IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: **ERCA NO. 6 OF 2011**

BETWEEN: **RENTOKIL INITIAL LIMITED**

APPELLANT

AND: **HENRY KEAN**

RESPONDENT

Appearances: **Mr. N. Prasad for the Appellant.**

Mr. N. Tofinga for the Respondent.

Date and Place of Judgment: **Wednesday 17 April 2013 at Suva.**

Coram: **The Hon. Justice Anjala Wati.**

JUDGMENT

The Cause

[1]. The appellant appeals against the finding and award of the Employment Relations Tribunal ***("ERT")*** of 10 March 2011.

[2]. The Tribunal made an award in favour of the employee in the terms that:-

- *The employee be reimbursed a part of the wages lost as the result of the grievance, that is, a equivalent of 14 months wages.*

- *The employee be paid compensation for humility and loss of dignity, which is a sum equal to 6 months wages.*
- *The 20 months wages to be reduced by 6 months wages in view of the extent of the employee's contribution towards the situation that gave rise to the employment grievance.*
- *The total sum of compensation to be paid is 14 months wages which includes part of lost wages and compensation for humiliation and loss of dignity.*
- *The payment was to be effected within 14 days of the decision.*

[3]. In assessing the grievance, the ERT made a finding that the employee was unlawfully, unjustifiably and unfairly dismissed in that he was not given the opportunity to be heard. The employer fell short of showing that the dismissal was justified substantially and procedurally. The ERT also found that it was unethical for the employer to confront the employee with allegations and not listen or consider his explanations. The ERT stated that Mr. Kean was denied the formal disciplinary procedures in his employment contract.

[4]. In assessing the quantum the ERT found that the hearing of the case was done some 28 months after the termination and the employee is still unemployed and unable to find employment.

The Grounds of Appeal

[5]. The following 8 grounds of appeal were raised:

1. *The Tribunal erred in law in not accepting the evidence that the respondent had been given an opportunity necessary to answer and did so in writing and orally, the complaints of the appellant before termination.*
2. *The Tribunal erred in fact in finding that the facts of the case were not in dispute when the appellant's submissions as contained in paragraphs 3 to 13 and the*

respondent's submissions as contained in paragraphs 14 to 19 of the judgment differ substantially.

3. *The Tribunal erred in law in failing to give reasons or adequate reasons for preferring the respondent's evidence over the appellant's evidence.*

4. *The Tribunal erred in fact in finding so when there was no evidence before the Tribunal to support or justify a finding that the respondent had suffered loss of wages equivalent to 14 months wages.*

5. *The Tribunal erred in fact in finding so when there was no evidence before the Tribunal to support or justify that the respondent had suffered humiliation or loss of dignity for which compensation should be paid equivalent to 6 months wages.*

6. *The Tribunal erred in law in not deciding that in the circumstances the Tribunal's decision pursuant to s. 230(b) of the ERP 2007 should in effect nullify the awards made under ss. 230(1)(b) and 230(1)(c) (i).*

7. *The Tribunal erred in law and in fact in finding so when there was no evidence before the Tribunal that the appellant in any manner was responsible for the time taken to have the hearings and decisions of the mediation or the Tribunal determined which appear to have influenced the Tribunal in fixing the period of compensation for loss of wages or of the respondent's continued alleged unemployment.*

8. *The Tribunal erred in law in making the award for compensation for 14 months wages for alleged loss of wages and compensation for humiliation and loss of dignity without deciding which amount was for what compensation.*

The Submissions

[6]. In respect of ground 1 Mr. Prasad argued that the employee was accorded all procedural fairness. He contended that by a letter of 5 March 2008, the employee was told of the allegations and given an opportunity to refute the allegation by 14 March 2008. There was no response to this letter of allegation. There was also a face to face meeting accorded to the employee. A second letter was written to the employee on 29 March 2008 which reminded the employee of his failure to respond and his failure

to comply with company policies. The employee was sent on leave pending investigations. On 16 April 2008 the employee writes in detail his response. Another email was written to the employer by the employee on 13 May 2008. The employer than finally states that it considered the employee's respond and found that the employee had breached paragraph 2(a) of the contract of employment.

[7]. In arguing ground 2, Mr. Prasad stated that the employee had at all times submitted that he was unfairly dismissed and the employer refuted that. For the ERT to find that the facts were not in dispute was a material error. By not calling oral evidence the problem was compounded. The ERT did not have the benefit of assessing whose evidence was correct.

[8]. In arguing ground 3, Mr. Prasad submitted that the Tribunal did not find on evidence whether the misconduct complained of by the employer was sufficiently serious to justify dismissal. The ERT should have found:

(i) Whether the conduct in question was capable of amounting to serious misconduct;

(ii) If so, was the dismissal warranted in all the circumstances of the case.

[9]. In arguing ground 4, Mr. Prasad argued that there was no evidence before the Tribunal to justify a loss equal to 14 months salary. The Tribunal also failed to examine whether the employee mitigated his loss.

[10]. In arguing ground 5, Mr. Prasad stated that there was no evidence to justify that the employee suffered humiliation or loss of dignity for which compensation should be paid.

[11]. In arguing ground 6, Mr. Prasad stated that by reducing the compensation, there is a finding that Mr. Kean was responsible for the employment grievance. Why then should the employer be responsible for paying compensation.

[12]. In respect of ground 7, Mr. Prasad submitted that the employee had no control over the prosecution of the case so it should not be held responsible for the delay.

[13]. Mr. Prasad stated that the matter should be decided in favour of the employer and the employee paid wages from the period he was sent on leave and a weeks' payment in lieu of notice which calculates to $969.08. Mr. Kean owes the company a sum of $950.25 being a sum for employer's items he kept in his possession. The balance the employer has to pay the employee is $18.83. The remedy of reinstatement cannot be available to the employee because the relationship of trust and confidence has broken down.

[14]. Mr. Tofinga stated that when the matter was set down for hearing, the employer's representative, its CEO, Mr. Matthew was only prepared to tender submission. He had no oral evidence. It was his courtesy he extended to Mr. Matthew by asking and advising the ERT that he will not take any advantage of Mr. Matthew.

[15]. The trial procedure was agreed to with the employer so that it is not deprived of tendering material evidence. The employer thus had added advantage otherwise it will not be able to tender its documents. The documents were tendered by consent and followed by submissions of the employee and the employer.

[16]. In arguing ground 1, Mr. Tofinga stated that the employer is exercising a very important national responsibility. It must act in accordance with the quarantine law. The natural interest overrides any interest. Should Mr. Kean be terminated because his actions were in compliance with national policy of observing the quarantine law? However the employee had denied the allegation in his email of 13 May 2008. There was compulsory presence of quarantine on the day in question. Mr. Kean had written a letter dated 16 April 2008. Paragraph 3 of that letter indicates that the matter was resolved. There was no rebuttal of this evidence by the employer. On the merits of the case therefore the ERT was in a position to make a finding that proper procedures were not followed. Mr. Kean had received the termination letter of 20 May 2008 on 6 August 2008 when the mediation was in progress.

[17]. Mr. Tofinga also argued that by its letter of 29 March 2008 the employer had promised investigation. The investigation did not take place. The part of one process promised was not completed.

[18]. In arguing ground 2, Mr Tofinga submitted that the employee tendered uncontested evidence.

[19]. In respect of ground 3, Mr Tofinga submitted that the employer had confirmed twice by its letter of 2 October 2007 and 11 December 2007 in that the employer had agreed that the employee was a competent, hardworking, honest and zealous worker. He therefore received wages increment and confirmation of work. The ERT was thus bound to accept the employee as a credible witness.

[20]. In arguing ground 4, Mr. Tofinga stated that the employer has admitted that it last paid the employee on 3 April. No annual leave was given.

[21]. Mr. Tofinga submitted in respect of ground 5 that the employee was humiliated and this was apparent from paragraph 11 of his email of 13 May 2008 wherein he wrote :-

"Sir being sent on annual leave without pay coupled with the rumours being spread by Yvonne and certain staff to discredit me is taking its toll on me spiritually, physically and psychologically".

This evidence according to Mr. Tofinga was uncontested. Further Mr. Tofinga submitted that the police was sent to collect employer's items from the employee. This is uncontested and admitted by the employer in Exhibit 12. This is humiliation.

[22]. Mr. Tofinga said that there was no evidence that the employee contributed to his own demise and so the 6 months wages which was deducted from the employee's award should be reinstated.

[23]. Mr. Tofinga argued in respect of ground 7 that officially the Court records will show how much delay was caused by the employer. Once it was also imposed with costs so there is evidence why the employer should be responsible to pay 14 months wages.

[24]. In respect of the final ground, Mr. Tofinga stated that reinstatement is a permissible remedy under the ERP so it is not correct for Mr. Prasad to say that it is not proper to grant the remedy.

The Law and the Analysis

[25]. The trial was by consent heard on documentary evidence only. Whilst the employee was ready to offer oral evidence, the employer was not but only ready to present submissions.

[26]. The terms of reference before the Tribunal was:

"Dismissal of the grievor on 20th May 2008 after being suspended from work which he claims to be unfair and seeks reinstatement with no loss of pay and benefits from the date of dismissal".

[27]. From the terms of reference that ERT had to find two facts:

(a) Whether the conduct of the employee in question capable of amounting to serious misconduct and if so was the dismissal warranted in all the circumstances of the case; and

(b) Was the procedure afforded in terminating the employee fair.

[28]. The Tribunal has not to any extent dealt with the question of whether the conduct of the employee in question was a serious misconduct and if a dismissal was warranted. The important aspect of the terms of reference was very conveniently overlooked. When making an award, the ERT reduced the award by six months and the reason for doing this was that employee contributed to the situation. The conduct complained of was that the employee had breached paragraph 2(a) of the employment contract. If the ERT found that the employee contributed to the

situation, then the essence of the finding is that the employee had done something which caused the termination. The ERT then was under an obligation to make a finding as to what actions of the employer were unjustified and whether it was serious enough to cause dismissal.

[29]. Without making a finding of fact on the aforesaid issue, I cannot say that the ERT's action to blame the employee and reduce the remedies is justified.

[30]. The ERT has not fully discharged its onus of deciding on the terms of reference and this duty must be completed by the ERT, albeit a different constituted Tribunal. I cannot make a finding of fact from the given evidence because I find the evidence to be insufficient and not established in many aspects for the appellate Court to make a finding in this regard. It goes without saying that the remedies awarded by the ERT depends much on the findings on the different questions.

[31]. The next question is that of procedural fairness accorded to the employee. I think in light of my intention to send the matter to the ERT for a rehearing I will refrain the determination of this issue. My findings may be limited to the documentary evidence. The new ERT may order oral evidence. The appellate Courts decision on procedural fairness should not influence the decision of the ERT. Further the appeal is limited to the question of an opportunity granted to the employee to be heard. That is only one aspect of procedural fairness complained of. The new Tribunal may require some more evidence to satisfy itself that all procedural fairness was accorded to the employee. My appellate decision in this case may interfere with the open mind with which the new Tribunal may want to decide the question.

[32]. The award made under the finding of the ERT cannot stand in light of my observation on incomplete determination of the terms of reference. It should be set aside for a fresh determination.

[33]. I must make an observation that when making an order for compensation the ERT is bound to look at so many matters like

(a) *the employer's conduct in the mediation and the progress of the case.*

(b) the delay caused by the employer.

(c) whether the employer should take responsibility for the delay in the determination.

(d) the employees employment status since termination.

(e) whether the employee mitigated his loss.

(f) the conduct of the employer hindering the employee from mitigating the loss and

(g) any other relevant factors.

[34]. There was no evidence submitted by the employee on his employment status, the mitigation he did and the employers conduct in assisting or depriving him of another employment.

[35]. I also do not find evidence of any humiliation or loss of dignity caused by the employer from its actions. Mr. Tofinga wants me to find from the email of the employee that he was humiliated. The email alleges rumours by the fellow employees of Rentokil. This cannot be linked to a humiliating action of the employer. Employees are individuals and if they take any part in gossip and spreading rumours, it has to be linked to an action authorised or permitted by the employer. The sending of police to collect employer's items from the employee cannot be said to be an humiliating act unless this is established uncontroverted. I do not find that there was any evidence of this nature before the Tribunal.

[36]. The Tribunal also failed to class what actions of the employee was humiliating. One cannot assume that it could have been this or it could have been that.

[37]. It is in the interest of justice that this matter, without any prejudicial comments, be reverted to the ERT for a fresh hearing.

[38]. On the aspect of hearing the case by documentary evidence, I find that the parties and the ERT are at a liberty to decide the mode of trial in a particular case. By consensus if a mode is preferred, the consenting party loses its right to complain about the procedure at an appellate level. The adducing of oral evidence was waived

by the appellant. He cannot complain now that he was not given a chance. Rather he did not make use of the available opportunity to it.

[39]. I do not find that the ERT has misunderstood the facts when it stated that the facts are not in dispute. The facts he specifically referred to was sending of the employee on leave, suspension, the ceasing of police investigation in relation to a fraud charge and termination of the employee. Paragraphs 3 to 13 of the judgment of the Tribunal and 14 to 19 of the same contains the submission of the parties. Paragraphs 3 to 13 refers to the appellant's submissions and paragraph 14 to 19 refers to the respondent's submission. Mr. Prasad's reading of the judgment is misconstrued.

Final Orders.

[40]. For the reasons I enunciated, the appeal is allowed and the case is sent to ERT for re-trial. A different Tribunal must hear the case.

[41]. Each party to bear their own costs.

[42]. The new Tribunal shall decide the mode of hearing.

Anjala Wati

Judge

17.04.2013

To:

1. ***Mr. N. Prasad, counsel for the appellant.***
2. ***Mr. N. Tofinga, counsel for the respondent.***
3. ***File: ERCA No. 06 of 2011.***