragraph 2 of the letter and the second is outlined in in paragraph 3.

43. Paragraph 2 states that *"in addition to the terms and conditions set out in the contract, you are offered access to the use of the Riv 1 vessel when not required for business use (i.e) downtime in place of the Opulence vessel. The vessel must only be used by you for limited personal use of up to 6 days per annum"*.

44. The plaintiff says that since he had worked for 10 months, he was entitled to use the vessel at least 5 times. He had already had the benefit of its use for 2 days and 3 days were left. The plaintiff says that it is not disputed that the yacht is chartered at the rate of $4,000 per day. If the plaintiff's use was to be converted into monetary terms, he should have been paid a sum of $12,000 upon his dismissal.

45. The defendant's position is that the plaintiff was only entitled to use of the vehicle and not to be paid for the same. To this the plaintiff agreed with the counsel for the employer when he was being cross-examined.

46. The plaintiff again changed his mind when his counsel in re-examination suggested to him that this benefit was like his annual leave and if he did not use it, he should get paid for it so he should be paid for 3 days for not using the yacht.

47. I have examined paragraph 2 of the letter which talks about the use of the yacht. This clause only discusses the use and does not contain any indication that if the yacht is not used the price of a day's hire would be paid. If that were to be the position, there should be clear agreement regarding that.

48. The use of the yacht cannot be equated to annual leave where it is common practice amongst most employers to pay if the leave is not used. The use of yacht as a benefit is not a common clause in most contracts in Fiji. If there is an established convention then I would have no hesitation is applying the common practice but this is a novel issue. The parties should have discussed about this aspect clearly and arrived at an agreement. In absence of any specific agreement, I find that the right cannot be established.

49. I can give an example, let me say that an expatriate contract allows an expatriate a return ticket to his home every year. In absence of the provision for the ticket cost to be exchanged for cash, I do not think it can be imposed upon the employer that the cash should be paid in lieu if the employee does not take a return ticket every year.

50. Let me now turn to the 3rd benefit which the plaintiff asserts has not been given to him. This relates to the 3rd paragraph of the letter of 19 May 2014. Paragraph 3 talks about the salary review after 6 months which was to be based on the performance of the employee and the company both. The employee stated that he was entitled to a review of salary in January 2015.

51. The employee also said that the company did not make any profits since he joined until he was terminated. The year 2014 was to fix the problems and the year 2015 was meant to break even. He also said that in 2015 no profits could be made because two employees were hired and their

costs for working for the company was exorbitant closing up to $380,000. He also said that the employer purchased about 24 Jet Skis which cost he had expected to be paid by the Managing Director Mr. Paul Cook but that it came out of the company's finances.

52. I find from paragraph 2 of the letter that the review in the context meant review with a view to increasing the salary of the employee. If I were to work out 6 months from the time the plaintiff started work then the review period was middle of February. It is clear from the evidence that there was no performance report for the plaintiff and that the company was not making a profit. Even the plaintiff agreed to this. He did state that the costs increased because two employees were hired and 24 Jet Skis bought but he does not precisely give evidence on whether these employees were hired before mid-February in 2015 and whether the Jet Skis were bought before mid-February in 2015. This evidence came up in re-examination of the plaintiff. No such matter was ever put to the defendant to comment upon. In that regard the evidence cannot be said to be tested and tried and therefore reliable. I will not give it any weight.

53. If there was no positive performance report for the plaintiff and the employer did not make any profit during the time the plaintiff worked for the company, I am not satisfied that the plaintiff was entitled to any increase in the salary. Nothing turns out by saying that there was no review. The plaintiff has to establish that his right under the contract had accrued and that he was entitled to an increase. Yes factually there was no review but then it was not established that the salary of the plaintiff would have increased.

54. If the salary was to increase, a review was warranted. What is the point of conducting a review when it was obvious that the company was not making profits and there was no performance report made for the plaintiff? I must say that under clause 21 of the contract, the employer had the discretion to conduct the performance assessment for the employee.

55. The plaintiff has also raised that he was entitled to the benefit of clause 11 and clause 28. I find that there is no evidence to establish that the plaintiff had an accrued right under the contract pursuant to this contract. The rights could not be established. It was a contingent right depending on factors which I am satisfied had been fulfilled.

B. Was the termination fair?

56. I am satisfied on the evidence that when the employer's agent Mr. Jack Latanis came to Fiji from Australia to hand over the letter of termination to the employee he had behaved in a rude and aggressive manner. I accept the evidence of the plaintiff, his witness Nilesh Kumar and the evidence of the employer itself that when the employee was handed over the letter of termination, he started using his phone. I accept that he used the phone to note his bank details and personal contacts when Mr. Jack Latanis snatched the phone from his hand. The employer says that the phone was snatched because he was deleting information from the same.

57. The employee denies deleting any information from the phone. Mr. Paul Cook was not present to say with conviction what happened on the day. Mr. Jack Latanis has not contravened the evidence of the employee. Whatever was the issue, I do not think Mr. Jack Latanis's conduct was proper in the circumstances. He could have politely asked the plaintiff that he wants to see what was being recorded or removed or that the use of the phone be supervised. By snatching the phone, the employer, I accept the evidence of the employee, hurt his feelings.

58. The employee also testified that his laptop was slapped down in a very rude way. He was not given more than 5 minutes to pack his personal stuff and leave. He was told by Jack Latanis to just pack his belongings and get out of the office. I accept the evidence of the employee that there were other employees present who saw how quickly the plaintiff was marched out of the office.

59. These actions no doubt as the plaintiff said caused him humiliation. I would not expect any employer to be rude and behave in the manner the employer's agent did. To add to all the hassle, the plaintiff was only given 3 days to pack all his belongings, sell his car and boat, settle his rental property issue with the landlord and fly to New Zealand. He was given return air tickets to fly out on 10 May 2015. The ticket was sent to the plaintiff's either on 6 or 7 May 2015.

60. I find that this was vindictiveness on the part of the employer to be make matters difficult for a person who was already disturbed after losing his job. The least the employer could have asked the plaintiff would be his suitable return date and if the plaintiff was not sure, either to

give an undertaking to purchase the tickets when the plaintiff was ready or to purchase an open ticket for him and his wife. There was no harm if the employer showed empathy. The contract had ended but the requirement of good faith in ending the same remained.

61. The actions of the employer I find has cause the plaintiff, humiliation, loss of dignity and injury to his feelings.

62. I find that for want of paying the proper benefit to the employee and for want of conducting itself fairly when the contract was being terminated, the termination was unlawful and unfair. The plaintiff is entitled to the appropriate remedy.

C. Remedy

63. Since the plaintiff was entitled to be paid NZD 4,000 as shipping costs, that amount is recoverable as damages. On top of this the plaintiff is also entitled to interest at the rate of 3 percent from the date of termination to the date of the trial that is calculated as follows:

Interest at 3% per annum amounts to NZD 120

5.5.2015 to 5.5. 2017	-	*NZD 240*
6.5.2017 to 6.8.2017 (3 months)	-	*NZD 30*
7.8.2017 – 8. 8. 2017 (1 day)	-	*NZD 0.30*
Total	-	***NZD 4, 270. 30***

64. If I were to convert the above amount in FJD it would come to a sum of $6049.69. I will work with that figure.

65. I have found that the contract was unlawfully terminated for want of payment of proper benefits. The plaintiff's actual loss is the sum I have arrived at in the preceding paragraph. He is entitled to that amount. I do not find that an additional amount is to be awarded for unlawful dismissal as damages are recoverable for the loss sustained. If he was terminated for improper

reasons, I would have considered the grant of loss of wages but I have found that he could be terminated under the provisions of clause 15 of the contract of employment.

66. For causing the plaintiff humiliation, loss of dignity and injury to his feelings, I am of the view that an amount of $25,000 is appropriate. This is equivalent to almost 2 months' salary.

Costs

67. The plaintiff is entitled to costs of this proceedings. I have regard to the fact that the trial was conducted over a period of two days. The plaintiff and his wife had to travel to Fiji to give evidence. I will not overlook the disbursements involved to bring the case and costs for preparation and conduct of the trial.

Final Orders

68. In final orders, I find that the employer had unlawfully and unfairly terminated the employment of the plaintiff for the reasons outlined in the preceding parts of my judgment.

69. I therefore order that the employer pays to the employee a sum of $ $31,049.69 as arrived at in the judgment.

70. I also order the defendant to pay to the plaintiff costs of the proceedings in the sum of $7,500.

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Hon. Madam Justice Anjala Wati

Judge

10. 07. 2020

HIGH COURT OF FIJI SUVA

To:

1. ***Natasha Khan Associates for the Plaintiff.***
2. ***Howards Lawyers for the Defendant.***
3. ***File: Lautoka - ERCC 01 of 2015.***