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

CIVIL APPEAL NO. ABU0084 OF 2022
[Suva Civil Action No: ERCA 21/19]

BETWEEN : **R C MANUBHAI & COMPANY**

Appellant

AND : **ARUN PRASAD**

Respondent

Coram : **I Mataitoga, AP**
P Andrews, JA
R Dobson, JA

Counsel : **Mr N. R. Padarath for the Appellant**
Ms M. Rabele for the Respondent

Date of Hearing : **1st May, 2024**

Date of Judgment : **30th May, 2024**

JUDGMENT

Mataitoga, AP

[1] I have read in draft the judgment prepared by Dobson, JA. I concur and support the reasons given in dismissing the appeal.

Andrews, JA

[2] I have read and agree with the reasoning and outcome of the judgment of Dobson, JA.

Dobson, JA

Introduction

[3] This appeal involves a disputed case of summary dismissal of an employee (the respondent). The respondent contested his dismissal and was successful in the Employment Relations Tribunal which found that he had been unlawfully and unfairly dismissed. The Tribunal ordered total compensation of FJD13, 260.

[4] His employer (the appellant) appealed to the Employment Relations Court which dismissed the appeal, affirmed the judgment of the Tribunal and ordered costs of FJD3, 500 in favour of the respondent.

[5] On 20 December 2022, the appellant filed its notice and grounds of appeal in this Court.

Factual background

[6] The appellant operates substantial businesses, including those of timber and hardware merchants throughout Fiji. On 23 October 2016, it employed the respondent as a yard supervisor in one of its timber yards in Suva. He was in charge of invoicing and accounting for deliveries leaving the yard. In mid-2017, audit personnel employed by the appellant became concerned at inadequate record-keeping at the yard where the respondent was employed.

[7] The respondent's evidence was that, in July 2017, he responded verbally during a meeting with the employees investigating the omissions. His evidence was that he explained why he was not responsible for the missing documents. Counsel for the appellant blocked his attempts to describe what his July 2017 explanation had been, but in re-examination he said that the system had been

changed when the pressure on deliveries from the yard was such that independent carriers were used to supplement the company's carrying capacity and that drivers for the independent carriers were given responsibility for providing the invoices to accounting personnel.

[8] The respondent was absent from work because of ill health from 14 August 2017. The Tribunal found that he returned to work on 28 August 2017. In his absence, the on-going concerns at the missing invoices were addressed in a number of emails sent by those investigating the omissions. The respondent was copied into some, but not all, of these emails via a work email address to which he had access when at work.

[9] One of the emails from an internal auditor dated 21 August 2017 to a number of email addresses, including the respondent's, sought a response from him on proof of delivery in respect of some 983 invoices from the period between May and July 2017 involving a total of FJD1, 017,904.

[10] On the same day, the company's HR manager emailed others involved in the investigation advising that an informer who had previously been employed by the company had provided a list of five names, including that of the respondent. The email stated:

> Let's screen their loading within 24 hours, if we find any clue, we will terminate them tomorrow, even if we can't get evidence, we will terminate them tomorrow based on Yard #3 Variance.

[11] The respondent's evidence, which was accepted by the Tribunal, was that when he returned to work, another employee was occupying his workstation. He was directed to show that person what was involved in his job and was otherwise put on light duties. He was adamant that no one asked further questions of him about the missing invoices after his return and there was no evidence that the emails sent in his absence were specifically drawn to his attention after his return.

[12] On 8 September 2017, he was handed a notice of termination that stated:

> You are being terminated due to audit queries and variances in yard as per audit report.
>
> Your signature indicates your agreement that you have read, understood and accept the above content and that it is an accurate reflection of facts.

[13] There is no evidence that the respondent signed in terms of that stipulation.

The Tribunal determination

[14] Following a failure of attempts to resolve the respondent's challenge to his dismissal at mediation, his grievance was heard, and a determination issued by the Tribunal in July 2019.

[15] The Tribunal found that the appellant had not made enquiries of the respondent in a reasonable manner and that he had not been given a reasonable opportunity to respond to relevant "queries". The appellant relied on gross misconduct and wilful disobedience of lawful instructions as the grounds justifying the respondent's summary dismissal. The first ground would rely on stock discrepancies but the Tribunal found that there was no evidence of such misconduct so it could not be relied on. Further, it had not been established that the respondent intentionally avoided responding to email enquiries copied to him during his absence from work. He was therefore not liable for wilful disobedience of such instructions.

[16] It followed that the appellant had not established a proper cause for the termination, which was unlawful. The Tribunal also considered whether the dismissal was unfair. The respondent had given evidence that he felt ashamed after his return to work, having to train someone else to do his job and otherwise having little to do. He described roaming around with people asking him what he was doing. The Tribunal found the appellant's dealings with the respondent unnecessarily humiliated him, causing injury to his feelings. That resulted in a further finding that the termination was unfair.

[17] The Tribunal awarded six months' wages for the unlawful termination and a further three months for humiliation, loss of dignity and injury to feelings in the unfair treatment involved.

The Employment Court decision

[18] Despite a thorough attack on the factual findings of the Tribunal and the approach to the law it had adopted, the Employment Court could not find fault with the Tribunal's determination. The Court found that the reasons advanced in the notice of termination were expressed too vaguely to enable the respondent to answer the criticisms being relied upon. The reference to audit queries was considered meaningless in the absence of an audit report that could identify for the respondent the concerns relating to his work.

[19] The Court was critical of the appellant for attempting to justify the termination on grounds other than those cited in the notice.

[20] As he did before us, Mr Padarath, counsel for the appellant, challenged the Tribunal's finding that the respondent did not return to work until 28 August 2017. He submitted that there was circumstantial evidence suggesting that the respondent was back at work by 21 August 2017. (The medical certificates that were produced to justify absences from work ran out before that date, and some of the emails in evidence contemplated that he was at work by then).

[21] The Court rejected this challenge, citing an onus on an employer on such an issue to adduce records confirming an employee's attendance on given dates. In the absence of any such usual employment records as evidence, the appellant could not challenge the Tribunal's finding as to the date on which the respondent had returned to work. Nor could the appellant make out an error in the Tribunal's finding that the respondent was not given a reasonable opportunity to respond to the concerns about missing invoices, after he had returned to work. The Tribunal's determination was affirmed.

Grounds of appeal

[22] The appellant's grounds included that:

- the Court had erred in law in requiring the notice of determination to be *"precise and have full particulars leading up to the termination",* having failed to take into account the background leading to it;

- the Court imposed a heavier burden on the appellant than was required by law in determining whether the termination was unlawful or unfair;

- the Court misinterpreted the law on compensation for unfair termination;

- the Court erred in awarding costs when the respondent had not incurred any.

[23] The essence of Mr Padarath's submissions was that the decisions below required too tough a standard of proof to be made out by an employer, and that the approach adopted in both decisions imposed an unrealistic and overly legalistic interpretation of the terms of s 33 of the Employment Relations Act 2007, where it has to apply to all manner of employment situations. If a more liberal approach was adopted, then arguably the appellant's conduct in this case was sufficient to have justified the termination within the terms of the section.

[24] The appellant's submissions were filed more than a month after the deadline set for them, one day before the hearing. No written submissions were received on behalf of the respondent prior to the hearing. Ms Robele sought and was granted leave to file written submissions by the end of the day of the hearing. In the absence of submissions, she did not respond at the hearing to the oral argument for the appellant. Written submissions for the respondent were subsequently received and have been taken into account in consideration of our judgment.

Analysis

[25] Section 33 provides:

> "33 (1) No employer may dismiss a worker without notice except in the following circumstances –
>
> (a) where a worker is guilty of gross misconduct;
>
> (b) for wilful disobedience to lawful orders given by the employer;
>
> (c) for lack of skill or qualification which the worker expressly or by implication warrants to possess;
>
> (d) for habitual or substantial neglect of the worker's duties; or
>
> (e) for continual or habitual absence from work without the permission of the employer and without other reasonable excuse.
>
> (2) The employer must provide the worker with reasons, in writing, for the summary dismissal at the time he or she is dismissed."

[26] The purpose of the section is to protect employees from summary dismissal except where the employer can show cause coming within one or more of the defined grounds for criticism of the employee's conduct or omissions. The requirement in subs (2) for employers to provide written reasons at the time serves two purposes. First, it enables an employee to understand why they are losing their job. Secondly, in appropriate cases, it enables an employee to challenge the existence of the ground relied on as sufficient to warrant their summary dismissal.

[27] For that opportunity to be meaningful, the terms in which the reasons are expressed must be understandable and sufficiently clear or precise for the employee to consider the adequacy of those reasons and in appropriate cases to contest the justification. That is no more than a fair employment practice, the right to which is enshrined in s.20(1) of the Constitution of Fiji.

[28] It is open to the Tribunal or the Employment Court to find that reasons for a summary dismissal have been expressed inadequately. For example, in Land Transport Authority v. Chand [2021] FJHC 254; ERCA01.2019 (10 August 2021) a dismissal letter simply asserted that the employee's actions amounted to *"Gross Misconduct under HR Policy"* without specifying what those actions were. The Court found the letter to be contrary to the mandatory requirement in s.33(2) of the Act.

[29] Mr Padarath did cite authority that he said supported a less stringent requirement for an employer's conduct when considering a potential summary dismissal. It was Yanuca Island Ltd v. Vatuinaruku [2017] FJHC 92; ERCA 9.2014 (8 February 2017). His incomplete quotation was from [52]:

> *"52. It is not necessary that an investigation is carried out all the time as sometimes the facts are clear but in cases where it is not and the employer is carrying out the investigation, it does not have to provide the employee with an opportunity to explain its position or a right to comment on the information. The employer, once is satisfied of the guilt."*

However, when the end of the paragraph is added, it is apparent that the observation does not apply to the employer's obligations under s.33, but only to the investigative stages that may precede that step. The sentence ended:

> *". . . . . may carry out the termination."*

[30] Mr Padarath did not cite any authority for his contention that a less informative standard of written reasons will suffice. I do agree with him that it would be counterproductive to require the section to be applied too prescriptively, or by setting any uniform formula for the terms in which reasons have to be given in every case. What is adequate is necessarily context and case specific. An employee must, in effect, know the case they would have to answer if they intended to contest their summary dismissal.

[31] In arguing for a less strict requirement to satisfy the obligations imposed under s 33, Mr Padarath submitted that the Court should have assessed what was conveyed or inferred by the notice of termination, in light of the circumstances surrounding concerns about missing invoices in the months leading up to the

issue of the notice. As a general rule, I would not exclude the prospect of other communications or interactions between an employer and an employee being taken into account in assessing the adequacy of the terms of a notice given to comply with s 33. However, I am not persuaded that a review of all the evidence of the dealings between the respondent and the appellant in the months leading up to the respondent's dismissal in this case can save the serious inadequacies in the reasons cited in the 8 September 2017 notice.

[32] The reference to "*audit queries"* was too vague to convey the precise source of concerns, especially given that no audit report was produced.

[33] The reference to "*variances in the yard"* had not been raised with the respondent, when the focus of the July 2017 dialogue with him was on the absence of proof of delivery invoices. There was no effective challenge to his evidence that he believed he had explained his position adequately on this before his absence on sick leave.

[34] The emails that were copied to the email address the respondent had used before his sick leave would have thrown light on what "*audit queries*" referred to. However, he did not have access to them while absent and there was no effective challenge to his evidence that his replacement was occupying the workstation he had used and that he was effectively roaming the workplace after his return. Nor was there any evidence that anyone involved in the investigation had engaged with him about it after his return.

[35] Mr Padarath said that the employees who dealt with the respondent had left the company and were not available to give evidence. The apparent absence of the opportunity to challenge the respondent's version of what occurred after his return to work cannot of itself cast doubt on the respondent's evidence, which was tested in cross examination. Further, there was no request that he access the emails and answer them. I am satisfied that the appellant did not come near to complying with the requirements of s 33, as it applied in the circumstances of this case. I agree with the concurrent findings in the determination and judgment below that the dismissal was unlawful.

[36] The appellant challenged the separate finding that the mode of dismissal was unfair. Submissions for the appellant criticised the Employment Court's alleged failure to appreciate that there was more than $1 million missing from the section where the respondent worked. I do not accept that the relative seriousness of an employer's concerns can excuse, in circumstances such as the present, an approach to dealing with an employee that does not respect fair and reasonable processes.

[37] Incidentally, I do not accept that the matter of the missing invoices had necessarily cost the business more than $1 million: one of the emails not copied to the respondent on 4 August 2017 in relation to an earlier three-month period of missing proof of delivery invoices had raised the scope for loss in these terms:

> These list of invoices require screening & we wish to get a feedback on as why we have not been able to do collections for these invoices? Is there any customer disputing that they have not received goods?

[38] There appears to be no evidence that the absence of a proof of delivery invoice necessarily precluded the company charging the customer for the products covered in it. Obviously, the company would be in difficulties where customers disputed what had been delivered to them, but that was not a matter of course.

[39] The appellant submitted that moving the respondent on his return to work was not done to humiliate him, but to protect the employer's business. The terms of the email quoted at [10] above are inconsistent with the appellant having any regard for the feelings of the respondent, and the evidence established that its course of conduct in dealing with him after his return from sick leave were devoid of consideration for his position.

[40] An aspect of defending the appellant's conduct was the contention that he had every opportunity to answer the emails raising the question of missing invoices. My analysis above, adopting the consistent findings of fact in the two prior decisions, rejects that notion.

[41] The appellant also submitted that any embarrassment the respondent felt was caused by his own failings in creating the situation in which he found himself.

That is an unrealistic characterisation of the power imbalance that was manifest in the company freezing the respondent out while it cast about for justification for a summary dismissal.

[42] Reflecting on these arguments, I have no difficulty in affirming the finding that this was also an unfair dismissal.

Employment Court Order for Costs

[43] The Order of FJD3,500 for costs imposed in the Employment Court judgment was challenged on the ground that it incorrectly assumed that extent of legal costs had in fact been incurred. The actual position is that the respondent has been represented throughout by Ministry solicitors/advocates, at no personal cost.

[44] In the written submissions for the respondent, the point was taken that the respondent has not been paid anything in respect of the award in his favour originally made in 2019. In those circumstances, it was suggested that additional compensation for him of that amount was warranted, to reflect the years he has been waiting for justice.

[45] However attractive the merits of that submission might be, the Court's jurisdiction to award costs is confined to an allowance to compensate for legal costs actually incurred for a successful party's involvement in the proceedings. Where no such costs have been incurred, the jurisdiction does not arise. Accordingly, the appeal must succeed in this respect. I reverse the Employment Court's order for costs in that Court.

Costs on the present appeal

[46] In light of the above outcome on costs below, there will be no order as to costs in this court.

OUTCOME

[47] The appeal is dismissed, except for the reversal of the order as to costs made in the Employment Court.

[48] The decision of the Employment Court under appeal required the appellant to comply with the order of the Tribunal within 14 days.

[49] The lodging of an appeal does not operate as a stay and we were advised by counsel that the amount had not been paid simply because of the lodging of an appeal. In those circumstances, there has been a failure to comply with the final order and an award of interest is more than justified. An order is made for payment of interest on the amount of the judgment in favour of the respondent at the statutory rate of four per cent per annum from the date of the Employment Court Judgment up to the date of payment.

Hon. Justice Isikeli Mataitoga
ACTING PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Pamela Andrews
JUSTICE OF APPEAL

Hon. Justice Robert Dobson
JUSTICE OF APPEAL