IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0047 of 2017
[Employment Court No. ERCA 13 of 2015]

BETWEEN : **PACIFIC FISHING COMPANY LIMITED**

Appellant

AND : **PITA KOROIBOLA**

Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Dayaratne, JA

Counsel : **Ms M. Rakai for the Appellant**
Respondent in person

Date of Hearing : **13 May, 2019**

Date of Judgment : **7 June, 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusion arrived at.

Lecamwasam, JA

[2] I agree with the reasons given and conclusion of Dayaratne, JA.

Dayaratne, JA

This Appeal

[1] This is an Appeal against the judgment of the Employment Relations Court (hereinafter referred to as 'ERC') at Suva dated 27.03.2017. That judgment was made consequent to an appeal filed by the Appellant against the decision of the Employment Relations Tribunal (hereinafter referred to as 'ERT') dated 17.06.2015.

The dispute between the parties

[2] The Respondent and the Appellant had entered in to a Memorandum of Agreement (MOA) on 02.12.2006. The Respondent is referred to in the MOA as 'Contractor' and it contains the following;

- the work /duties of the Respondent,
- the per annum payment to be made to him based on five day operations per week,
- the equivalent daily sum payable worked out in terms of the annual payment and number of days of work per week,
- that he will not be entitled to any form of payment on days that he is not performing any duties and that he is entitlement to receive payment if he works in excess of five days of the week.
- that any payment made by the Appellant to him will be subject to 15% withholding tax.

[3] In March 2008, a complaint had been made by the Appellant's Manager Production, against the Respondent to the effect that the Respondent had verbally abused him and threatened to assault him. Upon this complaint, a letter containing the allegations against him had been issued to the Respondent and he was requested to respond to the said allegations. In his response, he admitted to the use of foul language and also admitted that he had threatened to slap the manager. He explained the circumstances under which he behaved in such manner and apologized for his act of misconduct.

[4] The Appellant decided to suspend him for a period of three weeks and he was informed accordingly. It was also stated that the said decision will be reviewed at the end of the three week period.

[5] What exactly happened at the end of the three week period is not clear since the two parties have taken contradictory positions. Whilst the Appellant takes up the position that the Respondent did not return to work or contact the management, the Respondent takes up the position that his attempts to meet the management proved futile. Having waited for three months, he realized that such conduct amounted to the termination of his services. He thereafter initiated proceedings in the ERT alleging unfair dismissal and sought re-instatement.

Proceedings before the ERT

[6] The proceedings at the ERT having commenced upon the application of the Respondent has been concluded on 29.06.2010. However, for reasons that have not been explained, its decision has been delivered only on 17.06.2015.

[7] Since the Appellant had taken up the position that the Respondent was 'an independent contractor' and not an 'employee', the ERT had to first decide that issue. Having considered the evidence presented before it, the ERT concluded that the Respondent was an 'employee'. The ERT then determined that the dismissal of the Respondent was 'unjustified and unfair' and granted him the following relief;

- Re-instatement to former position
- Back wages from 22.04.2008 to 29.06.2010
- A further one year's wages to be paid as compensation for humiliation, loss of dignity and injury to feelings and
- Other statutory payments, including overtime payments

The Appeal to the ERC and its decision

[8] Being aggrieved by the decision of the ERT, the Appellant appealed to the ERC. The appeal was in respect of both the findings and the relief that was granted. Having analyzed the issue as to whether the Respondent was an 'employee' or an 'independent contractor', the learned judge concluded that the ERT was correct in its finding that the Respondent was an 'employee'.

[9] With regard to the issue of re-instatement, after a detailed analysis of the facts, the learned judge has concluded that the order for re-instatement was justified.

[10] As regards the quantum of lost wages, the learned judge has varied the decision of the ERT and has awarded only one year's wages. She has concluded that the Appellant cannot be faulted for the delay in the proceedings before the ERT and also that the Respondent had failed to mitigate any loss by finding alternative employment.

[11] Relief regarding loss of dignity and injury to feelings was struck down on the ground that there was no justification and relief on account of overtime payments was refused on the basis that there was no claim to that effect.

[12] As regards statutory payments, having noted that no contributions have been made towards the Fiji National Provident Fund (FNPF) either by the Appellant or the Respondent from the commencement of employment, she has directed that the Respondent as well as the Appellant make contributions to the FNPF.

[13] In conclusion, she has allowed the Appeal on the issue of compensation only.
The final relief granted by the ERC therefore, was as follows:

(a) That the Employee be re-instated to his former position

(b) If the employee is not already re-instated then he should be paid wages from the date of the order for re-instatement that is 17 June 2015 until the date he is re-instated. The payment is subject to all statutory dues including FNPF.

(c) That the employee be paid lost wages for one year at the contracted rate. The employer must deduct 8 percent FNPF contribution from the employee from his amount and also pay 10 percent employer's contribution to the FNPF,

(d) That the employer must contribute 8 percent towards FNPF from the date of employment until the date of termination. The employer must also deduct 8 percent from the employee's contribution. The applicable rate from the employer at the time was 8 percent. The employee's contribution must be deducted from the sum that is due and payable by the employer in the paragraph immediately preceding this,

(e) The Employee shall have costs of the proceedings in the sum of $1,500. The Employer shall pay this within 21 days with effect from today.

Appeal to this Court

[14] The grounds of Appeal urged by the Appellant before this Court are as follows:

(i) The learned judge erred in fact and law in holding that the Respondent was an employee and not an independent contractor

(ii) The learned judge erred in fact and law when she ordered the Respondent be paid lost wages for one year at the contracted rate and for the Appellant to deduct 8% FNPF contribution from the Respondent from this payment and also pay 10% Appellant's contribution,

(iii) The learned judge erred in fact and law when she ordered that the Respondent be re-instated to his former position within 21 days.

(iv) The learned judge erred in fact and law when she held that if the Respondent is not already re-instated then he should be paid wages from the date of the order for re-instatement that is 17th June 2015 until the date he is re-instated (11th April 2017) which would be subject to all statutory duties including FNPF.

(v) Since the Appellant has already paid costs in a sum of $1,500.00, there should not have been an order regarding such payment.

Employer or Independent Contractor?

[15] Since the Appellant had taken up the position that the Respondent was 'an independent contractor' and not an 'employee', both the ERT and the ERC have analyzed this issue at length having taken in to consideration the evidence led at the ERT as well as the legal position. The parties had referred to a vast volume of case law on the matter. Bearing this in mind, I think it is neither necessary nor desirable for this court to discuss this issue in great detail. However, I intend to discuss this issue in a manner that will suffice to justify my ultimate conclusions.

[16] It is clear from the submissions of the Appellant that it relies primarily on the contents of the MOA in support of its position. The Appellant emphasizes the fact that the MOA identified him as 'Contractor' that he was paid a daily rate which if converted to an hourly rate was higher than that of an employee and that the payments made to the Respondent were subject to 15% withholding tax.

[17] It must be noted that although the contents of agreements between parties no doubt are relevant and useful in finding out as to whether a contract is one of service or for service, it certainly is not the final yardstick in the determination of such issue. It is trite law that parties cannot alter the actual nature of a contract by the mere use of words or phrases. It is important to bear in mind that the question as to whether a contract is one of service or one for service is a question of law and one must not over emphasize the descriptions that parties have adopted.

[18] In the case of **Bryson v Three Foot Six Limited** [2005] NZSC 34, court adverted to certain yardsticks that could be used to determine this distinction. It was stated that

> *"The court must determine the real nature of the relationship. The intention of the parties is still relevant but no longer decisive. Statements by parties, including contractual statements, are not decisive of the nature of the relationship. The real nature of the relationship can be ascertained by analyzing the tests that have been historically applied such as control, integration and the "fundamental" test. The fundamental test examines whether a person performing the services is doing so on their own account. Another matter which may assist in the determination of the issue is industry*

practice although this is far from determinative of the primary question".

[19] The different tests that are to be applied have been discussed in detail in a number of cases and **Stephenson Jordan & Harrison Ltd v Mc Donald and Evans**, (1952) 1 TLR 101, **Montreal Locomotive Works Ltd v Montreal and AG for Canada** (1947) 1 DLR 161, **Australian Timber Workers Union v Monaro Sawmills Pty Ltd** (1980) 29 ALR 322 and **R v Allan, Ex Parte Australian Mutual Provident Society Ltd** (1977) 16 SASR 237 are worthy of mention.

[20] It is therefore necessary to consider the nature of the relationship between the parties by reference to the evidence presented at the ETC. The evidence that has emerged at the ERT has been summarized by the learned judge of the ERC at paragraphs 41 – 44 of her judgment and I do not consider it necessary for me to repeat them here.

[21] The course of action taken by the Appellant consequent to the act of misconduct by the Respondent as adverted to hereinbefore, without doubt was a disciplinary step. It is ironic that the Appellant used the term 'contract of service' not once but twice in the letter informing him of his suspension. Whilst this by itself will not amount to an admission on the part of the Appellant that the Respondent was an employee, that causes a serious dent to the position taken up by the Appellant.

[22] These factors taken as a whole reveal the fact that the Appellant exercised adequate control over the Respondent and also that he was part and parcel of the organization so as to satisfy the 'control' test as well as the 'integration' or 'organization' test which are considered as benchmarks in such determination.

[23] It is imperative to note that during the course of the hearing before us, when the learned Counsel for the Appellant was referring to the disciplinary steps that had been taken against the Respondent, court posed the question as to why such a course of action was followed if the Respondent was not an employee. Her response was that the relationship between the parties had evolved to that of a 'contract of service' by that time. It can also be observed that in the reply submissions that were tendered to court on behalf of the

Appellant at the commencement of hearing of this appeal, at paragraphs 3.22 – 3.24 this position had been taken up. In support of her proposition, the learned Counsel for the Appellant has cited the case of **Excell Corporation Limited v Carmichael** AC 30/03 [2003] NZ Emp C 62, where the issue of a contract changing its character had come up for consideration,

[24] It must be emphasized here that what is important is to consider the nature of the Respondent's employment at the time the termination took place. In the light of the position taken up by the learned counsel for the Appellant, it would not be necessary for this Court to labour the point any more. Having applied the dicta of the cases that I have referred to and the matters discussed by me above, I am inclined to agree with the conclusions arrived at by the ERT and the ERC and hold that the Respondent was an employee of the Appellant and not an independent contractor.

Termination of Employment

[25] There is no clear evidence as to whether the Appellant made an attempt to reach the Respondent and review the decision to suspend him or whether the Respondent reported to the Appellant after the period of suspension. Nevertheless, the failure on the part of the Appellant to review its decision amounts to termination of the Respondent's services or in the least it amounts to constructive termination. The act of indiscipline on the part of the Respondent cannot be treated lightly but I am of the view that termination of services was not commensurate with the act of misconduct. Hence I agree with the ERC and the ERT that the termination of services was unfair.

The relief granted by the ERC

Re-instatement

[26] Having so decided, I will now consider as to whether the relief granted by the ERC is justified under the circumstances. It was submitted by the learned Counsel for the Appellant at the hearing of this appeal that she does not wish to pursue the ground of appeal pertaining to re-instatement of the Respondent. Her position was that consequent

to the judgment of the ERC, the Respondent was re-instated and that the parties had entered in to a new contract of service. Therefore, I will not deal with the aspect as to whether the ERC was correct in ordering re-instatement.

[27] I must however advert here to certain references made by the Respondent in his written submissions filed in this court, to the contract of employment that he is said to have entered into after the judgment of the ERC. The Appellant in its reply submissions has raised issue over such references and has stated that the Respondent is not entitled to raise such issues in these proceedings. This court takes the view that such matters cannot be agitated and the documents annexed to the Respondent's written submissions cannot form part of the record in this case and therefore have not taken such matters in to consideration in arriving at our determination. The question as to whether there has been due compliance as far as re-instatement was concerned is not a matter that this court can go into since that is not an issue that we have been called upon to look into.

Other reliefs

[28] In considering the other reliefs granted by the ERC, it is necessary to see if such relief is appropriate considering the circumstances of this case. The nature and quantum of compensation to be awarded is a matter of discretion of the Tribunal and no precise rules should be laid down so as to fetter that discretion. However, such discretion must be exercised reasonably having taken all matters in to consideration.

[29] In this case it is important to note that the Respondent had worked for the Appellant for less than one and a half years. Although this court agrees with the ERC that the termination of his services was unfair, the circumstances that led to such termination cannot be ignored altogether. Further, the Respondent had not taken steps to mitigate the loss and has not endeavoured to find alternative employment during the period he was out of employment. Contributions had not been made to the FNPF during the period from 2006 December to March 2008 since 15% withholding tax was deducted in terms of the MOA. The Respondent did not complain of this arrangement knowing well the terms of the MOA. The Respondent was not in the service of the Appellant from April 2008 until

the time of his re-instatement pursuant to the judgment of the ERC. These contributions are generally made when a person is in employment.

Determination of this court

[30] Although the learned judge of the ERC has varied the relief granted by the ERT, I am of the view that taking in to consideration the matters as stated above, there is no justification for the grant of the relief as mentioned in sub paragraph (d) of paragraph 63 of the judgment of the ERC. Therefore, I hold that the learned judge was in error in granting such relief and the Respondent will not be entitled to receive the relief enumerated thereunder. The Respondent is entitled to the rest of the reliefs granted by the ERC.

[31] Subject to the aforesaid variation, the judgment of the ERC dated 27.03.2017 is affirmed and the appeal of the Appellant is dismissed. There will be no costs. The Respondent is directed to make the payments as allowed by this Court to the Respondent within four weeks hereof.

Orders of the Court

1. Subject to variation Appeal Dismissed
2. No costs

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice V. Dayaratne
JUSTICE OF APPEAL