

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 15 of 2016

BETWEEN: **COCA COLA AMATIL (FIJI) LIMITED**

APPELLANT

AND: **VISHWA NADAN**

RESPONDENT

Appearances: Mr. E. Batiweti for the Appellant.

Ms. T. Vosawale for the Respondent.

Date/Place of Judgment: Wednesday 16 August 2023 at Suva.

Coram: Hon. Madam Justice Anjala 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 - whether the award of remedy for unlawful and unfair termination is proper and justified.

B. Legislation:

1. ***Employment Relations Act 2007 ("ERA"): ss. 30, 33, 34 and 114.***

Cause

1. Mr. Vishwa Nadan was employed by Coca Cola Amatil (Fiji) Limited as a Merchandiser - Route since November 2008.

2. He was summarily terminated from work on 26 March 2013 for various reasons outlined in the letter of termination dated 26 March 2013.
3. The letter of termination gives the full background of the problems faced by the two parties in the employment relationship. It is important that I outline the letter in full.

“Dear Vishwa,

In the past 12 months or less, we have had a number of [telephone] conversations with you, with the Regional Sales Manager, Mohammed Firoz in attendance, regarding your unacceptable behavior and attitude in the workplace.

All of this culminated in a meeting starting on Wednesday the 3rd of October 2012 to Friday the 5th of October 2012. In these meetings, there were a number of issues/allegations about your behavior and attitude that were raised against you and discussed, the details of which were written out in the letter I wrote you dated the 9th of October 2012.

This letter was a final written warning and towards the end of the letter I urged you to work on your attitude to work and behavior to ensure that you do not reoffend in the next 12 months of the date of this letter. In less than 4 months from the date of the final written warning letter, your unacceptable behavior reared its ugly head again. As a consequence, the Regional Sales Manager, Mohammed Firoz had to intervene, called you and your immediate Supervisor, Arun Mudaliar, for a discussion on your unacceptable behavior.

At the end of the meeting, Firoz asked you to forget the past, work for the future and improve on your behavior. Again, you continued to disregard the lawful instructions given by Firoz and by yours truly and display behaviors that are contrary to the Working Together Policy which espouses a behavior of respecting one another in the work place and ensuring that we behave in a professional manner.

As a consequence, I invited you to a meeting in Firoz’s office in Lautoka while I had to call in from Suva on Wednesday the 6th of March 2013 to talk about the following issues:

1. *In a private conversation with your landlord regarding the non-payment of your rent, you made a comment that the reason that you could not pay your rent to the landlord at that time was because your employer, Coca Cola Amatil (Fiji) Limited had not paid*

your wages for that week. Furthermore, you made some personal comments about your Manager, Mohammed Firoz, in the same conversation. With regards to your comment about non-payment, this was a blatant lie because Coca Cola Amatil (Fiji) Limited has not defaulted on its payment of your weekly wages. You only made this comment for your personal gain and in the process, brought disrepute to the name of your employer.

- 2. You took 3 days sick leave on Friday the 1st of March 2013, Saturday the 2nd of March 2013 and Monday the 4th of March 2013. You submitted two sick sheets, one for Thursday and Friday and the second one for Monday. Your landlord revealed to us that you were not at home all of Friday, you left home early Saturday and returned around noon. You left home again on Monday and carried a TV to the bus in the morning and did not return home till late in the afternoon. When questioned, you mentioned that you were at the doctor's clinic all of Friday and all of Monday. You mentioned that you went to the bank on Saturday. I informed you of the provisions in the Employment Promulgation 2007, Section 68(4), "A registered medical practitioner who knowingly issues a medical certificate to a worker whom the registered medical practitioner knows is capable of work commits an offence as does the worker who sought the medical certificate." In my opinion, a person who takes 3 consecutive days of sick leave is a very sick person and is one who is supposed to be at home resting. This is not so with you and you did not deny that you were not at home during the times stated above. I feel that you used this sick leave to run your personal errands instead of resting at home. This is an offence under section 68(4) of the ERP 2007.*
- 3. Recently, your supervisor, Arun Mudaliar gave you instructions to follow. According to Arun, your response was, "you don't tell me what to do, I know what to do." The reason that Arun gave you instructions was because your performance in the outlets was not consistent with the standards required. Your response indicates your refusal to follow lawful orders given by your immediate supervisor. When you started your employment with Coca Cola Amatil (Fiji) Limited, you were assigned to work under Arun Mudaliar as your Supervisor. You had to be moved to another Supervisor because of your behavior and attitude. A little while later, you had to be moved again because of a similar attitude you displayed with the second supervisor. Under the third supervisor, you had to be moved again because of an incident you were involved in at a Customer's Outlet. You were brought back to work under Arun Mudaliar. You had another row with Arun and Mohammed Firoz had to get involved. In that discussion, which happened sometime in 2013, Firoz asked you to forget the past, work hard and improve on your behavior and attitude. Arun even went as far as reassuring you. Despite that, you continue to display unacceptable behavior and attitude that are contrary to the Working Together Policy. The Working Together Policy promotes that*

all employees have the right to be treated fairly and with respect. It promotes professional and appropriate conduct is expected of all employees at all times.

- 4. Finally you mentioned to Arun that you had a recording of my telephone conversation with you where I had mentioned that you, Vishwa will not be transferred to or moved anywhere else. Arun felt intimidated by this threat of the recording of my conversation with you which is tantamount to bullying and threatening/blackmail. You had not obtained my permission to record our telephone conversation and had no authority to use that recording for your personal gain. The Working Together Policy also states that it does not tolerate conduct which results in bullying. You attended the initial rollout of the Working Together Policy on the 21st of January 2011 and a refresher on the 25th of May 2012 and were fully aware of this policy. Despite this, you continue to blatantly disregard the provisions of this policy and follow your own personal agenda which is contrary to the policy.*

Given the explanation above, and the letter I wrote you in October 2012, it appears that your behavior and attitude will not change for the good and has been contrary to what is expected of each employee under the Working Together Policy, Coca Cola Amatil (Fiji) Limited does not tolerate behaviors that are disrespectful, disobedience, bringing disrepute to the Company name and threatening or blackmailing fellow employees, especially a supervisor.

You leave with me no other choice but to terminate your employment with Coca Cola Amatil (Fiji) Limited. Accordingly, you are dismissed from the employment with the Coca Cola Amatil (Fiji) Limited in terms of section 33 of the Employment Promulgation 2007, Number 36 effective from Tuesday the 26th of March 2013.

You are to return any company owned property to the Regional Sales Manager, West of the Coca Cola Amatil (Fiji) Limited and complete your exit formalities”.

- 4. After the dismissal, the worker filed a case for unlawful and unfair dismissal from his employment.*
- 5. The Tribunal found that the termination was unlawful for proper procedure not being followed. The Tribunal therefore ordered the employer to pay to the worker 8 months wages. In justifying this remedy the Tribunal stated that the date of termination was 26 March 2013 and the last day of hearing was 2 August 2014 making the time period to be 17 months. The Tribunal said that it will not pay the worker the whole of 17 months*

wages as it had decided to forfeit 9 months wages because the worker's conduct had given rise to the grievance.

6. The Tribunal also found that the worker was unfairly terminated so it granted the worker 4 months wages for humiliation, loss of dignity and injury to his feelings. I will now reflect on the Tribunal's reasons for arriving at the finding of unlawful and unfair dismissal.

Tribunal's Findings

7. On whether the employer had established the reasons for the termination of the worker, the Tribunal stated that from the evidence, the employer laid out the reasons for dismissal to be bad behavior and attitude bringing disrespect, disobedience, bringing disrepute to the employer's name and threatening or blackmailing fellow employees and a supervisor. It said that it was attracted irresistibly by the evidence that management made out a case against the worker but without exhausting its own disciplinary and grievance procedures. The Tribunal went further and stated that it found that the worker had admitted to at least the selling of the recharge cards during official hours.
8. The Tribunal said that the worker had the right to be heard in respect of all the allegations before he was terminated during which process he was entitled to cross-examine the witnesses who had made allegations against him.
9. For unfair termination, the Tribunal found that that the worker was unfairly terminated for the following reasons:
 1. *Since there was no grievance procedure, the worker was virtually at the mercy of management. He attended a number of meetings he was called to, to answer the allegations. However, he was not allowed the opportunity to cross-examine the witnesses.*
 2. *The employer deviated from its high standards and values when it went hunting to check whether the worker was really sick and at home. Responsible employers do not*

do that, as all workers have sick leave entitlements that are to be utilized with a medical certificate.

3. *Responsible employers also do not interfere into the private life of their workers as the landlord in this case related to Mr. Firoz the conversation he had with the worker regarding his rent in particular the worker's claim that the employer was not paying him wages on time.*

The Appeal

10. Aggrieved at the findings of the Tribunal, the employer appealed the decision on various grounds but only maintained some of it at the hearing.
11. The employer maintained its appeal against the award of 8 months wages for unlawful dismissal on the grounds that the worker was responsible for the delay in the hearing.
12. It also maintained that the Tribunal erred in making a finding that the worker was unfairly terminated and awarding it 4 months wages for humiliation, loss of dignity and injury to the feelings of the worker.

Law and Analysis

13. The employer does not challenge the Tribunal's finding that the worker should have been provided due process of hearing him on the allegations including allowing him to cross-examine all the witnesses who made allegations against him. Its challenge on the finding of unlawful dismissal is confined to the quantum of damages.
14. I however, cannot ignore the fact that the employer had heard the employee on all occasions. This is also endorsed by the Tribunal that the worker was called for various meetings by the employer and confronted with the allegations. The Tribunal finds that the worker was not given an opportunity to cross-examine the witnesses. This was a case for summary dismissal and the worker was not entitled to any form of hearing let alone a full hearing of cross-examining the witnesses. In any event, he was afforded a chance to explain himself so that the employer has all the facts before it to come to a

determination. In summary dismissal cases, most employers will not require the worker to respond to the allegations as it can establish the cause for dismissal from other lawful means.

15. Since this was a summary dismissal case, all the employer was required to do was to provide the worker the written reasons for dismissal at the time he was dismissed, his up to date pay and a certificate of service as required by ss.30(6), 34 and s.114 of the Employment Relations Act. The sections reads:

“30(6). 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.

34. If a worker is summarily dismissed for lawful cause, the worker must be paid on dismissal the wages due up to the time of the worker’s dismissal.

114. 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.”

16. The employer’s witness Mr. Kameli Batiweti agreed in his cross examination evidence that the termination letter was not given on the same day. I thus find that there was breach of ss. 33 (2) and 114 of the ERA. S. 33(2) imposes the same requirement as s. 114 by stating that *“the employer must, provide the worker with reasons, in writing, for summary dismissal at the he or she is dismissed”*.

17. I also find that the employer had not provided the worker with the certificate for service thus breaching s. 30 (6) of the ERA.

18. The employer ought to have given the worker a certificate of service for him to be able to secure employment quickly. A certificate of service is an essential document that assists an employee in getting work by evidencing his experience as established by the certificate of service.

19. In this case the worker was out of employment for 7 months. That was not refuted by the employer. However, he did not state in his evidence that the delay in finding work was due to lack of certificate of service. I would consider awarding 7 month's wages as appropriate if the termination was unlawful for want of valid and proper reasons. In this case the worker does not challenge the findings of the Tribunal that the employer had the causes to terminate his work.
20. The worker was out of work for 7 months. For procedural breaches I find that the worker ought to paid wages for a period of 3 months.
21. In regards to whether the worker was unfairly terminated, I find that the employer had acted unfairly by invading the private space of the worker by turning up to his residence to check whether he was genuinely sick. I agree with the Tribunal that one cannot expect a sick worker to be confined to bed or home all the time. He may need to go out and get examined, buy himself food and medication and do other incidental work. If the employer had information that the worker was not utilizing the sick leave properly, it could have refused to pay him for the sick leave. There was no medical evidence before the tribunal that the worker was not sick or that his medical certificate was false. To come to his home and confront him or talk to the landlord about his whereabouts is a breach of his privacy which caused the worker unnecessary humiliation and loss of dignity.
22. No worker would want any employer invading in his or her private life to establish whether the worker is sick. This can cause any worker agony and humiliation. I find that the conduct of the employer was improper in this regard justifying the 4 months wages awarded as remedy.
23. I do not endorse the other reasons stated by the tribunal to have caused the worker humiliation. The first is that the worker was not allowed to cross-examine the witnesses who had made the allegations against him. This aspect goes towards procedural

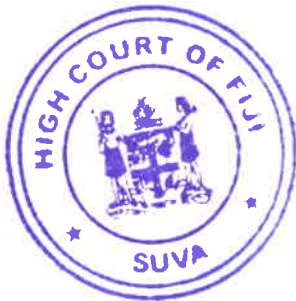
compliance to terminate a worker. Procedural non-compliance is a matter that affects the lawfulness of the dismissal and not the fairness of it.

24. The second reason the Tribunal found that caused the worker humiliation is when the landlord informed the employer that the worker was not paying rent because the worker had told the landlord that his employer had not paid him wages. This is a matter that was raised by the landlord and the employer had no control of it. The employer was concerned about the pecuniary embarrassment that was brought upon it by maligning its reputation. I am of the view that the employer was entitled to question the worker when faced with the problem. This is not something that the employer had brought up on its own. If the employer had gone out of its way and checked whether the landlord was paid the rent then it could be debatable that the employer's conduct amounted to invasion of privacy.

Final Orders

25. In the final analysis I allow the appeal partly, and order the employer to pay to the worker 3 months wages for unlawful dismissal and 4 months wages for unfair dismissal. In total, the employer is to pay to the worker 7 month's wages for unlawful and unfair dismissal.

26. I order each party to bear their own costs of the appeal proceedings.



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Hon. Madam Justice Anjala Wati

Judge

16.08.2023

To:

1. *Coca Cola Amatil (Fiji) Limited for the Appellant.*
2. *Ministry of Employment, Productivity and Industrial Relations for the Respondent.*
3. *File: Suva ERCA 15 of 2016.*

