IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA NO. 18 OF 2012**
BETWEEN:	**NASESE BUS COMPANY**
	APPELLANT
AND:	**SATI RAJESH SHIU PRASAD**
	RESPONDENT
Appearances:	**Mr. D. Nair for the Appellant.**
	Mr. L. Ramoce for the Respondent.
Date /Place of Judgment:	**Wednesday 12 March 2014 at Suva.**
Coram:	**The Hon. Justice Anjala Wati.**

JUDGMENT

Catchwords:

Employment Law- Termination of employment- Unlawful and Unfair Dismissal- Court must find whether there is dismissal- if there is then the Court must find whether the dismissal is lawful for which the Court needs to find whether the cause and the procedure leading to the termination was proper- to find on the fairness of the termination, the Court needs to find whether the manner of treatment provided to the worker whilst he was terminated was fair, justified and dignified- when the Court accepts or rejects a piece of evidence, it has to have sound reasons for doing so which reasons must be provided in the judgment.

Legislation:

The Employment Relations Promulgation 2007 ("ERP"): ss. 4; 230(2) (a) and (b).

The Cause

[1]. The appellant appeals against the decision of the Employment Relations Tribunal ***("ERT")*** of 1 October 2012.

[2]. The Tribunal had found that the employment relationship between the parties had ended and it awarded the employee compensation of 12 weeks wages which calculated to $3000. The order was for payment to be made within 28 days.

The Grounds of Appeal

[3]. Aggrieved at the decision, the appellant raised 6 grounds of appeal. It asserts that the ERT:

1. *erred in law and fact when it failed to first establish that the respondent was unfairly dismissed before granting the remedies to the respondent.*

2. *erred in law and fact when it disregarded relevant evidence which established that the respondent was not dismissed but had absconded his employment.*

3. *acted unfairly and unreasonably when it totally disregarded the oral evidence and written submissions of the employer in determining the said employment grievance.*

4. *erred in law and fact when it failed to take into consideration the actions of the worker that contributed towards his non-employment as required under s. 230(2) of the ERP before considering any relief.*

5. *acted unfairly and unreasonably by relying upon the evidence of the respondent which was inconsistent, uncorroborated and unsubstantiated.*

6. *had exceeded its jurisdiction and abused its powers by determining the relief of 12 weeks compensation based on a purported wages without first establishing the actual weekly wages that was paid to the respondent.*

The Evidence at the ERT

[4]. The parties had maintained two contradictory positions. The employee stated that he was chased from work by the Director of the company and told not to come back to work. The employer stated that the employee failed to report to work after his sick sheet expired.

[5]. Due to the contradicting versions of the evidence, it is important that I set out in full the evidence of the witnesses. The employee had one witness which was the employee himself and the employer had three witnesses.

[6]. The employee filed his affidavit evidence in chief and also gave oral evidence in Court. In his affidavit evidence in chief he stated that he commenced work on 10 January 2011. He was to carry out repair works to one of the employer's buses. He worked from 7.45 am to 6.00 pm – 6.30 pm for six days in a week. His normal wages was $250.00 and he was paid a standard $230.00 net per week. He was always regular to work and never went late. He was never reprimanded or given any verbal or written warning about his work. The wages he received was consistent and did not depend on the number of days and hours he worked.

[7]. He further stated in his evidence in chief that he never signed any wages and time record for the period that he was employed. He had an electric shock at work on Saturday 5 March while carrying out repair works to one of the company buses at Raiwai. He attached a medical certificate and a dressing note from Raiwaqa. The dressing note is dated 5 March 2011. The endorsement in the dressing note reads *"got electric shock at work at 12.55 pm physiotherapy 07/03/2011 Monday 9 am – 12 MD".*

[8]. The medical sick sheet is dated 7 March 2011. The endorsement on the sick sheet reads: - *"Electric shock – post. Will be fit to resume duty on 9 March 2011".*

[9]. The employee further deposed that he was taken to the hospital by a police officer and was seen by a doctor at Raiwaqa Health Centre because no one was available at the work place to take him to the hospital. He did not turn up to work after that because he was advised by the doctors to stay away from work.

[10]. He was given various sick sheets. He annexed 6 more to his affidavit as follows: -

Place Issued	Date Issued	Endorsements
Raiwaqa	8 March 2011	Electric shock. Will be fit to resume duty on 12 March 2011. Will be reviewed on 11 March 2011.
Raiwaqa	11 March 2011	Numbness of left hand 2 digits. Will be fit to resume duty on 14 March 2011.
Cannot identify	14 March 2011	Numbness left hand post electrocution. Will be fit to resume duty on 16 March 2011
Raiwaqa	17 March 2011	Decreased strength & numbness left hand. Will be reviewed on 22 March 2011.
Raiwaqa	22 March 2011	Electrocution at work. Will be reviewed on 28 March 2011. Ortho (?)
CWM	28 March 2011	Electrocution injury left hand. Will be reviewed on 28 April 2011.

[11]. The employee testified that post his injury, the employer paid him for only three weeks wages and then stopped. This was on 11 March, 18 March and 24 March. He was paid the sums of $170.00, $150.00 and $150.00 respectively.

[12]. On 22 March 2011 when he went to collect pay on his sick sheet, the Director swore at him and told him not to come back to work. He is a left handed person and he sustained shock in his left hand. He is currently unemployed because of the accident.

[13]. In his evidence in chief in Court, the employee stated that he commenced employment on 9 January 2011. The contract was an oral one. He would at times

work 5 days and at times 6 days a week and between the hours of 7.30 am to 6.30 pm. He was repairing body of the buses. He was paid $230.00 - $250.00 net. His FNPF was deducted at 8%. He was paid cash weekly. There was no pay slip and no envelope. He did not punch in or out of work or sign for wages.

[14]. He further testified that on 5 March he was welding the muffler underneath the bus. He got exposed to a naked wire and got shocked. He told the Garage Manager. The Garage Manager telephoned the Director. The Director told the Manager to send him to Raiwaqa Health Centre. He went to Raiwaqa Health Centre on 7 March 2011. He received a medical certificate. He was paid $170.00 on 11 March 2011 being 3 weeks wages, $150.00 on 18 March and $150.00 on 25 March 2011.

[15]. On 22 March 2011 he took the sick sheet to the Director. The Director said to him ***"you people are making me fool- you just f--- off from the company. I won't give you any single cent- I don't want to talk to you".*** He was not given any opportunity to explain. The Director came out of the office behind the counter and said ***"are you going or not".*** He then ran out of the office.

[16]. Under cross - examination the employee stated that on 5 March 2011 which was a Saturday, he had the Director's permission to work. When the accident happened the circuit breaker did not go off. He then stated that the police showed him the medical centre. He went by himself. He did not have sick sheet for 5 March 2011 because he worked on Saturday, to make up for time off lost on Monday. He went to the Health Centre at 8.00 am. The police officer did not take him to the Health Centre. He went to collect wages on 22 March instead of 24 March 2011.

[17]. Under re-examination, the witness stated that he wanted to collect the wages on 22 March instead of 24 March. The boss told him on 11 March 2011 to ***"f--- off"*** and said ***"you just go from here. You don't have any job in this company."*** The boss made a gesture to stand up. He was frightened. He was told by doctors that he cannot work for 2 years but 3 weeks prior to the hearing he commenced work as a cleaner at Lautoka City Council. He works 2 – 3 days as a cleaner.

[18]. The 1st witness for the employer was Mr. Jenindra Kumar. He is the Director of Nasese Bus Company. He stated that he owns the company. He is responsible for

hiring and firing people. The employee reports to him or his foreman. After 5 working days the employee provided sick sheet dated 5 March and 7 March. He came 3 other times to collect his wages. The worker was engaged to do body work and not welding. To repair mufflers, usually gas welders are used. The worker can come back to the work place to do light duties – painting and cleaning workplace.

[19]. Under cross examination the witness said that the incident was not investigated. All electrical wires were checked and they were proper.

[20]. The second witness for the employer was the Garage Manager, Mr. Hammit Ashmeel Chand. He testified that the normal working days for the employee was Monday to Friday. On 5 March the employee had come to the workplace. He asked for the boss. He told the employee that boss had gone to LTA. The employee then went away with a driver. He testified that no one works on Saturdays. The garage foreman and he work on Saturdays though.

[21]. The final witness for the employer was the bus driver, Mr. Ravinesh Chand who stated that he was assigned to do a special trip on 5 March for route Tailevu – Dawasamu. He recalls meeting the employee who asked him when he was coming back, he said 7.00 pm. The employee boarded the bus and got off at Nabua.

The Findings of the ERT

[22]. The Tribunal remarked that there were two competing accounts of events which do not coincide. He remarked that the employer had the advantage of corroborating evidence and unfortunately that has ramifications for the worker. If the employer challenges that the worker did not work on 5 March 2011 and suffer electric shock, it would ordinarily not have entertained the sick sheet. The employer assumed some responsibility for the worker's fate. The Tribunal found that the employment was brought to an end because he believed that the worker did have an argument with the company director and that is how the contract came to an end. The Tribunal initially found that 2 months compensation of wages in the circumstances was an appropriate quantum to be awarded because the worker was a body repairer who on

the evidence had no formal training or qualifications. The Tribunal finally gave 12 weeks wages at a rate of $250 per week totalling to $3000.00.

The Submissions

[23]. In respect of ground 1, the appellants counsel submitted that in any dismissal case, the onus of proof rests with the worker to establish that there was an employment contract and that he was dismissed. Once it is established that the employee was dismissed, the onus of proof shifts to the employer to justify whether the dismissal was justified and fair. There was no finding by the Tribunal that the employee was dismissed and that the dismissal was unlawful and unfair.

[24]. During the hearing of the dismissal case, the employee gave fabricated evidence that he was dismissed, the Tribunal accepted this evidence and disregarded the evidence of the employer.

[25]. There was no evidence adduced by the employee to prove that he was injured at his workplace. There was no medical report provided to confirm that the respondent was indeed electrocuted at the workplace. The evidence of the appellant confirmed that the respondent was not at work on Saturday 5 March 2011 but this relevant consideration was disregarded by the Tribunal.

[26]. The employee was paid wages out of goodheart and not that the employer assumed responsibility. The Tribunal disregarded serious inconsistencies in the medical sick sheets. It were obtained from various hospitals only to justify the extension of his sick sheets. The first sick sheet of 7 March stated that the employee could resume work on 9 March 2011. Then on 8 March 2011 the employee got another sick sheet from another doctor certifying that he will be reviewed on 11 March 2011. The respondent had even obtained sick sheet from Lautoka Hospital.

[27]. There was another inconsistency in the evidence of the employee. In his affidavit evidence in chief he stated that he went to the police station and the police took him to the Raiwaqa Health Centre. In fact during the hearing, the appellant had adduced a letter from the Raiwaqa Police Station confirming that there was no entry made on

5 March 2011 regarding the respondent going to the station. It was during the cross-examination that the respondent admitted that he was not taken to the hospital by a police officer when all along he maintained that a police officer had taken him to the hospital.

[28]. In light of the inconsistencies, the Tribunal failed to state why it accepted the evidence of the worker and disregarded the evidence of the employer.

[29]. In respect of ground 2, the appellant submitted that the worker stated in his evidence that he did not wish to return to work as he had moved back to his family in Lautoka. This confirmed that the employee was not interested in work but in his sick sheet pay and compensation. The worker was paid all his sick sheets so the worker was treated fairly.

[30]. In respect of ground 3, the appellant submitted that the Tribunal totally disregarded the corroborated and credible evidence of the employer without giving any valid reasons whilst on the other hand the evidence of the employee was inconsistent but still accepted.

[31]. In respect of ground 4, the appellant submitted that the worker's action which contributed to the situation was not considered. The worker failed to resume work after expiry of his sick sheet. He abandoned work and was not dismissed. The employee's action should be taken into account under s. 230(2) of the ERP.

[32]. In respect of ground 5, the appellant submitted that the employee failed to provide any evidence to support his claim for unfair dismissal. The employee's evidence was merely hearsay, fabricated and contradictory. The evidence which is substantiated should be taken into consideration. The employer's evidence was corroborated and consistent.

[33]. In respect of ground 6, the appellant submitted that before arriving at a figure of $3,000 as compensation to the employee, the pay ought to have been substantiated with payslip or other documentary evidence.

[34]. In respect of ground 1, the submission of the respondent is what I cannot fathom. It is argued that it is the duty of the parties to establish the issues and for the Tribunal

to adjudicate and determine. Perhaps this was argued because of the word "establish" used in ground.

[35]. In respect of grounds 2 and 3 the respondent argued that in the judgment, the subheading ***"was the worker dismissed or did he abandon his employment"?*** demonstrates that the Tribunal considered the evidence of both parties.

[36]. In respect of ground 4, the respondent argued that it is the discretion of the Tribunal on whether or not it will reduce the remedies by considering the workers action that contributed to the employment grievance. In any case, it was argued that the Tribunal did consider the actions of the worker and thereafter determined that the work relationship had come to an end.

[37]. In respect of ground 5, it was argued by the respondent that the worker was assessed to have 25% impairment. The seven medical certificates were acknowledged by the appellant. The worker was remunerated until he was summarily dismissed. These facts support the evidence of the respondent.

[38]. In respect of ground 6, it was argued that the remedies were consistent with s. 230 of the ERP. The wages was calculated at $250 per week which was given in evidence by the employee. The worker was compensated for the loss of livelihood.

The Law and Analysis

[39]. In respect of ground 1, I do not agree with the appellant when it argues that the respondent was not under a contract but that he was only engaged to carry a specific task. The worker was on a contract for service. He was assigned work and paid weekly wages. His FNPF was deducted. He was even paid on sick sheet. S. 4 of the ERP defines *"contract of service"* as meaning ***"a written or oral contract, whether expressed or implied, to employ or to serve as a worker whether for a fixed or indefinite period, and includes a task, piecework or contract for service determined by the Tribunal as a contract of service".*** I find that there was an oral contract of service.

[40]. The Tribunal clearly fails to make a finding on whether there was a dismissal and whether it was lawful and fair. It was for the ERT to find that if there was a dismissal, what caused the same and whether the reason was sufficient to cause the termination. The ERT also had to find whether the procedure invoked in carrying out the termination was correct. If these two findings were made then the ERT would have properly, on the law, found on the lawfulness of the dismissal. Then to assess the fairness of the dismissal the ERT had to look at the manner of the dismissal and decided whether the treatment provided to the employee in terminating him was fair and dignified.

[41]. The Tribunal said that the employment contract came to an end after the argument between the parties, that is, the employer and the employee. It does not say whether the relationship was ended by the employer in that the employee was dismissed or the employee was constructively dismissed or that the employee left the work because of the argument. The Tribunal uses the word "argument". The Tribunal stated that ***"the worker did have an argument with the company and this did give rise to the parties by their conduct, bringing the employment relationship to an end."***

[42]. There was no evidence of any argument between the worker and the employer. The employee's evidence was that the employer chased him away from the work. If that was what the Tribunal meant then the Tribunal still had to make a finding on whether sending the employee home was correct in the circumstances. To find that, the Tribunal ought to have analysed the sick sheets and made a finding whether they were genuine or fake and flawed for the employer's actions to be justified. The Tribunal also ought to have stated the procedure which ought to have been followed and found whether the procedure invoked in terminating the employment was followed or not. Further, it was for the Tribunal to find whether the employer's action in terminating the worker caused him any humiliation, loss of dignity and injury to feelings. I do not find that the Tribunal made any such findings.

[43]. I also find it astonishing that the Tribunal does not make any finding of what piece of evidence of each witness it accepts and what he rejected and the reasons for it. The Tribunal heard the evidence of the Director who stated that the employee did not

report to work after the final sick sheet expired and that he did not threaten the worker in any way. No finding was made on why this evidence was rejected.

[44]. The Garage Manager denied that the employee worked on 5 March 2011 and so did the bus driver witness. No reason was given as to how and why these evidence should be rejected. Further, the Tribunal did not make any remarks about credibility of the witnesses, their demeanour and deportment and who is to be believed.

[45]. It is not enough for a Court to say that a witness is believed and others are not. Clear and concise reasons are needed to accept or reject a piece of evidence.

[46]. There were numerous inconsistencies in the evidence of the employee like different dates of starting work. In his affidavit evidence in chief he stated that he started work on 10 January and that a police officer took him to the hospital as no one was available to take him from the garage. In his evidence in Court he stated that he started work on 9 January and that he informed the garage manager of the accident and that the police did not take him to the hospital. He also stated in his evidence in chief that he was chased away on 22 March but in Court under re-examination he said he was chased away on 11 March.

[47]. These inconsistencies should have been addressed by the Court.

[48]. Failure to give reasons as to what evidence is accepted or rejected and failure to find that there was a dismissal and the lawfulness and the fairness of the same is simply an error of law.

[49]. I cannot make a different finding. The evidence on record is a short version of what the witnesses said. I cannot do justice with that kind of note keeping. If I were to make a finding, I would need to rehear the evidence and see the witnesses' demeanour to assess their credibility.

[50]. In respects of grounds 2 and 3 I do not find that the worker's evidence was hearsay and should be rejected because it was not corroborated and that the employer had the evidence corroborated. In assessing evidence we do not depend on quantity of witnesses but any evidence which is accepted or rejected should have reasons to be regarded or disregarded which reasons, but, must be comprehensively outlined.

[51]. In this case I do not know what evidence was given weight and why. In fact no one knows.

[52]. In respect of ground 4, s. 230(2) (a) and (b) states that if the Tribunal determines that a worker has an employment grievance by reason of being unjustifiably or unfairly dismissed, the Tribunal may in deciding the nature and extent of the remedies consider the extent to which the actions of the worker contributed towards the situation that gave rise to the employment grievance and if those actions so require reduce the remedies that would otherwise have been decided accordingly. The appellant says that the Tribunal should have considered that the employee had abandoned work.

[53]. The two issues before the Tribunal was whether there was dismissal from work by the employer or abandonment of work by the employee. If a finding on an earlier version is made, there cannot be a finding on the other so naturally the abandonment of work cannot be a consideration under s. 230 (2) (a) otherwise there would be inconsistent verdict.

[54]. Ground 5 has been dealt with whilst I dealt with grounds 2 and 3.

[55]. In respect of ground 6, I must say that the employee had given evidence that his wages was $250 net per week. This was not contradicted by the employer. In absence of any contrary evidence I do not find that the weekly wages was wrongly used to calculate the lost wages. However, I find that the Tribunal was inconsistent when it made two findings of what is the appropriate remedy. The finding was that 2 months wages was appropriate compensation and that immediately the Tribunal found and awarded 12 weeks wages which was considered an appropriate remedy which makes it 3 months wages. In any event this will not make much difference to the result because I intend to send the matter back for re-hearing before another Tribunal.

[56]. I find that there was error by the Tribunal in not making a specific finding on:

- *whether there was a dismissal;*

- *whether the dismissal was justified;*
- *Whether the dismissal was unfair;*
- *if the dismissal was unjustified and unfair, how it was so; and*
- *the appropriate consistent compensation.*

Final Orders

[57]. I thus set aside the orders of the ERT and order a fresh hearing before another Tribunal.

[58]. Since I am sending the matter back for retrial, I order that each party must bear their own costs of the appeal proceeding.

[59]. The Registrar of the Tribunal to advise the parties of the new date before a different Tribunal.

Anjala Wati

Judge

12.03.2014

To:

1. ***Mr. Nair for the Appellant.***
2. ***Mr. Ramoce for the Respondent.***
3. ***File: ERCA No. 18 of 2012.***