

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:

ERCC 04 of 2015

BETWEEN:

ANNANDALE APARTMENTS

APPELLANT

AND:

VERENAISI SISI MOKUBULA

RESPONDENT

Appearances:

Mr. R. P. Singh for the Appellant.

Mr. W. Tokalau for the Respondent.

Date/Place of Judgment:

Friday 21 July 2023 at Suva.

Coram:

Hon. Madam Justice A. Wati.

JUDGMENT

A. Catchwords:

Employment Law - Appeal - whether the tribunal was correct in arriving at a finding that the procedure to terminate the worker was wrong in law making the dismissal unlawful and whether the worker was unfairly terminated from employment.

B. Legislation:

1. *Employment Relations Act 2007 ("ERA"): ss. 24; 30; 33 and 34.*

Cause

1. This is an appeal against the decision of the Employment Relations Tribunal ("**Tribunal**") that the employee Ms. Mokubula was unlawfully and unfairly dismissed from employment.
2. As a result of its findings on unlawful and unfair dismissal, the Tribunal ordered the employer to pay to the employee the following remedies:
 - (a) *wages from the date of termination (7 September 2012) to the date of hearing (14 October 2013) with additional two weeks being the period when the employee's suspension had expired until the date of termination.*
 - (b) *6 months wages as compensation for humiliation, loss of dignity and injury to the feelings of the worker.*
3. From the total of the awards made, the Tribunal ordered that a sum of 4 months of wages be reduced to reflect the employee's contribution to the situation that gave rise to the grievance.
4. If I were to add up the months for which the employer was ordered to pay the wages to the employee, it would be 19 months 3 weeks less 4 months being a total of 15 months 3 weeks.
5. Aggrieved at the findings of the Tribunal, the employer appealed the decision. The grounds of appeal are that the Tribunal erred in law and in fact in:
 1. *Ruling that the employee made out a case of unjustified and unfair dismissal against the employer.*
 2. *Awarding reimbursement to the worker whole of the wages lost from the date of termination till the date of hearing.*

3. *Ordering the payment of further 6 months wages as compensation for humiliation, loss of dignity and injury to the feelings of the worker.*

Background: Employment and Termination

6. The worker was re-employed by Annandale Apartments from 31 July 2009 as a Receptionist.
7. She had several complaints made against her during her work period for which she had provided various explanations. Her conduct culminated to a point where one other staff reported on 4 July 2012 that the worker was using a room to sleep with a guest in contravention of the house rules.
8. The worker was then suspended on 6 July 2012 with effect from the same date. After that, she was given her two weeks annual leave. . When the suspension and the leave was over, the worker called the Manager, Ms. Sharon Chand. Ms. Chand is the daughter of the Managing Director of the Apartment.
9. Ms. Sharon Chand told the worker to wait until the Managing Director (her father) made a decision. He was away overseas at the time. The worker was not called to work which compelled her to lodge a grievance on 3 September 2012. The employer then called her for a meeting on 6 September 2012 when she was termination and told to collect her letter of termination from the office the next day. She did not turn up to collect the letter.
10. It was clear from the evidence that the worker did not receive her termination letter at the time of her dismissal. However, the termination letter which bears the date of 7 September 2012 reads as follows:

"To: Verenaisi Mokubula

This is to inform you that you have been terminated from your duties, from the above mentioned company, effective immediately, for the following reasons:

- *After clubbing, you would show up to the above mentioned company with a male friend and use the room 103 that was witnessed by staff.*
- *Dating in -house guest.*
- *Checking-in guest and not recording it in the reservation book or receipt book provided.*
- *When transferred to the Laundry, stock for laundry was not up to date and white bedsheets would come to stock room with stains or off coloured.*
- *When transferred to house-keeping, rooms weren't cleaned to company standard, when rooms were checked by Manager on Duty, used condoms were found on top of dresser and beer bottles were found in sink cupboard. The same rooms that you released to sell.*
- *Smoking during working hours, inside building while you were aware of flammable chemicals around you.*

The purpose of the meeting with our Director was to show you a video feed of you checking – in guest and not recording it in the reservation books or receipt books provided, and to show you complaints from your rooms. Your excuses were lame.

Stealing is not tolerated in this company and we work hard to keep standard cleanliness of the rooms, and that obviously is ignored by you.

Some of your mistakes has happened so many times already, and even after giving you numerous chances you still failed to comply with the company rules.

I wish you well in your future endeavours”.

Tribunal's Findings

11. The Tribunal did not find that the reasons for the dismissal of the worker was unjustified. It found that the procedure in dismissing the worker was not proper and legal.

12. In reflecting on the procedural irregularity, the Tribunal found that when the worker's suspension had expired, she was entitled either to resume work or to be advised that she had been terminated. Neither of that happened, and that, the Tribunal found was unjustified action on the part of the employer.
13. The Tribunal further found that the complaint or the filing of the grievance prompted the employer to call a meeting with the worker on 6 September 2012.
14. The Tribunal also found that the employer failed to provide to the worker a termination letter at the time of the dismissal setting out the reasons for the dismissal as required by law. The onus was on the employer to serve the dismissal and it failed when it asked the worker to turn up the next day and collect the termination letter. That the Tribunal found was unfair as the worker would be too embarrassed to front up in to the office again to collect her termination letter.

Issues on Appeal

15. The issue on appeal requires me to examine whether the Tribunal had made a proper finding of unlawful and unfair dismissal and whether the remedies ordered were proper in law and on the facts of the case.

Law and Analysis

16. There is no appeal by the employee against the finding of the Tribunal that the reasons for her dismissal were justified. I will therefore not delve into the reasons aspects.
17. I will consider whether the Tribunal had correctly arrived at a finding that the procedure to dismiss the employee was wrong in law as that is one of the grounds of appeal.
18. This was a case of summary dismissal. In Summary dismissal cases, the employer is required to provide to the employee written reasons for the dismissal at the time of the

dismissal, up to date pay and a certificate of service: *ss. 30 (6); 33 (2); and 34 of the ERA.*

19. None of the above procedures were followed. It is uncontroverted that when the worker was told that she was terminated, she was sent away from work and asked to collect her termination letter the next day. This is totally absurd and unfair to ask a terminated worker to come to office and collect the termination letter. The Tribunal was correct in arriving at a finding that the law mandates that the employer gives to the worker a letter of termination setting out the reasons for the termination. That clearly was not complied by the employer.
20. Further, the worker was suspended for one month. Her suspension expired on 5.8.2012. On 5.8.2012 the worker ought to have been called back to work. However, she took 2 weeks annual leave which she was allowed. Two weeks from 5.8.2012 would take the worker until 19.8.2012. The worker should have then been allowed to work immediately after her leave expired. She was not called to work which means that she was terminated on the day her leave expired that is on 20.08.2012. When she was not called to work or given her termination letter; that was breach of procedure for not providing to the worker work or salary in lieu as required by s.24 of the ERA.
21. The worker was deemed terminated in August. Once again the employer breached the procedure by not providing her with the termination letter in August itself and not providing her with a clear explanation to allow the worker to find work somewhere else. This is most ungrateful and an unfair act on the part of the employer. The worker may have been a disastrous employee but that does not mean that she be treated without any due regard for her need to earn for a living.
22. The employer also ought to have provided to the worker up to date pay from 19.8.2012 till she was officially informed of her termination. That did not occur.

23. The law also requires that the worker be provided with a certificate of service at the time of her dismissal: **s.30 (6) of the ERA**. That was not provided to her. If it was, the letter of termination would mention that.
24. None of the requirements of the law was followed in carrying out the dismissal of the worker so the Tribunal was correct in arriving at a finding that the termination was unlawful. In examining whether the termination of a worker is lawful, the reasons for the termination and the procedure in terminating the worker is looked at. If the reasons are not justified or the procedure improper, the termination will be unlawful.
25. In examining the fairness of the termination, the conduct of the employer in carrying out the dismissal is examined. The employer must not conduct itself in a manner that causes the employee humiliation, loss of dignity and injury to the feelings of the worker. If the worker undergoes this feeling as a result of the dismissal then that does not get classified as unfair dismissal.
26. In this case there was no evidence of why the Tribunal found that the worker was humiliated and suffered loss of dignity. However, the act of the employer in sending the employee away and asking her to come back to collect her letter of termination is nothing short of belittling her. Not giving her the termination letter is one aspect which I have found amounts to procedural non-compliance in carrying out the dismissal. The act of belittling the employee is grossly unfair which is not part of the procedural non-compliance but an additional misconduct of the employer which needs to be punished by damages.
27. In awarding the remedies what the Tribunal ought to have considered was whether there was delay in hearing the case and whether the delay was due to the conduct of the employer, whether the employee mitigated her loss by looking for employment, whether she found work, whether after finding work she still sustained loss of income and the extent of the loss and whether the employer's conduct precluded the employee from securing work.

28. There was no evidence extracted by the employer on these aspects. I therefore find that a total award of wages for 15 months 3 weeks is not unjustified. The worker was not a very qualified person that she will easily find work. On top of that the employer did not provide to her a certificate of service which would allow her to secure new work stating her experience. The award of wages to her is justified as in monetary terms the amount will only be approximately close or even less than \$7,000.00. I would have normally granted \$5,000.00 for causing the employee the humiliation. However, since there is no appeal by the employee, I will not disturb the award.

Final Orders

29. I do not find any merits in the appeal. I dismiss the same and uphold the judgment of the Tribunal. I order the employer to comply with the decision of the Tribunal within 14 days.

30. There shall be costs to the employee in the sum of \$1500.00 to be paid within 14 days.



Anjala Wati

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Hon. Madam Justice Anjala Wati

Judge

21.07.2023

To:

1. *Messrs Kohli & Singh, Suva for the Appellant.*
2. *Ministry of Employment, Productivity and Industrial Relations for the Respondent.*
3. *File: Suva ERCC 04 of 2015.*