

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA NO. 16 OF 2012

BETWEEN: CBM SHIPPING LIMITED
APPELLANT

AND: THE LABOUR OFFICER
RESPONDENT

Appearances: Mr. Diven Prasad for the Appellant.

Mr. Vakaloloma for the Respondent.

Date and Place of Judgment: Monday 17 February 2014 at Suva.

Coram: The Hon. Justice Anjala Wati.

JUDGMENT

Catchwords:

Employment Law - Appeal- Unlawful and Unfair Dismissal- Trial Courts finding on credibility not to be disturbed easily.

Legislation:

The Employment Relations Promulgation 2007 ("ERP"): s. 23(3).

The Cause

- [1]. At the Employment Relations Tribunal ("*ERT*"), the employee brought a case for unlawful and unfair dismissal. On 6 September 2012 the ERT held that the employee was unjustifiably and unfairly terminated. The appellant appeals against that decision.

[2]. The remedy provided to the employee by the ERT was as follows:-

- “(i) Under section 230 (1) (b) the reimbursement to Mr. Vunaki of 2 years wages lost by the worker as a result of the grievance.*
- (ii) Under section 230 (1) (c) the payment to Mr. Vunaki of one year’s wages as compensation for humiliation, loss of dignity and injury to feelings; and.*
- (iii) Under section 230 (2) (a) and (b) reduce the total remedies in (i) and (ii) above by 6 months”.*

Evidence Adduced at the ERT

[3]. The evidence adduced at the ERT was well and properly summarised by the Chief Tribunal at paragraphs 3.1 to 3.21 of the judgment. I can only reproduce the same for reasons of efficacy.

“3.1. The Fleet Superintendent, Mr. Hector Smith gave evidence for the employer that Mr. Vunaki commenced employment on 10th September 2006 until 17 March 2009 when he finished off as Chief Officer of the Tug Tui Wailevu. Mr. Smith added that initially he was a responsible officer but later on developed some disruptive behaviour and that was the reason why he was given final warning and suspended on 17th March 2009 for 2 days.

3.2 Mr. Smith continued that the suspension letter given to Mr. Vunaki requested him to reply in writing whether he wishes to change his attitude in order to continue working in the company. Mr. Vunaki did not reply in writing and he has not resigned. Mr. Smith also told the Tribunal that the company also paid for Mr. Vunaki’s education between 7 August 2007 and 30th November 2007 as a way of supporting qualification wise and hoping that it would lead to a change in attitude.

3.3 Mr. Smith ended his examination in chief by confirming that Mr. Vunaki was not terminated but suspended for 2 days and he had asked for written replies on whether or not Mr. Vunaki had changed his attitude to work. Mr. Vunaki did not reply or turn up to work.

- 3.4 Under cross-examination, Mr. Smith could not recall Mr. Vunaki coming back to see him after the suspension on 17th March 2009 when he was served the suspension letter, but agreed that he saw Mr. Vunaki working for another employer at Walu Bay.
- 3.5 On the grievance procedure, Mr. Smith explained that the employer uses the letter system that works this way; management sends out letters to staff to remind them of their responsibilities and in their weekly discussion they diagnose the various replies from the staff. The letter is written by Mr. Smith in consultation with the Master and the final say is with Mr. Smith.
- 3.6 On the actual suspension, Mr. Smith agreed that it was on 17th March 2009 and the letter was written on the same date and left at the reception as he did not have the contact address for Mr. Vunaki. Later on in cross-examination, Mr. Smith agreed that he had Mr. Vunaki's personal contact number and when asked as to why he did not contact him, he argued that Mr. Vunaki was not dismissed as he was supposed to be at work 2 days after the suspension.
- 3.7 Mr. Vunaki is now 42 years old, married with a child and the wife is working at CWM Hospital. He is now working as a Second Officer with CV Shipping. In his evidence in chief, he told the Tribunal that Mr. Smith called in 2006 to serve as the Chief Officer on the Tug Tui Wailevu which belongs to CBM Shipping.
- 3.8 Mr. Vunaki confirmed that he did not sign any employment contract with CBM Shipping and his duties included supervising the handling of cargo during loading and checking the safety vessel for the next voyage. Mr. Vunaki then told the Tribunal the background of the events leading up to him losing his employment with this employer.
- 3.9 Mr. Vunaki took the Tribunal back to 14th March 2009 when the Tug Tui Wailevu was on the voyage from Labasa back to Suva and on reaching the waters of Nukulau Passage, he handed over the watch to the Captain who was furious that someone had used the credit on the company mobile, so he took the phone and threw it at the side of the deck breaking it into pieces. Back in Suva, Mr. Smith called the Captain and Mr. Vunaki into his office and advised him to pay for the phone. Mr. Vunaki told the Tribunal that he refused as he did not break it, the Captain did. Mr. Vunaki explained to the Tribunal that it was immediately after that refusal that Mr. Smith turned to

him and ordered "you go pack your things from the boat; I do not want to see you in this office and do not want to see you near the boat". That was the reason why he left this employer.

- 3.10 Mr. Vunaki stayed away for about 3 months then went back to Mr. Smith on 3rd June 2009 asking for his work back as he was virtually broke. He said that Mr. Smith advised him that he did not have any work for him. Again on 15th July 2009, Mr. Vunaki made another attempt of trying to be re-employed with CBM Shipping but the answer was the same.
- 3.11 Then came November 2010 when the Captain of Tug Tui Wailevu came searching at his place in Raiwaqa for him to serve as Chief Officer on another trip. Mr. Vunaki agreed that he was a bit hesitant, since his case was before the Tribunal. Mr. Smith was away overseas at this particular time, so the Captain arranged with one Mr. Adrian the Accountant for Mr. Vunaki to take the trip as the Chief Officer.
- 3.12 There was no second trip as Mr. Smith was back in the office and got another Chief Officer to replace Mr. Vunaki who was paid wages for the trip taken and sent home.
- 3.13 Looking at the history of his employment at CBM Shipping, Mr. Vunaki said that he was not given any verbal warning but remembered receiving a warning letter from Mr. Smith but could not recollect its content. Mr. Vunaki added that this employer does not have any grievance procedure and Mr. Smith controls everything as everybody is answerable only to him.
- 3.14 Mr. Vunaki was then shown the document dated 17th March 2009 that Mr. Smith referred to as the warning letter, suspending him for 2 days. Mr. Vunkai recognised the signature to be that of Mr. Smith on the left hand and his signature on the right and when asked as to the date he received that letter, Mr. Vunaki told the Tribunal that he received it on 6th October 2009 in front of Mr. Haribans Narayan the Mediator in the mediation room.
- 3.15 Mr. Vunaki was next shown a copy of his seamen's record book which shows the date of engagement and the date of disengagement on a particular vessel, and the record book is normally signed by the Captain and stamped by the company. Mr. Vunaki stated that authorisation for the company's stamp is done only by Mr. Smith and in

that connection the claim by Mr. Smith that he did not see him again in June 2009 is false.

- 3.16 *Mr. Vunaki further told the Tribunal that he went back to Mr. Smith on 15th July 2009 asking for work as he was about to get married and needed money but the answer was the same: no work for Mr. Vunaki. At this juncture, Mr. Vunaki reiterated that at that time, he still had not received any letter from the employer whether it be suspension or termination. Mr. Vunaki also added that other employees were treated the same as there was no grievance procedure.*
- 3.17 *Under cross-examination Mr. Vunaki repeated that he was not given any letter on 17th March 2009 and that is the reason why he did not know whether he was suspended or not. He also told the Tribunal that he again worked for CBM Shipping in 2010 and was paid for that work.*
- 3.18 *Still under cross-examination, Mr. Vunaki agreed that the employer paid for his further training with a fee of \$1,000 plus wages totalling \$4,000. He was then asked that if the employer paid for his training to the tune of \$4,000 would the employer terminate him. Mr. Vunaki answered that he would never terminate but give that worker a suspension letter by hand and make sure that he received it.*
- 3.19 *On re-examination, Mr. Vunaki explained that the Managing Director of the Company, Mr. Smith asked him if he wanted further training at the Maritime School and when he agreed, the Company paid for his fees and asked him to sign a bond. He did not sign that bond.*
- 3.20 *Mr. Joe Tasman Tehana gave evidence for the grievor. He stated that he worked for the employer in 2006 as a seaman until January 2007 when he was terminated over the filling of a 20 litre diesel in Savusavu. He outlined to the Tribunal that once the tug boat arrived in Suva he was called into the office and Mr. Smith told him to pay for the 20 litres diesel and go home. There was no disciplinary hearing, no warning letter and no termination letter.*
- 3.21 *Under cross examination, Mr. Tehana agreed that he did not raise a grievance with the Ministry of Labour”.*

The Findings of the ERT

- [4]. The Tribunal found that there was no evidence produced to say that there was an employment contract between the parties but that a *"Consort Shipping Crew Conditions of Agreement"* was attached to the appellant's written submission which resulted in the ERT to presume that the contract related to the seaman and captain. There was no evidence that the agreement applied to the captain and crew of the Boat Tui Wailevu. The ERT held that the absence of a written contract was a clear breach of the ERP.
- [5] The ERT found that there was no grievance procedure but the employer dealt with the employees by writing letters to them. That was an impersonal way of dealing with disciplinary issues and denied the worker natural justice and the benefit of the good faith provisions in the ERP.
- [6]. The ERT found that the employee was in fact not suspended as alleged by the employer but terminated. The employee believed he was terminated because he was never served with the suspension letter until 6 October 2009. The ERT believed the evidence of the employee in that on 17 March 2009 the employee was not served with any letter but told *"you go pack your things from the boat, I do not want to see you in this office and do not want to see you near the Boat"*.
- [7]. The ERT found that there was constructive dismissal.
- [8]. The evidence of the employer was rejected for numerous inconsistencies. In his evidence in Chief, the employer stated that he gave the suspension letter to the employee on 17 March 2009. In his cross examination he said he left the letter at the reception because he did not have the employee's contact. Then under further cross - examination he revealed that he had personal contact details of the employee.
- [9]. The ERT stated that under the new regime of good faith between the parties, the Tribunal is willing to imply into Mr. Vunaki's contract, terms obliging the employer to maintain the relationship of trust between itself and its workers, not to treat its workers arbitrarily, capriciously or inequitably, not behave intolerably and to behave in accordance with good and acceptable workplace practice based on the exchange of good faith. These implied terms were breached by the employer.

[10]. There were no reasons provided for suspension or the termination and the employee was not treated fairly in the office of the employer.

[11]. The actions of the employer was unjustified and the manner of dismissal unfair.

The Grounds of Appeal

[12]. The appellant raised 5 grounds of appeal. They are that the Chief Tribunal erred in law and in fact:

1. *By concluding that the Consort Shipping Crew Conditions of Agreement did not apply to the respondent and crew of Tug boat Tui Wailevu hence there is no employment contract.*
2. *By finding that the respondent was treated arbitrarily, capriciously, inequitably and intolerably and ignored the evidence that the respondent was never terminated but suspended from work.*
3. *By finding that the respondent's evidence was correct and ignored to consider the letter of suspension given to the respondent and being absent from work for more than three months by the respondent.*
4. *In finding that there was no formal letter given to the respondent thus made employment relationships more bitter and unfair when there are evidence of formal letters given to the respondent which he failed or ignored to consider.*
5. *By coming to the conclusion that the respondent was never suspended but unlawfully terminated.*

Appellant's Submissions.

[13]. In respect on ground 1, Mr. Prasad argued that the "Consort Shipping Crew Conditions Agreement" applies to crews of the Tug Boat Tui Wailevu. The respondent was also in the vessel Tui Wailevu so the agreement applies to him. It was an error of law to

find that there was no employment contract between the parties. Under s. 23 (1) of the ERP a contract can be an oral or a written one.

- [14]. On the second ground of appeal, it was contended that the employee was not treated arbitrarily, capriciously, inequitably and intolerably. The employer Mr. Smith however did lash out words in anger but the employee was only suspended from work. He should have reported to work after 2 days of suspension but he reported after 3 months and gave evidence that he thought that he was terminated. The employee has no right to assume that he was terminated. He should have come back to work. The employer had the right to reject the employee if he came back after 3 months. It was the actions of the employee that terminated the employment relationship. The Tribunal is merely implying that the respondent was treated unfairly.
- [15]. On the third ground, Mr. Prasad argued that the employee had breached his duties toward the employer.
- a) by being not present in his location as per the instructions given.
 - b) not supervising the crew at all and leaving the crew members to neglect the steering of the boat and
 - c) by not securing the ship's mobile Vodafone as instructed by the master as that was his responsibility.

Mr. Prasad said that the above breach of the contract by the employee could cause serious damage to the boat and injury to the crew members if the engineers had not arrived on the scene. As a result the employee was suspended. When he did not turn up to work, the company considered the relationship terminated

- [16]. In respect of grounds 4 and 5, Mr. Prasad submitted that there is evidence of formal letters given to Mr. Vunaki. One was given on 17 October 2008 and the other on 17 March 2009. Mr. Osea Vunaki admits to receiving a warning letter and that he was aware that verbal warnings are given by Mr. Smith. Mr. Osea Vunaki states that he went to Mr. Smith's office on 17 March 2009 to attend a meeting regarding the damage to the phone. Mr. Smith told the Tribunal that he had a discussion with Mr.

Vunaki that he was suspended for 2 days and told him to come back but he did not show up. If the ERT assumes that the formal letter was not given then at least there is evidence of the discussion on 17 March 2009. Mr. Vunaki thus ought to have come back to work and not terminate his employment contract.

Respondent's Submissions

- [17]. In response to ground 1, Mr. Vakaloloma argued that the appellant has failed to established the relevance of the purported contract to this case. The fact that there was no employment contract was unchallenged and the appellant is now trying to bring extraneous factors in this appeal.
- [18]. On ground 2, it was submitted that the employee was terminated and the written notice of termination was delivered to the him afterwards. The issue of suspension was superseded by the termination as such the issue of suspension is of no relevance.
- [19]. On the final 3 grounds, Mr. Vakaloloma argued that the matter before the Tribunal was not in regards to suspension but termination. The Chief Tribunal had considered all relevant factors relating to dismissal. The grounds lack merit. If the worker was suspended, he should have continued to have received wages. He was not receiving wages and that indicates that he was terminated.

The Law and Analysis

- [20]. The employer and employee both have given different versions of how and why the employment contract came to an end. The employee states that the captain had been furious over the Vodafone as someone had used the funds from the same. In anger he threw the mobile to the side which then broke into pieces. Upon the boat arriving in Suva, he was called in the office of Mr. Smith. The captain was also there. Mr. Smith ordered Mr. Vunaki to replace the phone. He refused because according to him the captain broke it and the captain should replace it. Then Mr. Smith told him to pack his things and go home and that he was not to be seen by him in his office or come near the boat. The employee considered that he was terminated. He went back

home until he was financially constrained and went to the employer twice in June and July to ask for his work back. He was refused work.

- [21]. The employers version is quite different. It says that on 17 March 2009 the claimant had been instructed to be at the wheel house and supervise the crew on duty on that day and ensure that the boat was being steered properly. The employee was however not at his jobsite when the engineers on duty went to the wheel house as they were concerned with way the vessel was being steered.
- [22]. The employer says that the employee had breached his responsibilities and duties as an employee towards the employer which could have resulted in serious damage to the boat and injury to the crew members if the engineers did not arrive on time. The employee was thus suspended for two days for his serious misconduct. He was expected to return to work after two days of suspension but he did not and came back after 3 months when the employer deemed the contract terminated by the employee.
- [23]. The ERT clearly accepted the employee's version of how things happened on 17 March 2009. The ERT had the advantage of hearing the evidence of the parties, watching their demeanour and deportment and observing the inconsistencies in the evidence. The ERT clearly found the employer's witness Mr. Smith to have been giving different versions of how he communicated the suspension to the employee.
- [24]. First in his evidence in chief Mr. Smith said that he handed the letter to the employee then he said in cross examination that he left it at the reception. After that he said that he did so because he did not have the personal contact of the employee but later admitted that he had the contact detail of the employee.
- [25]. The ERT was perfectly within its powers to make a finding that the suspension letter was never given to the employee until 6 October 2009. I would have drawn a similar conclusion. The letter of suspension has an endorsement of the employee which states that he received the letter on 6 October 2009. There is no other reliable evidence to suggest that the employee was told that he was suspended and that he had to return to work after two days.

- [26]. Mr. Diven Prasad also agrees in his submission at page 4,2nd paragraph of ground 2 that the employer Mr. Smith lashed out at the employee in anger. With that anger and the words that he does not want to see the employee in his office or near the boat will result in any employee to conclude that he or she is dismissed. There cannot be any other conclusion given the fact that terminations in that company used to occur like that.
- [27]. The employee then never returned to work. When the letter was drafted and when it was kept at the reception is not what the employee is expected to know. According to the employee, he was dismissed and he indeed was. The employee thus stopped working because the employer by its words and actions clearly caused the end of the employment relationship.
- [28]. Having found that there was dismissal I find that the ERT was correct in stating that the dismissal was unjustified. The ERT accepted that the dispute occurred over the ship Vodafone. If the Captain broke the phone, then Mr. Smith calling the employee in his office and asking him to replace it is inequitable. When the employee refused to replace the phone, Mr. Smith in Mr. Diven Prasad's words "*lashed out*" at him and chased him away. I will not label this anything less than what the Tribunal said that the employee was treated arbitrarily, capriciously, inequitably and intolerably.
- [29]. If there was a problem between two people both deserved to be heard and dealt with confidentially and politely. Subjecting one person to another's fault is not what is expected in an employment relationship. There has to be mutual courtesy and respect. Each person has his own dignity and that must be respected at the employment and even when the employment comes to an end.
- [30]. The reason for the dismissal was not justified. Given that the employers witness has been lying, his evidence that the employee on that day neglected work is much to be doubted.
- [31]. There may be evidence of a formal suspension. The issue is whether that was ever brought to the attention of the employee until he was told in June and July both that the employer had no work for him. The answer is in the negative.

- [32]. Mr. Diven Prasad argues that the employee should have returned to work at least after 7 days. How can he when he knew that he was not required at the work. Indeed the employee did go back but that was for a fresh employment.
- [33]. Mr. Prasad states that there was evidence of a formal contract. No evidence was led to that effect. Annexing a contract to a submission does not make it evidence. The employee ought to have been given a chance to comment on the contract. The ERT said that there was no employment contract between the parties. The evidence indicated that there was no written contract but there was an oral contract.
- [34]. The Tribunal was correct to imply in the contract, even though oral, under s.23(3) of the ERP that under the *“new regime of good faith between the parties, the Tribunal is willing to imply into Mr Vunaki’s contract, terms obliging the employer to maintain the relationship of trust between itself and its workers, not to treat its workers arbitrarily, capriciously or inequitably, not to behave intolerably and to behave in accordance with good and acceptable workplace practice based on the exchange of good faith”*.
- [35]. S.23 (3) states that *“subject to subsection (4), the terms of a contract must be such terms as are agreed between the parties or which apply by virtue of custom or practice or which are implied by law.”*
- [36]. Even if the ERT recognised the written contract, nothing turns out on that. The verdict of the ERT would not be any different from what was pronounced.
- [37]. In any event Mr. Diven Prasad has failed to bring to my attention what difference would it make to the judgment if the written contract was considered as the contract that was entered into by the parties.
- [38]. I find finally that the ERT was correct in determining that the constructive dismissal was unjustified and unfair. Neither did the employee act in a manner worthy of being terminated nor was he treated fairly when he was being terminated. The employee was lashed out at before a senior when it was not his fault. He was being forced to pay for the phone when he did not break it. He was sent home without any valid reasons. These actions are humiliating and undignified. It definitely hurts the feelings of a worker and causes him or her embarrassment.

[39]. There is no appeal on the quantum so I do not consider it proper to make any comments on the same.

Final Orders

[40]. I dismiss the appeal wholly and affirm the orders of the Tribunal.

[41]. The appellant is to pay to the respondent costs of these proceedings in the sum of \$1500, summarily assessed.

[42]. So ordered.

Anjala Wati

Judge

17.02.2014

To:

1. *Mr. Diven Prasad, for the appellant.*
2. *Mr. Vakaloloma, for the respondent.*
3. *File: ERCA No. 16 of 2012.*