

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 13 of 2015

BETWEEN: PACIFIC FISHING COMPANY LIMITED

APPELLANT

AND: PITA KOROIBOLA

RESPONDENT

Appearances: Ms. M. Rakai for the Appellant.

Mr. T. Tokalauvere for the Respondent.

Date/Place of Judgment: Monday 27 March 2017 at Suva.

Coram: Hon. Madam Justice A. Wati.

JUDGMENT

Catchwords:

Employment Law–Employee v. Independent Contractor: How to distinguish? Whether dismissal unlawful and unfair– when fixing remedies, the court must have regard to why the employee has not mitigated his loss and whether reinstatement is a proper remedy.

Cases:

1. *Australian Timber Workers Union v. Monaro Sawmills Pty Ltd* (1980) 29 ALR 322.
2. *Performing Right Society Ltd. V. Mitchell & Booker Ltd* [1924] 1 KB 762.
3. *R v. Allan; Ex-parte Australian Mutual Provident Society Ltd* (1977) 16 SASR 237.
4. *Re. Porter* (1989) 34 IR 179.
5. *Stevens v. Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

Cause and Background

1. The employer appeals against the decision of the Employment Relations Tribunal (“ERT”) of 17 June 2015 which was delivered upon the employee’s claim for unlawful and unfair dismissal ***(although the form via which the grievance was lodged only included a claim for unfair dismissal)***.
2. The ERT found that the employee was unlawfully and unfairly dismissed. Upon that finding, the ERT ordered the following remedies:
 - (a) ***That the employee be reinstated to his former position;***
 - (b) ***That the employee be paid all the wages lost as a result of the grievance for the period beginning 22 April 2008 to 29 June 2010 (the earlier being the date when the employee was to be told of his fate after suspension and the latter being the date of hearing of the matter);***
 - (c) ***That the employee be paid a further one year’s wages as compensation for humiliation, loss of dignity and injury to his feelings;***
 - (d) ***That the other statutory payments due to the employee including his overtime be paid to the employee.***
3. Pita Koroibola (“PK”) and Pacific Fishing Company Limited (“PFCL”) had entered into a Memorandum of Agreement (“MOA”) on 2 December 2006. The MOA sets out the terms of engagement *(I use the word engagement in lieu of contract as the central issue in dispute was whether PK was an employee or an independent contractor – the word engagement is applicable to both the employee and an independent contractor)*.
4. The terms of the MOA in full are as follows:

“An agreement is made between PACIFIC FISHING COMPANY LIMITED (here-in-after referred to as the COMPANY) as one part and MR. PITA KOROIBOLA (here-in- after referred to as the CONTRACTOR) as the other part as follows:-

1. *THAT the Contractor shall be responsible for co-coordinating, organizing and controlling transport runs associated with the operation of the business of the Company.*
 2. *THAT the contractor shall be responsible for organizing transport particularly for the night shift operations.*
 3. *THAT the Company shall pay the Contractor an equivalent sum of \$10,920 (Ten Thousand, nine hundred and twenty dollars) per annum based on five day operations per week.*
 4. *THAT on basis of the equivalent annual sum and the operational days as stated in clause (3) above, the equivalent daily payable to the Contractor shall be \$42.00 (forty two dollars), payable for the days engaged in organizing the transport during the week.*
 5. *THAT the Contractor shall not be entitled to any form of payment for the days on which he has not been involved in organizing transport, however he will be paid the equivalent payable under clause (4) above for any extra days engaged in organizing the transport in excess of the five days stated in clause (3) above.*
 6. *THAT any payment made by the Company to the Contractor shall be subject to 15% withholding tax”.*
5. On 7 March 2009, the Manager Production of PFCL made a formal complaint against PK to the employer. The nature of the complaint was that on 7 March 2009, as the Manager Production was going out to have lunch at home, he saw two bags of fishmeal for delivery at the main gate. He asked the Company Security Litiana about the fishmeal. She showed him two receipts, one of which was for A grade fishmeal and the other for B grade fishmeal. He questioned Litiana as to who authorized the purchase of B grade fishmeal.
 6. The Manager Production said that Litiana told him that PK should be aware as he was the one who escorted such sales of fishmeal. The Manager Production then instructed another security by the name of Meli to ask PK about the issue. The Manager Production also called one Manasa who confirmed that they were only selling A grade fishmeal and that they needed to find out who was authorizing the sale of B grade fishmeal.

7. The Manager Production then drove out of the Company premises on the main road. Near the shell service station, he saw PK walking towards the factory. The Manager called him near the vehicle. He asked him about the B grade fishmeal and who authorized the sale of it. PK said that there was approval from RML (*whoever that person maybe*) and that he only acted on the sales receipt that is directed to him from Letila Vakatale. He said that he only facilitated the sales and transfer of bags from the fishmeal.
8. The Manager Production then told him that there should not be any sale of B grade fishmeal and that the approval had to come from Production. The Manager said he told PK not to listen to the fishmeal boys as someone maybe cheating the system. The possibility was that the A grade fishmeal was sold at a lower price on the pretext of it being B grade.
9. The Manager Production said that at this stage PK got very angry. He could see PK full of rage and asked him to go and clarify the issue with Letila Vakatale or RML. PK said to the Production Manager that he only acted on instructions. According to the Manager Production, PK told him to shut up or else he will punch him. This he repeated two or three times. PK also used foul language and swore at him in *i-taukei* language.
10. The Manager Production said that he told PK to cool down. He also told PK that he will see him later. The Manager Production drove away and PK was still swearing as he slowly walked towards the factory.
11. On receiving the Manager Production's complaint, the Manager Human Resources wrote to PK setting out the allegations of insubordination against him. PK was asked to submit a written statement to explain the reasons for his behavior. The contents of the letter reads as follows:

“

Allegations of Insubordination

On Friday 7th March, 2008 a report was made against you by Manager Production alleging as follows:

... that on the same day (Friday 07th March 2008) in Levuka (near the Shell Service Station) after being asked something about B Grade Fishmeal, you became agitated, swore at him and threatened to punch him.

The Company treats the above allegation very seriously in view of the fact that you are a contracted employee and the Manager involved is a part of the senior management team of the Company.

In view of the above, you are hereby given seven (07) days to submit a written statement to explain the reasons of your behavior. Failure to do so will result in disciplinary actions taken against you which might lead to termination of contract.

A copy of the report made by the Manager Production is attached”.

12. On 11 March 2008, PK wrote to the Manager Human Resources and provided his explanation. The gist of his explanation was that on the day in question, he was asked by Letila Vakatale to bring two bags of fishmeal to the security main gate. The order was for one A grade fishmeal and the other B grade.
13. PK further explained that Letila had spoken to Avinesh on the availability of fishmeal for sales and upon Avinesh's confirmation that only one bag of B grade fishmeal was left, PK said he was instructed to go to the Fishmeal Plant to ensure that the fishmeal requested was delivered to the main gate.
14. The two bags of fishmeal were receipted by Letila Vakatale. He has no business in the matter except to deliver the fishmeal as directed by Letila.
15. He said that the Manager Production asked him who authorized the sale of fishmeal. PK said he replied for him to ask Letila or RML. The Manager Production said “no”. PK said he was insulted by the way he was spoken to. The Manager Production accused him of being aware of the issue and told him not to sell the fishmeal. PK said that he then told him to check with the sales

representative, RML or whoever is in charge because he had nothing to do with the sale of fishmeal. He was only following orders.

16. PK said that the way the Manager Production spoke to him, he felt insulted. PK said that he could tell with the tone of the Manager Production that he was upset with something and he took his frustration out on PK. PK said that he then used foul language on the Manager. PK said he said **"FUCKENASS"** to the Manager Production and told him once that he will slap him. He never said that he would punch the Manager Production. PK also admitted that he said **"VUTULAKI"** to the Manager Production.
17. PK said that he used foul language because he was humiliated on the accusations made against him. PK then said that this was a work related issue and the Manager Production should resolve this within the company premises and not outside the gate. PK also said at that time that he worked lengthy hours, that is, 12 hours a day and that sometimes he had had sleepless nights. He said that he gets up at 4.00am in the morning to prepare himself for work. With all that he apologized for using foul language on the Manager Production.
18. On 31 March 2008, the employer wrote to PK and suspended his contract of service for a period of 3 weeks with effect from 1 April 2008. The letter of suspension stated that his contract of service was to be reviewed on Monday 21 April 2008.
19. The position of the employer was that PK did not turn up to work for review of his contract. He was absent for 5 days and he was deemed to have resigned from work. According to PK he made several inquiries with the Human resources Manager in regards review of his contract but there were no firm answers. He waited until 31 July 2008 when he lodged a claim.

ERT's Findings

20. On the question of whether the employee was an independent contractor or an employee the ERT examined the evidence of the parties and the law pertaining to who should be regarded as an employee.

21. On the evidence, the ERT found that although PK had said that he was an independent contractor; that was not conclusive to rule that he was not an employee as PK had specifically stated in his evidence that he did not know the position of the law.
22. The ERT said that the position of the law was that an employee was a person who is integrated with others in the workplace even though the employer does not necessarily exercise a detailed control over what he does. What needed to be considered was whether the worker was a vital part of the operation of the workplace.
23. The ERT found that the suspension letter mentioned the words “*contract of service*” between the parties which indicated that PK was an employee and not an independent contractor.
24. On the question of unlawful dismissal, the ERT accepted the unchallenged evidence of the grievor that he called the Human resources Manager and asked whether he could start work. The Human Resources Manager replied that he would contact him at home. The ERT found that the grievor was ready to be re-employed and when nothing was forthcoming from the employer, he filed his claim.
25. The ERT found that there was no evidence from the employer that efforts were made to contact the grievor.
26. The ERT also found that before the employee was suspended he ought to have been told by the Human Resources Manager that he should consult his representative as an advocate as there was a likelihood of a hearing. Although there was a case for summary dismissal, that option was not exercised and instead suspension was resorted to. The suspension letter stated that the contract of PK was to be reviewed on 21 April 2008 which was not reviewed by the employer. PK’s contract was terminated without any reasons and procedure making the termination unlawful.
27. The ERT also found that the termination was unfair as when PK was suspended he had every hope to be called back to work after review of his employment. PK waited for three months and when he was told that his contract was terminated, that humiliated him. This is one person who

had served in the military with honor. He was a local of Levuka and commanded the respect of every person in the community. That had injured his feelings and caused him loss of dignity.

Appeal/Submissions/Determination

28. Aggrieved at the findings of the ERT, the employer appealed. The first ground of appeal was that the ERT erred in law and in fact in finding that PK was an employee and not an independent contractor.
29. The argument that Ms. Rakai put forward under this head is that the employee had admitted in his evidence that he was an independent contractor. The MOA also stated that he was a contractor and that he was paid daily wages instead of hourly wages.
30. Ms. Rakai said that the ERT decided from the suspension letter that PK was an employee when reference was made to the term “*contract of service*” in the said letter. The suspension letter, it was argued, does not decide whether a person is an employee or an independent contractor but the MOA should have been used to determine the nature of the employment.
31. I do not find that the ERT was wrong in stating the law which articulates how to distinguish an employee from an independent contractor. The ERT only used the suspension letter to make that finding however there existed many other facts based on which a finding could be made that PK was an employee and not an independent contractor.
32. Before I identify those facts I must say that because the MOA states the word “contractor”; that does not mean that the party to the contract is an independent contractor: ***Re Porter (1989) 34 IR 179 at 184-5, per Gray J.***
33. The employee in his evidence did admit that he was an independent contractor but he clearly stated that he did not know what the law is and how to differentiate between the two. The admission cannot be fairly used against him. The Court has to make a finding whether he was an employee irrespective of the admission made by him.

34. The Courts have over a period utilized a number of tests in its attempts to find a suitable basis for distinguishing employees from those performing work on some other basis. The most durable of these centres on the concept of “control” by the employer. As *MaCardie J* put it:

“[T]he final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant... An independent contractor is one who undertakes or produces a given result, but so that in the actual execution of the work he is not under the order or control of the person for who he does it, and may use his own discretion in things not specified beforehand”.

Performing Right Society Ltd. v. Mitchell & Booker Ltd [1924] 1 KB 762 at 767 – 8.

35. The distinction, in other words, is between being empowered to tell a person what work is to be done, which may occur in any work relationship, and the more extensive notion of controlling the manner in which that work is done. This does not mean that there must be detailed and specific control in practice.

36. Rather than rely on the control test, even in its modified form, some courts have preferred to adopt what has been termed the “integration” or “organization” test, under which the question becomes whether the alleged employee is “part and parcel” of the employer’s organization: *Australian Timber Workers Union v. Monaro Sawmills Pty Ltd (1980) 29 ALR 322.*

37. However the integration test has not succeeded in displacing control as the principal determinant of the existence of a contract of employment. In *Stevens v. Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16*, the High Court indicated that organizational integration is merely one factor that may be relevant in categorizing a relationship.

38. *Bray CJ* has properly summed up in *R v. Allan; Ex-parte Australian Mutual Provident Society Ltd (1977) 16 SASR 237 at 248*:

“There is no magic touchstone. The court has to look at a number of indicia and then make up its mind into which category the instant case should be put. It is a question of balancing the indicia

pro and con... But the power of a control over the manner of doing work is very important, perhaps the most important of such indicia”.

39. There are no hard-and-fast rules as to which indicia that must be examined. However in addition to looking at the extent of any authority to control, it is especially relevant to ask whether the worker:

- *supplies their own tools or equipment;*
- *is free during the engagement to perform similar work for other “employers”;*
- *carries a risk of financial loss or, by the same token, an opportunity to make a profit from the work; or*
- *is paid according to task completed, rather than receiving wages based on time worked.*

40. Positive answers to any of these questions will militate to some degree against a finding that the contract is one of service. If the answer is negative, it is more likely the worker is an employee.

41. In the case before me, PK was subject to control by the employer. He was basically a transport officer of PFCL who was to organize PFCL’s transport for the various workers in the factory. PFCL dictated to PK the number of hours he had to work and when he was not required to work. Apart from that, PK was asked to do other work by the senior employees for example bringing fishmeal from the Plant. No one questioned him why he was doing other work if he was an independent contractor only to organize transport for the workers.

42. Further, the seniors like the Manager Production would give him instructions on what to do for example the Manager Production asked him not to sell B grade fishmeal. Letilla Vakatale also used to give PK instructions to facilitate the sale of fishmeal.

43. PK was not free to do any work for other employers as he was full time engaged like all other employees at work in PFCL’s factory. He was very well integrated with other employees. Apparently, from the security to the workers, all knew him and knew what work he used to do.

44. PK was paid wages rather than paid for a particular task. He never made available his own vehicles for use by the company. He controlled the vehicle use belonging to PFCL. There was no financial risk or profit that he gained from the work he did.
45. Based on the indicia identified by the cases, I find that PK was an employee of PFCL and that the ERT, although not having examined all the indicia, was correct in finding so.
46. The second ground of appeal is that the ERT was wrong in reinstating PK when it was admitted that he had threatened and verbally abused a Manager of PFCL. It was argued that the action of the employee amounts to serious misconduct. Ms. Rakai also argued that PK was absent for 5 days and that is also a ground for summary dismissal.
47. I will first of all deal with the issue of serious misconduct which the employer says entitled it to summarily dismiss the employee. PFCL must not overlook that it had decided not to exercise its powers to summarily dismiss the employee for what he had admittedly done on the day in question.
48. PFCL had decided to suspend the employee and after the suspension period it **had to review the employment of PK**. PFCL now cannot go back and use the conduct of the employee to say that they could have dismissed the employee. They had decided to suspend the employee and then to review his contract. They did not review the contract. There is not tangible evidence that a decision one way or the other was made on what is the employment fate of PK. There is also no tangible evidence that the information on the review was communicated to the employee.
49. There was no evidence of any letter of termination or any phone call records to suggest that PK was called back to work. In absence of any tangible evidence, the ERT accepted the evidence of the employee that he attempted to find out what was happening to his employment through Manager Human Resources but he was told to wait and that he would be informed. When no information was forthcoming, the employee correctly accepted that his employment was terminated. What else was he to make out of that silence by the employer?
50. The employer says that the employee failed to turn up for a review. There was no requirement for the employee to go back to work for a review. It was for the employer to make a decision and

inform the employee. If they required the employee to be back at work for review then the suspension letter should have clearly stated that. The employee was only absent because he was not told to report to work at any time. Had he been told, he would have reported to work.

51. The employment of PK was terminated without any reasons given to him on 21 April 2008 when his contract of service was to be reviewed. The termination is therefore unlawful for want of proper reasons and procedure.
52. On the question of reinstatement, there is justification in reinstating the employee. The issue that caused PK to behave in the way he did can be explained. The Production Manager to a large extent should accept the responsibility for what happened on the day. He confronted PK outside the work premises where people, on the unchallenged evidence of PK, were watching what was happening. That caused the employee a lot of embarrassment and to calm the situation down he retaliated. What he did is not correct but explicable in the circumstances.
53. PFCL is a large company. It has various employees and it is not run by an individual or a single employer. There will not be any disharmony between the employer and the employee if he is reinstated. The Manager who was involved in the dispute does not need to see and deal with PK on a daily basis. The Manager Production is also an employee. The two can separately and peacefully do the work allocated to them. I do not find that the remedy of reinstatement is unjustified.
54. The third and fourth grounds of appeal are in regards the quantum. The third ground states that the ERT was not correct in awarding lost wages from the period 22 April 2008 to the 29 June 2010 when PK did not turn up for review.
55. The fourth ground of appeal states that the ERT erred in giving compensation for humiliation, loss of dignity and injury to his feelings when the same was not pleaded and adduced in evidence.
56. I will first of all deal with the issue of wages lost as a result of the grievance being wages for almost two years. When fixing remedy for loss of wages, the ERT ought to have examined whether the delay in the hearing of the proceedings from the date of termination can be laid at

the employer's door, why the employee did not find any other work and mitigated his loss, and whether the employer caused any hindrance in the employee getting any work. There were no findings made in this regard.

57. There is no evidence that the employer caused the delay in the hearing of the case. The employee ought to have at least found some work for himself and mitigate his loss. He did not give any evidence why he could not find any suitable work for himself given his reputable status.
58. He could not possibly sit and wait for damages to feed his family. He ought to have found work in at least a years' time from the date of dismissal. I find that only a years' wages lost as a result of the grievance is therefore justified. The employee should have found work in at least a year from the date of termination.
59. The next issue is compensation for humiliation, loss of dignity and injury to the feelings of the worker. There was no evidence from the employee that when the termination of the employment occurred on 21st April 2008 (*the date on which the employment contract was to be reviewed*), the employee was humiliated or the employer acted in a manner which caused him humiliation, loss of dignity and injury to feelings. The ERT gave an award under this head based on its own apprehension that a former military man would feel humiliated. There was no basis to justify this award.
60. The ERT also ordered the employer to make all statutory payments due to the employee. I note that since the employee started work, he never paid his FNPF contributions, nor did the employer contribute any money towards his FNPF. The employee should have been paid his wages less 8 per cent. The deduction of 8 per cent ought to have been paid to his FNPF account. Further, the employer ought to have contributed 8 per cent from its side to the employee's FNPF account (*now the contribution amount has changed to 10 percent*).
61. It is therefore proper that all these monies be paid by the employee and the employer to the employee's FNPF account.
62. The remaining issue is that of overtime payment which was never tried before the ERT. There was no evidence of overtime worked and the amount that is due to the employee. The employer

was not even given an opportunity to address that issue. I find that the award for overtime payment was abstract and not justified.

Final Orders

63. For the reasons I have enunciated, I allow the appeal on the issue of quantum only and order as follows:

- (a) *That employee be reinstated to his former position within 21 days.*
- (b) *If the employee is not already reinstated then he should be paid wages from the date of the order for reinstatement that is 17 June 2015 until the date he is reinstated. The payment is subject to all statutory dues including FNPF.*
- (c) *That the employee be paid lost wages for one year at the contracted rate. The employer must deduct 8 percent FNPF contribution from the employee from this amount and also pay 10 percent employer's contribution to the FNPF.*
- (d) *That the employer must contribute 8 percent towards FNPF from the date of employment until the date of termination. The employer must also deduct 8 percent from the employee's contribution. The applicable contribution rate from the employer at the time was 8 percent. The employee's contribution must be deducted from the sum that is due and payable by the employer in the paragraph immediately preceding this.*
- (e) *The employee shall have costs of the proceedings in the sum of \$1,500. The employer shall pay this within 21 days with effect from today.*


Anjala Wati

Judge

27.03.2017



To:

1. Messrs Sherani & Company.

2. Mr. T. Tokalauvere.

3. File: Suva ERCA 13 of 2015.