

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 2 of 2014

BETWEEN: CARPENTERS FIJI LIMITED T/A MORRIS HEDSTROM

APPELLANT

AND: MAHESH PRASAD

RESPONDENT

Appearances: Mr. E. Narayan for the Appellant.

Mr. Serulagilagi for the Respondent.

Date/Place of Judgment: Friday 03 February 2017 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

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**JUDGMENT**

Catchwords:

*Employment Law – Whether summary dismissal of the employee lawful and fair – assessing remedies for unlawful dismissal.*

Legislation:

*The Employment Relations Promulgation 2007 ("ERP"): s. 33.*

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**Cause**

1. The employer appeals against the decision of the Employment Relations Tribunal ("**ERT**") of 17 January 2014 wherein it held that the termination of the employment of Mahesh Prasad ("**MP**") was unlawful and unfair.
  
2. It awarded the employee the following remedies:
  - (i) **2 years' wages for unlawful dismissal;**
  
  - (ii) **18 months wages for humiliation, loss of dignity and injury to the feelings of the worker for unfair dismissal. This was reduced by 6 months after the tribunal considered that the actions of the employee gave rise to the grievance.**
  
3. In total, the employer was to pay 3 years wages for both unlawful and unfair dismissal.

**Employment Background**

4. MP was a Produce Supervisor at MH, Labasa Outlet. He was a full time employee.
  
5. It was alleged by the employer that MP had sent a text message on the mobile phone of another employee namely Zabin Farzana. Her husband had read the message and called on the phone of MP which was answered by the wife of MP. Upon learning about the text message, the wife came to the workplace of MP and wanted to make an enquiry on the issue. MP had shouted at her and also pushed her.
  
6. It was the employer's contention that the message to Zabin Farzana was sexual harassment to her and that MP's actions towards his wife was misconduct which was used to summarily dismiss the employee.

7. MP was summarily dismissed on 23 September 2011 following an internal investigation by the employer. He was implicated for gross misconduct for which explanation was sought and considered.
  
8. The termination letter of 23 September 2011 sets out the reasons for the termination. It reads:

*"We refer to our internal investigations that we recently completed on you. As you are aware, you have been implicated on a number of issues, which points and constitutes to gross misconduct. These include:*

- *You have used foul language on the premises which is against industry practices in a retail business in front of customers.*
  
- *SMS messages were sent to a fellow female colleague from your phone which had sexual connotations. This had disadvantaged and inconvenienced her, as well as affected her marriage.*
  
- *You have physically "pushed" your spouse and threatened her in presence of the customers, in front of our shop.*

*In our discussions with you two weeks ago, these allegations were laid to you and you were asked to provide your responses to the allegations put on you.*

*In view of the responses given by you and the material evidence, the company has decided to terminate your services effective immediately. You shall be paid a week's wages in lieu of notice.*

*Please ensure that all company assets in your care are returned to the Store Manager. By a copy of this letter the Payroll Clerk is advised to pay you all monies due after all necessary clearances are made".*

***Evidence and Findings***

9. The employer called two witnesses and the employee was the only person who testified on his behalf. The two witnesses for the employer were Mr. Pawan Sharma, the Group Human Resources Manager and Ms. Ranjana Kumar Deo, Assistant Store Manager, MH, Labasa.
10. The material part of Mr. Pawan Sharma's evidence was that he interviewed the employee as regards the complaint of serious misconduct. He testified that the employee denied sending the text message to the fellow employee but admitted that the phone through which the message was sent was his.
11. The employee admitted that he had told his wife to leave the premises. He only pushed her but did not hit her. Mr. Sharma testified that he had seen the text message which was shown to him by MP's wife. He did not record the date and time of the message.
12. Mr. Sharma further said that the statements of the witnesses' were recorded by one Mahen Chand and not by him. He agreed that the statement was not properly recorded.
13. Exhibit F which was the interview statement of the employee indicated that the employee admitted to having shouted at the wife and that his voice was a bit loud.
14. The evidence of Ms. Deo was that she was in the store on the day in question. She was with another employee named Ranjit. MP's wife approached her and spoke to her about the messages in MP's phone from one of their staff and she also saw the messages from MP to the staff.
15. Ms. Deo testified that she saw that MP suddenly came out of his work area and started shouting at his wife. According to her, MP said "*I will chop you*". He then pulled the wife and slapped her. The other staff and customers watched the incident. MP was loud and used foul language.

16. Ms. Deo further testified that she did not speak to MP after the incident as he was very angry and so thought it best to leave him alone for that time. She said that she reported the matter to the Store Manager for his further action.
17. MP also gave evidence. He denied using foul language in front of the customers and that he sent any message to the cashier. He also denied having pushed and threatened his wife. He said he was not aware of the complaint letter and that he did not get an opportunity to question the makers of the letter.
18. In cross-examination, he agreed that he shouted at his wife during working hours but outside the shop.
19. On the allegations of sexual harassment, the ERT found that the employee victim did not ever make a formal complaint to the employer about this. She also did not give evidence as to the nature of the text message sent by MP which amounted to sexual harassment. The letter which was written by her and given to the employer was undated and she was not present to be cross-examined.
20. Even the two witnesses who testified did not reveal what the contents of the message were and whether it was humiliating, offensive or intimidating. The ERT could not therefore make a finding that the text message constituted sexual harassment to Zabin Farzana. The ERT found that the gross violation of Zabin's rights could not be established by the employer.
21. On the question of the incident with his wife, the ERT found that it was personal in nature and there was no complaint from any shopper or bystander that they were affected. The incident happened outside the shop as per the statements of two employees Mr. Peni Nabure and Mahend Chand. Further, the incident was personal in nature and the employer was more concerned about how the public and shoppers reacted to the altercation. The

ERT found that this was not such a serious matter that warranted summary dismissal. This was a single isolated act and summary dismissal was not justified.

### *Grounds of Appeal/Law and Analysis*

22. Aggrieved at the decision, the employer appealed on the following grounds:

1. *That the ERT erred in fact and in law in holding that there was no formal complaint of sexual harassment against the employee when the evidence was produced to show that a complaint had in fact been made.*
2. *That the ERT erred in law in not accepting the evidence that the employee had been made aware of the sexual harassment complaint against him and was given an opportunity to answer both orally and in writing prior to the termination.*
3. *The ERT erred in fact in finding in the absence of any evidence that the employee has suffered loss of wages equivalent to two years.*
4. *The ERT erred in fact in making a finding in absence of any evidence that the employee had suffered humiliation, or loss of dignity for which compensation in the sum of 18 months was ordered.*
5. *That the ERT erred in law in not deciding that in the circumstances the ERT's decision pursuant to s. 230(2) (b) of the ERP should in effect nullify the awards made under ss. 230 (1) (b) and 230 (1) (c) (i).*

23. The first two grounds of appeal can be dealt with together. The first issue is regarding the sexual assault text message that was allegedly sent by the employee MP. The ERT found that there was no formal complaint by Zabin regarding the text message.

24. In fact the two witnesses who gave evidence did not to any extent testify that the complaint was made to them by Zabin and that MP had sent a text message which constituted sexual harassment to her.
25. All the witnesses of the employer seem to only suggest that MP has sent a message to Zabin Farzana. What the nature of the message was and how it was perceived by Zabin to be sexual harassment was not addressed in the evidence.
26. It is possible that MP may have sent a message which could be in reply to what was said by Zabin. It is further possible that the messages were exchanges of each other's feelings or that it occurred between two parties who are adults and that Zabin did not have any issues about the same. One must not overlook the evidence of Ms. Deo who says that MP's wife had spoken to her about the messages by Zabin too.
27. There are so many possibilities given the absence of any evidence from Zabin that the messages constituted sexual harassment to her and that she made a report because of how she felt regarding the message. Zabin Farzana's statement was tendered in evidence as it appears in the records but that statement was not substantiated by Zabin as her own statement. She failed to give evidence on that statement and that cannot be given weight as any person who makes the statement should be produced for cross-examination.
28. She was either conveniently not called or that Zabin Farzana chose not to appear and give evidence. Further, Zabin's statement is only to the effect that MP's wife had come to the workplace one afternoon and wanted to see what MP had texted her. She showed the message which MP's wife started writing in a piece of paper. She never mentioned the content of the text message or that the message constituted sexual harassment to her. In absence of such crucial information being missing, I find that the ERT was correct in finding that the employer could not establish that MP had sent to Zabin Farzana messages which could be classed as sexual harassment under the definition provided for in ERP.

29. The ERT had also made a finding that the employer did not show good faith in interviewing MP as it failed to show to him the statements that it had obtained from various employees and making the makers available for cross-examination.
30. It is not necessary that whilst carrying out the summary dismissal, an investigation be carried out by the employer. In carrying out the dismissal, the employer must be satisfied of the guilt of the employee on the grounds provided for in s.33 of the ERP.
31. Normally to be satisfied of that guilt the employer carries out its internal investigation if the facts are not clear. In that investigation, the employee has no right to be interviewed for his views or be provided with an opportunity to question the employer on certain facts or aspects. This right of the employee will arise if he feels that the termination was unlawful and/or unfair and proceedings are thus instituted in court. The onus then is on the employer to establish the cause in the court proceedings. At this stage in court, the employer's internal investigation normally assists in establishing the reasons. However, that does not create a right for the employee to an oral or written response. If it is provided, the employee is on a much better footing but if it is not, the summary dismissal procedure does not become unlawful.
32. Having said that, this employer chose to provide a right of explanation to the employee which right in fact was not realistic as he was not told what other people had said in their statements for him to clarify the position. Given that, the summary dismissal still cannot be classified unlawful for want of proper procedure as the ERP does not prescribe a right for explanation or hearing before carrying out the dismissal.
33. To that end, the finding of the ERT that the employer did not act in good faith can be a statement that can be treated as a remark that can be made in passing but not substantial to make a finding of whether the dismissal was justified procedurally.



34. The appellant has not raised any appeal on the finding of the ERT regarding the remaining allegations of using foul language at the employer's premises, and pushing and threatening his wife in front of the employer's place of business. I will therefore not interfere with the findings in that regard.
35. The rest and remainder of the grounds of appeal deal with the issue of remedies. The first remedy was two years wages lost as a result of the grievance. The ERT justified this on the basis that the worker was terminated on 23 September, 2011. The hearing of the matter was conducted on 8 October 2013 and the closing submission of the worker was received on 24 October 2013. Since there was a period of two year in between, the ERT thought proper to compensate the worker part of the wages he lost as a result of the grievance.
36. Indeed since the termination until the hearing, the period is two years. The evidence of the worker was that he was at the time of the hearing employed by Fiji Forest Industries. It was then the duty of the employer to cross-examine the employee on when he secured the job and since when was he being paid and whether he was being paid the amount equal to or more or less than what he was being paid by the previous employer.
37. Although the employer did not extract that information, it is still safe to assume that the worker had been in employment prior to the hearing and that he was earning wages. The ERT must justify the award it makes and since the worker was employed at the time of the hearing, wages for the two year period prima facie is not justified.
38. In absence of any information regarding when the employee started work, I find that wages for at least one year should be granted to him in lieu of two years. I have picked one year because it is the duty of the employee to mitigate his loss and seeing that the matter was delayed for hearing it was his obligation to find work for him and feed his family and look after himself. He cannot simply stay out of employment in expectation of damages from the employer. His duty is to mitigate his loss.

39. There is no evidence that this worker has any special skills or qualification which would have enabled him to secure work for himself earlier than expected and so in the absence of any evidence I find that in one years' time he should have found work for himself.
40. On the remedy of 18 months wages to be paid to the employee for humiliation, loss of dignity and injury to his feelings, there was no evidence to this effect that the employer's act of carrying out the dismissal was in a manner which caused these negative feelings which naturally arises in any termination due to the fact of the dismissal itself. If these feelings arise because of the fact of dismissal, remedy for humiliation, loss of dignity and injury to feelings is not justified unless the actions of the employer in carrying out the dismissal causes this feeling.
41. The ERT had also ordered that the 18 months be reduced by six months due to the actions of the employee which led to the grievance. Although the ERT found that a single act of personal problem and family issue and the altercation between the husband and wife is not sufficient to justify the dismissal, it found that the employee's actions contributed to the dismissal. This does not mean that the ERT is finding that the dismissal was lawful but that the employee's actions contributed to the situation.
42. All that occurred was as a result of the alleged sexual message sent by this employee to Zabin Farzana. The wife of the employee created such a situation at the work premise that the employee had to handle the situation in his way to avoid any further confrontations and embarrassment to him. Anyone in his place would naturally act like that because having one's partner to confront an employee at the work place is humiliating.
43. The employer should have intervened and controlled the situation and asked the wife to leave the premises. Instead they allowed the bitterness to brew causing MP to react in the manner he did.

44. I do not find that on the facts of the case, he ought to be held responsible. He did what he did on the spur of the moment and this was a single incident which could have been easily handled by the employer without resorting to dismissal.

***Final Orders***

45. In the final analysis I find that the ERT was correct in finding that the dismissal was <sup>un</sup>lawful *hnl* but erred in finding that it was unfair. I also find that the remedies awarded are not justified and ought to be reduced.

46. I therefore allow the appeal in part for the reasons above and set aside the remedies ordered by the ERT and substitute with an order that the employer pays to the employee wages for 12 months for unlawful dismissal only. This sum should be paid within 7 days from the date of the order. I set aside all the other remedies in full.

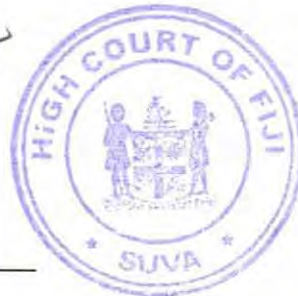
47. Each party must bear their own costs of the appeal proceedings.

*Anjala Wati*

Anjala Wati

Judge

03.02.2017



To:

1. *Patel Sharma Lawyers for the Appellant.*
2. *MC Lawyers for the Respondent.*
3. *File: Suva ERCA 2 of 2014.*