IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal
Case No 19/1073

BETWEEN	PACIFIC PASSION LIMITED Appellant
AND	GUILLAUME DEBAY Respondent
CORAM:	Hon Justice J Mansfield Hon Justice J Hansen Hon Justice O Saksak Hon Justice D Aru Hon Justice S Felix
COUNSEL:	Mrs Patterson and Ms Muluane — Counsel for Appellant Mr Hurley — Counsel for Respondent
DATE OF HEARING:	16 July 2019
DATE OF DECISION:	19 July 2019

JUDGMENT OF THE COURT

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[1] This is an appeal and cross-appeal against the decision of the Chief Justice delivered on 9 April 2019.

Background

[2] The dispute between the parties arises from the respondent's employment as a shop manager for the appellant from 4 October 2012 to 4 June 2015 (a period of 2 years 8 months). There appears to have been four different employment contracts up until the time of his dismissal on 4 June 2015, but nothing turns on the number of contracts for present purposes.

[3] The appellant came into possession of material that indicated that the respondent had used his work computer to download matters unrelated to his employment. The Chief Justice

found these totalled 161,013 items. They consisted of movies, games, personal amusement and pornography, although the latter was apparently what is described as "soft porn". It is also alleged the respondent spent at least 50 per cent of his hours of employment accessing and watching those items, or playing the games. This appears to have never been denied by the respondent. The downloads were confirmed by a computer expert who also noted that a lot of the material had been recently deleted. The deletions appear to have coincided with a requirement for the respondent to take annual leave. This is confirmed by the evidence of Mr Marceau, a director of the appellant, who stated that the respondent spent an inordinate time at his computer immediately before going on annual leave. These matters were raised with the respondent on a number of occasions from about the 12 May 2015, and thereafter, but he denied he was responsible for the downloads. This included a letter from the respondent's agent which did not respond to any of the allegations but did accuse Mr Marceau of "*moral harassment*".

[4] The appellant set out the matters of concern, that were said to amount to serious misconduct, in a letter dated 30 May 2015 that was given to the respondent on 1 June 2015, which concludes, "*Considering these facts as proof of serious misconduct on your behalf, we are asking you to provide some explanations and clarifications on the points mentioned above.*" It is apparent that the respondent came to Mr Marceau around 9.30 on 1 June and asked if he could leave the office for 30 minutes to think about the letter. With permission he left, but did not return. Mr Marceau made a number of efforts to contact the respondent, but there was no answer. By 4 June, when he had heard nothing, he prepared and sent a letter dismissing the respondent for serious misconduct and stating that the appellant held the respondent's salary and paid leave for the month away, as well as any amount on his account, which could be collected.

[5] The learned Chief Justice was satisfied on the evidence that the respondent was guilty of serious misconduct. At paragraph 43 of his judgment he stated:[1]

> ... The evidence is **overwhelmingly** to this effect. The Claimant was continuously employed by the Defendant through different staged contracts from October 2012 to 04 June 2015. In June 2014, the Claimant said the Defendant provided him a computer to use for his work as the shop manager of the Defendant. The Claimant, during the working hours and after working, used the Defendant's computer given to him for his professional work, and downloaded material items including pornographic material classified as soft porn. (Our emphasis).

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1 *Debay v The Pacific Passion* [2019] VUSC 41; Civil Case 163 of 2015 (9 April 2019).

[6] Given the evidence before the learned Chief Justice, such a finding was inevitable.

[7] The learned Chief Justice considered the circumstances of the letter of 1 June, and the respondent requesting he be given 30 minutes to think about that letter, when he left the store and did not return. He also records the attempts made by the director of the appellant to contact the respondent. He was satisfied on the evidence that the respondent had been given the clear opportunity to explain himself about what occurred, but failed to do so.

[8] Notwithstanding the finding of serious misconduct and the opportunity to respond to the allegations, the Chief Justice went on to consider whether the dismissal for serious misconduct was justified. At paragraph 36 he stated:[2]

> In this case, factual material evidence exist to dismiss the Claimant for cause ("serious misconduct"). However, Mr. Guillaume Debay, like any other employee working in the public or private sector has legal rights protected by the law. He is entitled to the procedural fairness in the manner he has been dismissed under s.50 (3)(4) and (5) of the Employment Act. The fact that the Claimant did not provide any explanations or responses to the allegations made against him as requested by the Defendant, is not a license for the Defendant not to comply with s.50(3) of the Employment Act. As I have decided earlier, I am satisfied the Defendant by the letter of 30 May 2015 has given an adequate opportunity to the Claimant to be heard in explaining and answering the factual allegations made against him. This is in relation to the opportunity given to the Claimant (employee) to answer to the nature of allegations and the specific and particulars of the allegations made against him. I take it that section 50 (4) is the relevant subsection.

[9] The Chief Justice went on to consider s 50(3), and continued:[3]

> On perusal of subsection (3) above, dismissal is the only course that the employer can take. As a matter of justice and procedural fairness, the Claimant (as employee) **must have an opportunity to be heard or make submissions on the decision to dismiss him or not to dismiss him but to consider options (alternatives) on the circumstance of the case if there is any.** The Claimant is the only person to make such submissions or through his lawyer but in this case, the Claimant terminated his lawyer as I mentioned at the beginning of this judgment. **(Our emphasis)**

[10] He found that the dismissal of the respondent was unjustified for failure to comply with s 50(3) of the Employment Act, and went on to consider relief. It is appropriate we first consider whether the finding of unjustifiable dismissal is correct.

Submissions on s 50(3)

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2 Ibid.

3 Ibid, at [38].

[11] Mrs Patterson submits that the director of the appellant did turn his mind to s 50(3) before dismissing the respondent. She records the chain of events from the date when the respondent left for annual leave, the finding of the pornographic and other non-work related down loaded material, the respondent's denial and his agent's response, and a number of exchanges, including at least 11 phone calls to the respondent's agent and the respondent in an attempt to resolve those matters. That led to the letter of 30 May, delivered on 1 June, when the respondent left as recorded earlier.

[12] Mrs Patterson submitted that the employer had to act in good faith, which can be interpreted as acting as a reasonable man. She further submitted that the letter of dismissal of 4 June 2015 is implicit evidence that the employer applied his mind to s 50(3) between 1 June and that date. She submits that by not responding, the respondent made it impossible to discuss alternatives. Especially so in circumstances where he did not admit to committing any wrongful act, and counter-attacked, blaming a saleswoman and Mr Marceau for having downloaded the material. She said that made it impossible to keep him as manager, or assist him with some form of counselling or therapy. She said this distinguishes the case of *Public Service Commission v Tari*.[4] She submitted, having reviewed the effective findings of facts:

> 11.5 Would any reasonable person in society want his/her daughter to work in an environment and in these circumstances where the manager is an addict to pornography, denies his addiction and especially taking into account that all these downloading and watching of pornographic materials happen mostly during working hours.

[13] We note Mr Hurley was not counsel appearing in the Supreme Court. Notwithstanding the respondent has not challenged the finding of serious misconduct, Mr Hurley submits that the Chief Justice was right in his conclusion that s 50(3) of the Act had not been complied with and the dismissal was unjustified. He relied on *Tari* and, in particular, the fourth to seventh paragraphs at page 6 of that judgment.

Decision

[14] We set out the relevant portions of s 50:

> **50. Misconduct of Employee**

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4 *Public Service Commission v Tari* [2008] VUCA 27; Civil Appeal Case 23 of 2008 (4 December 2008).

(1) In the case of a serious misconduct by an employee it shall be lawful for the employer to dismiss the employee without notice and without compensation in lieu of notice.

...

(3) Dismissal for serious misconduct may take place only in cases where the employer cannot in good faith be expected to take any other course.

(4) No employer shall dismiss an employee on the ground of serious misconduct unless he has given the employee an adequate opportunity to answer any charges made against him and any dismissal in contravention of this subsection shall be deemed to be an unjustified dismissal.

[CAP 160]

[15] Subsection 3 is plain on its face. An employer may only dismiss for serious misconduct where in good faith dismissal is the only reasonable option. The section is about the employer's state of mind and it makes no mention of the employee's position. The section is silent as to the process and procedure that is required by an employer in reaching that good faith decision. S50 (4), on the other hand, provides a procedural element that requires an employee has an opportunity to explain his actions before dismissal. It does not require he be given another opportunity after that explanation to discuss the dismissal and other alternatives. But, as is clear from *Tari*, there will be circumstances that will require the employee to be given the opportunity to further explain and alternatives to dismissal may well need to be considered by the employer. *Tari* does not lay down any specific approach that needs to be taken to s 50(3), nor does it require any particular process, hearing or documentation in all cases. We are satisfied that the application of s 50(3) must be made by taking into account all surrounding circumstances and evidence.

[16] The "*good faith*" requirement in s50 (3) means an employer must conscientiously turn his/her mind to whether objectively and reasonably there is no alternative to dismissal. We accept the submission from Mr Hurley that best practice would suggest an employer would be wise to record this process but it is not a requirement of s 50. Mr Hurley accepted such a requirement could not be read into s 50 but arose from general considerations of fairness and natural justice. We are satisfied the "*good faith*" requirement can be inferred from the evidence and surrounding circumstances. It will not automatically require the formal process this Court found was necessary in *Tari.*

[17] We do not consider that in every case that an employee **"must have an opportunity to be heard or make submissions on the decision to dismiss him or not to dismiss him but to consider options (alternatives) on the circumstance of the case if there is any"** as the Chief Justice found. What is required of both employee and employer will depend on the circumstances of a given employment dispute.

[18] The reason for the process set out in *Tari* was that the circumstances of that case required that the employer consider sanctions short of dismissal. As we have noted that arose from the general principles of fairness and natural justice.

[19] In this case the matters were raised in the middle of May 2015, and a number of efforts were made by the director of the appellant to get an explanation from, and to discuss matters, with the respondent. The approach taken by the respondent was to deny that he had downloaded the material referred to, and attempt to blame it on others (the director and the shop girl). The letter of 30 May, delivered to him on 1 June, set out clearly what was found on the respondent's computer, stated it was viewed as proof of serious misconduct and asked for the provision of some explanation and clarification. That was found by the Chief Justice to satisfy s 50(4) as well. There is no appeal against that. The dismissal three days later, when the respondent had not responded in any way, even though the director of the appellant continued to attempt to contact him, does not make specific reference to s 50(3). But we do not consider that in itself demonstrates a breach of s 50(3).

[20] Mr Hurley, in his submission, referred to alternative actions to dismissal that could have been taken by the employer. The Chief Justice also addressed the possibility of alternatives in his decision.

[21] The factual reality in this case, established by expert evidence and confirmed by the Chief Justice in his findings, is that over 161,000 separate non work downloads were made by the respondent. Indeed, one analysis of the expert evidence suggests slightly over 189,000 non work related downloads. Of these slightly over 161,000 contained pornographic material. These downloads were made in 2012, 2013 and 2014. A large number of these files were transferred by the respondent from his old computer to the new computer the appellant supplied him with in early June 2014. Most of the material was pornographic in nature and part of the rest were movies. These appear to have been in breach of both the obscenity and copyright

laws of Vanuatu. There was also no response from the respondent as to the further allegation that he was streaming and watching videos during working hours.

[22] In those circumstances we do not believe there was any alternative for an employee acting in good faith other than to dismiss for serious misconduct. What was done by the respondent was serious misconduct at the most egregious end of the scale. He failed to respond to overtures from the director of the appellant, both before and after the letter of 30 May. He attempted to blame others, including the director and the saleswoman. Inevitably, and understandably, that must mean there was a complete breach of trust between the respondent, the director and the other staff member involved. It did not leave any alternatives, such as a computer policy, training or anything else to be considered. Right through to the Court hearing, the respondent insisted he was not responsible for the downloads. That evidence was rightly and firmly rejected by the learned Chief Justice. We cannot see what other course of action was open to an employer acting objectively and in good faith for such egregious "serious misconduct", other than dismissal.

[23] As noted in some circumstances natural justice requirements will dictate a further opportunity for an employer to discuss dismissal further with an employee and to explore alternatives. This is not such a case. It must be borne in mind that natural justice considerations apply to both parties to a dispute. In this case not just the respondent but the appellant, the director and the other staff member.

[24] As we have noted *Tari* involved completely different factual circumstances and can be distinguished. In that case, the employee acknowledged his serious misconduct, and it could not possibly be compared with the culpability of the misconduct in this particular case. Objectively, the facts in that case allowed consideration of alternative punishment short of dismissal. But we are satisfied in all the surrounding circumstances of this case that is not the position.

[25] Accordingly, we consider s 50(3) has been complied with. Section 50(4) has also been complied with. They cannot be read separately from each other. If an employee has an adequate opportunity to respond, such response may well identify some alternative action that could be taken in good faith, short of dismissal. In this case, his failure to respond and the behaviour that was inevitably found proved, satisfies us that there has been compliance with

s 50(3), and the appeal must be allowed. Such a finding is based on the facts and circumstances of this case, which could be placed in the extreme category of serious misconduct. Each case involving s50 (3) will require a careful consideration of the surrounding circumstances to establish whether an employer "*cannot in good faith be expected to take any other course*". Here those surrounding circumstances dictate that "good faith" required dismissal.

[26] The appeal is allowed and we declare the dismissal for serious misconduct was justified. That means the appellant is only entitled to outstanding wages, leave and other monies he was properly owed on his account before his dismissal. We understand these have been paid. We do not need to consider other grounds of appeal. Given our finding it follows the cross appeal must be dismissed. There will be costs of this appeal, and in the Court below, to the appellant, to be taxed if not agreed.

Dated at Port Vila this 19th day of 2019.

By the Court

The Honourable Justice John Mansfield