IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA NO. 10 OF 2012**
BETWEEN:	**ISIRELI FA**
	APPELLANT
AND:	**ROKO TAGI ALBERT**
	RESPONDENT
Appearances:	**Mr. I. Fa for the Appellant.**
	Mr. A. Vakaloloma for the Respondent.
Date and Place of Judgment:	**Monday 17 February 2014 at Suva.**
Judgment of:	**The Hon. Justice Anjala Wati.**

JUDGMENT

CATCHWORDS:

Employment Law-Appeal-Summary Dismissal-Procedures to be observed by the employer in summarily dismissing an employee-remedy for unlawful dismissal- a party cannot change case theory at appellate level as it would cause prejudice to the other party.

Legislation:

The Employment Relations Promulgation 2007 ("ERP"): ss. 29, 30, 33, 230.

The Cause

[1]. The employee brought an action for unlawful dismissal at the ERT.

[2]. The ERT determined that the employee had a grievance of unfair dismissal which was established and it awarded to the employee remedy as follows:

"…the payment of 3 months wages to the worker as compensation by the employer for humiliation, loss of dignity and injury to the feelings of the worker. This compensation is in addition to the wages and other benefits due to the worker at the time of dismissal".

[3]. The appellant appeals against the said decision.

[4]. The grounds of appeal are:

1. ***That the Chief Tribunal erred in law in its decision of the 11th of May 2012 when it applied the "manner of dismissal" principle from the Supreme Court decision of Central Manufacturing v Kant (2003) FJSC 5 and held that the way the dismissal was carried out hurt the respect and dignity of the appellant without taking into account that there was no evidence both written and oral before the Tribunal to reach such a conclusion.***

2. ***That the Chief Tribunal erred in fact and in law in its decision of the 11th of May 2012 when it ordered that the appellant pay the respondent 3 months wages as compensation by the appellant for humiliation, loss of dignity and injury to feelings of the appellant without providing any justifiable reason how the quantum of 3 months was arrived at.***

3. ***That the Chief Tribunal erred in law and in fact in its decision of the 11th of May 2012 when it held that the respondent had a grievance of unfair dismissal against the appellant due to the fact that no dismissal letter was given to the respondent at the time of dismissal, without taking into account the following factors:***

   a. ***That in paragraph 16 of the decision, the Chief Tribunal had submitted that it had agreed with the action of the appellant in summarily dismissing the respondent;***

b. ***That despite agreeing to the summary dismissal of the respondent, the Chief Tribunal disagreed with the way the termination was done;***

c. ***That the oral evidence of Thomas Wong Junior which is found on paragraph 5 of the decision clearly states that the respondent was terminated on the 19th of November 2009 and given her letter on the same date.***

4. ***That the Chief Tribunal erred in law and in fact in its decision of the 11th of May 2012 when it held that the respondent had a grievance of unfair dismissal against the appellant due to the promises made to the respondent by the appellant when in fact no such promises were made by the appellant to the respondent and the Tribunal should have rejected such evidence on the grounds of hearsay.***

The Evidence adduced at the ERT

[5]. The evidence adduced at the ERT has been adequately summarized by the Chief Tribunal at paragraphs 3 to 11 of his judgment. I shall recite the same. The abbreviation TWJ represents the person Thomas Wong Junior and the abbreviation RTA represents Roko Tagi Albert.

"TWJ gave evidence that he started working with the employer from 2002 to date and that he is familiar with all the workers including RTA when she was employed as a receptionist with the company from 2007 to 2009. As a receptionist her work was to look after the reception and liaise with clients coming to the office.

TWJ told the Tribunal that RTA performed well when she started in 2007 whilst from 2008 she performed well below her best. She was missing work and often reported late for work, well after 8.00am and sometimes close to 9.00am. He added that RTA also started taking extra time off during lunch breaks.

TWJ stated that he was involved in looking after the staff from 2002 till 2010 and monitoring their performances. He said that RTB would tamper with the records when clocking in late and that he had witnessed her doing that sometime in February 2009. That behaviour continued and on 3rd August 2009 she was given a

warning letter. On 19th November 2009 she was terminated and given her letter on the same day.

Under cross examination TWJ confirmed that whilst RTA was employed as a receptionist, she was required to do a lot of typing and was given an increment in January 2009 and was employee of the month in May 2009 although she was found tampering with the records in February of the same year.

On re-examination TWJ reiterated that RTA was incompetent as a typist; she was too slow.

In her evidence, RTA told the Tribunal that Mrs. Fa called her to work in the husband's office and she started working there as a receptionist sometimes in April 2007. RTA added that her work included receiving and making calls, updating of diaries and recording of staff movement and she added that she hardly did any typing.

As to employment contract, RTA confirmed that she was given an "offer letter" which she did not sign and a second letter about "contract and agreement for the job" which she also did not sign.

On the termination of her employment, RTA explained that Mr. Isireli Fa called and advised her on 18th November 2009 that he was letting her go as the law firm was going into a new direction and that she was going to get her one month's pay plus her Christmas money. RTA further submitted that Mr. Isireli Fa told her that 13th December 2009 would be her last day at work and there was no need for her to come to work the next day but it was solely up to her. There was no termination letter given to her during termination and that the letter dated 30th December 2009 was delivered to her home where her husband received it.

Under cross examination, RTA specified that she worked for about 2 years and 6 months and that she received but did not sign the contract. As for her termination she stressed that she was performing well when she was terminated on 19th November 2009.

The Submissions of the Parties at the ERT

[6]. The Submissions of the parties are summarised by the ERT in paragraph 12 of his judgment. I shall repeat them here too.

"For RTA, her counsel submitted that Mr. Isireli Fa never at any time during the conversation with her stated that the reason for letting her go was that of being absent from work, or of coming late to work, or inability to type as stated in the termination letter and that RTA completely disagreed with the reasons set by Mr. Isireli Fa….

Counsel for RTA submitted that her client was employed on an oral contract as counsel for the employer had alleged that RTA did not sign a contract with the employer and as such she was not a contracted worker. To support her position counsel for RTA referred to the increment paid out in January 2009 to RTA and her award for being the employee of the month in May of the same year as evidence of being a contracted employee of this law firm.

Counsel for RTA then referred to the breach by the employer in not paying to RTA all wages and benefits due to the worker at the time of termination.

Counsel for the employer made submissions on the following 2 issues:

-Was the employer entitled to summarily dismiss RTA?

-What were RTA's entitlements?

On the first issue, counsel for the employer referred to the grounds of summary dismissal being misconduct for tampering with the time cards and continual or habitual absence from work without the permission of the employer and without other reasonable excuse, and in that regard was entitled to summarily dismiss RTA.

On RTA's entitlement, counsel for the employer referred to the claim by RTA that she should be paid all her wages and benefits then due during termination and responded that the employer is not going to pay any other entitlement other than what RTA had earned up to the day of her dismissal. Counsel for the employer alleged that RTA has defrauded the company and to pay her anything more would not be fair".

The Findings of the ERT

[7]. The ERT held that the employer was entitled to summarily dismiss the employee but found that the procedure invoked was incorrect.

[8]. The ERT stated that there ought to be a fair procedure. It held that there was no dismissal letter at the time of dismissal, yet in evidence, Thomas Wong Junior for the employer, testified that the termination letter was given to her on 19 November 2009. The ERT found that that could not be possible as the employer wrote to the employee on 30 December 2009 confirming the termination effective from 19 November 2009. The ERT found that this piece of evidence plus the promises made to RTA by Mr. Isireli Fa are fatal to the employer's case on the unfairness of the dismissal and to top it all, the dismissal letter was delivered to her home and collected by the husband.

[9]. The ERT found that the employee *"genuinely and rightly felt that she was pushed into termination and the employer can plead termination with cause but the way it was carried out hurt the respect and dignity of RTA. Who knows, there could be a trophy or a certificate in her house in Delainavesi for being the employee of the month in May 2009 but terminated 6 months down the line".*

The Appellant's Submissions

[10]. Mr. Fa argued that he wants to pursue this case from a different perspective. He said that it was undisputed that the worker did not have a written contract but an oral one under s.27 of the ERP. S. 27 defines the period of contract to be the period of pay. Mr. Fa said that s.29 of the ERP states the notice period. In this case the employee was given two weeks' notice. She was advised on 19 November 2013 about her termination and given two weeks pay. Her contract had expired at the end of her wages period so she cannot contest that she was unlawfully dismissed.

[11]. Mr. Fa said that the ERT acted as if the contract was for a fixed period. That was wrong in law and on the facts.

[12]. In any event the employee was liable to be terminated for misconduct.

[13]. Mr. Fa also argued that there was no evidence of humiliation that warrants the making of the order. The anxiety was self caused and the employer cannot be held liable.

The Respondent's Submissions.

[14]. Mr. Vakaloloma argued that the ERT was correct in coming to the determination it did. The employee was being humiliated in that she was promised to be paid her salary which was not paid. She was just informed to go home without the termination letter. The letter came in afterwards. All this amounts to humiliation.

The Law and Analysis

[15]. From the very beginning the employer had maintained that the employee was summarily dismissed for misconduct and incompetency. When that matter was decided in favour of the employee, the employer decided to change its stance at the appellate level and say that the employee's contract had expired because the contract term was the same as the pay period. The employer says that the employee was given two weeks' notice and sent home. It stated that it thus complied with s.29 of the ERP and ought not to be liable for any unlawful dismissal case put forward by the worker.

[16]. This changing of stance appears that the employer somehow or the other is trying to justify the termination. It does not know what its real purpose for termination was. The employer cannot be allowed to change its case theory at the appellate level.

[17]. The employee was terminated on 19 November 2009. Both parties have in evidence accepted that. The termination was for cause and summary dismissal. The letter of termination is dated 30 December 2009 and reads as follows:

"We write to advise and confirm that effective from 19th of November 2009; your employment with the firm was terminated. You have been terminated is the result of

your constant absenteeism and inability to do typing and related secretarial work. We are obliged to give you 2 (two) weeks salary. Please liaise with our accounts department for your salary".

[18]. The law on summary dismissal is provided for by s.33 of the ERP.

"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".

[19]. The law requires that the procedure to be followed is that the employer must at the time of dismissal provide to the worker the reasons in writing for the summary dismissal and the wages due until the time of the dismissal.

[20]. Was that done? On the evidence before it, the ERT had valid reasons to find that it was not and I do not have any basis to disturb that finding. In fact if the letter of termination is dated 30 December 2009 then the termination letter cannot be served on 19 November 2009. The time of dismissal was 19 November 2009. The employer's witness was lying and of course it follows that the evidence was concocted and bad to be given any weight.

[21]. There was also no evidence of payment of all dues and wages. The employer's evidence was rejected that all monies were paid and that it did not promise a package. The employer's witness lost credibility and for ERT to reject its evidence is well founded on facts.

[22]. The process of termination thus was unfair.

[23]. The two weeks' notice as professed was given must be in writing under s.29 (2) of the ERP. That was not tendered it evidence. S.29 reliance is also procedurally unjustified. S. 29 does not operate on its own. It operates with section 30. Ss. 29 and 30 read as follows:

"29. (1) Subject to subsection (2), a contract for an indefinite period may, in the absence of a specific agreement between the parties to the contrary, be terminated by either party—

(a) if the contract period is less than one week, at the close of a day without notice;

(b) if the contract period is one week or more but less than a fortnight or where wages are paid weekly or at intervals of more than one week but less than a fortnight, by not less than 7 days notice before the employment expires;

(c) if the contract period is a fortnight or more but less than a month or where wages are paid fortnightly or at intervals of more than a fortnight but less than a month, by not less than 14 days notice before the employment expires; or

(d) if the contract period is one month, by not less than one month's notice before employment expires.

(2) The notice required under subsection (1) must be given in writing".

"30. (1) Upon the termination of a contract of service, the employer must pay to the worker all wages and benefits then due to the worker by end of the following working day.

(2) The wages and benefits due to a worker under subsection (1) must, in the case of a worker who is entitled to receive notice from the employer in accordance with this Promulgation or the workers contract (the terms of which relating to notice are not less beneficial than this Promulgation), include wages and benefits payable in respect of services rendered during the period of notice or payable in lieu of the notice.

(3) If payment is made in lieu of notice the payment must include the wages and benefits that would have been payable to the worker if the worker had worked during the period of notice.

(4) Nothing in this Promulgation precludes either party from summarily terminating a contract of service for lawful cause.

(5) The termination of a contract of service under this Promulgation must be without prejudice to any accrued rights or liabilities of either party under the contract or section 28.

(6) Upon termination of a workers contract or dismissal of a worker, the employer must provide a certificate to the worker stating the nature of employment and the period of service".

[24]. There are the following things that the employer ought to have done if it relied on s.29.

i) *Requisite notice in writing.*

There is no evidence of notice in writing.

ii) *Payment of all wages and benefits due to the worker by end of the following working day.*

The letter of termination states that the employee was to collect the wages from the accounts. It was the duty of the employer to pay the wages and dues by end of following working day. It could not have paid the wages as the termination occurred on 19 November 2009 and the letter of termination was drafted on 30 November 2009 in which the employee was asked to liaise with the accounts and take the pay. So obviously the payments were not made on 20 November 2009 as it should have been. Further if the wages were paid, the employer would have records of that. No such evidence was produced.

iii) A certificate to the worker stating the nature of employment and the period of service.

There is no evidence to this effect.

[25]. The process of termination under s. 29 was thus unjustified too.

[26]. In deciding the fairness of the termination, the ERT must look at the manner of termination. It must look at the treatment provided to the worker in carrying out the dismissal. There was no evidence of any humiliation caused to the worker or embarrassment or injury to feelings. It was natural for the worker to undergo disturbances but that was due to the fact of dismissal and not that the employers manner of treating the employee was humiliating so the remedies provided for humiliation, embarrassment and loss of dignity is not properly founded on the facts of the case.

[27]. However there ought to be compensation for unlawful dismissal. What could be the possible remedies? I need to answer that from s.230 of the ERP which reads as follows:

"230. (1) If the Tribunal or the Court determines that a worker has an employment grievance, it may, in settling the grievance, order one or more of the following remedies—

(a) reinstatement of the worker in the worker's former position or a position no less advantageous to the worker;

(b) the reimbursement to the worker of a sum equal to the whole or any part of the wages or other money lost by the worker as a result of the grievance;

(c) the payment to the worker of compensation by the worker's employer, including compensation for-

(i) humiliation, loss of dignity, and injury to the feelings of the worker;
(ii) loss of any benefit, whether or not of a monetary kind, which the worker might reasonably expect to obtain if the employment grievance had not occurred; or
(iii) loss of any personal property.

(2) If the Tribunal or Court determines that a worker has an employment grievance by reason of being unjustifiably or unfairly dismissed, the Tribunal or Court may—

(a) in deciding the nature and extent of the remedies to be provided in respect of the employment grievance, consider the extent to which the actions of the worker contributed towards the situation that gave rise to the employment grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been decided accordingly.

(3) If the remedy of reinstatement is provided by the Tribunal or the Court, the worker must be reinstated immediately or on such a date as is specified by the Tribunal or the Court and, notwithstanding an appeal against the determination of the Tribunal or the Court, the provisions for reinstatement must, unless the Tribunal or the Court otherwise orders, remain in force pending the determination of the appeal".

[28]. The worker left employment on 19 November 2009. The unlawful dismissal case was reported on 11 December 2009. The case was heard on 8 February 2011 and judgment delivered 11 May 2012. The employer cannot be held to be responsible for the delay from 8 February 2011 to 11 May 2012. There is no evidence of any new employment or any mitigation of loss. The employee should have been subjected to cross-examination on why she did not find a new employment and mitigated her loss. She is obliged in law to do so.

[29]. Without all that evidence and limited evidence at hand it is evident that the employee has lost some wages as a result of the grievance. The employee was expected to at least find an employment in the six months because there is no evidence from her that she could not.

[30]. In light of the limited evidence, I order that the employer pays to the employee part of the wages lost as result of the grievance under s.230 (1) (b) which equals to 3 months wages and all the wages and benefit due to the worker.

[31]. I will not reduce any remedy under s. 230 (2) as it was not in the control of the worker to comply with the procedures of the termination. The misconduct and incompetence of the worker justified the cause for the dismissal. The ERT found that the cause for the dismissal was justified. There is no appeal against that finding and I cannot make a finding on that aspect again as I have not been asked to. The dismissal of the employee is sufficient punishment to her. In view of that I am not giving her total wages lost but only a meagre sum for not been accorded the procedural right. That in my view is justified under s. 230 (1) (b) of the ERP.

Final Orders

[32]. In the final analysis I uphold the orders of the ERT except to allow the appeal on the ground that there was no evidence that the dismissal was unfair. I have found that the termination was not lawful in that the procedure leading up to the termination was in breach of the statutory requirement in carrying out summary dismissal.

[33]. The remedy for humiliation, loss of dignity and injury to workers feelings is set aside but the same remedies are granted for unlawful termination.

[34[. The employer thus has to pay to the employee 3 months wages lost as a result of the grievance and all the benefits due to the worker.

[35]. There shall be costs in favour of the respondent in the sum of $1000 to be paid within 21 days. The costs are summarily assessed.

Anjala Wati

Judge

17.02.2014

To:

1. *Mr. Fa for the appellant.*
2. *Mr. Vakaloloma for the Respondent.*
3. *File: ERCA No. 10 of 2012.*