

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 13 of 2012

BETWEEN: NATADOLA BAY RESORT LIMITED

APPELLANT

AND: ISIRELI TAMANITOAKULA AND OTHERS

RESPONDENT

Appearances: Ms. Macedru for the Appellant.

Mr. D. Nair for the Respondent.

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

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

Catchwords:

Employment Law – Termination of Contract – Is it lawful and fair – Reasons on which redundancy can be carried out – process of redundancy –onus on employer to justify cause if it carries out summary dismissal – a person who is summarily dismissed is entitled to true reasons for being dismissed in writing- assessing proper remedies to be provided for unlawful dismissal for employees on fixed term contracts.

Legislation:

The Employment Relations Promulgation 2007 ("ERP"): ss. 4; 33(2); 106; 107.

Cause/Background

1. *Isireli Tamanitoakula; Maciu Naisoso; Apisai Loganimoce; Josateki Maibola; Atekini Sesenibaravi; Kiniviliame Namoumou; Vilikesa Kalou and Inoke Livanasiga ("Respondents")* are former employees of Natadola Bay Resort Limited ("**Resort**").
2. They were employed by the resort for one year with effect from 6 April 2009 except for Apisai Loganimoce whose contract was with effect from 1 October 2009.
3. All the respondents were terminated by the resort on 31 October 2009 with one week's pay in lieu of notice. After the termination they filed proceedings against the employer for unlawful and unfair termination.
4. The ERT found upon a trial that the termination was unlawful and unfair and ordered the resort to pay all the employees the wages for the balance of their contract.
5. Aggrieved at the decision, the employer appealed raising the following grounds:
 1. *That the ERT erred in law by entering judgment against the employer without giving consideration to s. 230(2) of the ERP.*
 2. *That the ERT erred by failing to consider the submissions of the employer in its position that the termination of the employees be considered by the court as a redundancy with due consideration be given to the facts submitted pursuant to s. 230 (2) of the ERP.*
 3. *That the ERT erred in law by stating that the notice period was in breach of the ERP although notice was provided and the workers were paid in lieu of notice.*
 4. *That the ERT erred in fact by not considering the documentary evidence submitted by the employer and the evidence of Ms. Vera Madigibuli, noting that a commercial decision to terminate the workers also related to the manner in which the workers*

were claiming benefits and privileges and abused the facilities of the employer during the course of their engagement.

5. *That the ERT erred in law by analyzing evidence submitted by both parties as amounting to an event of redundancy but made a determination that the terminations were unjustified and unfair.*
 6. *That the ERT erred by failing to provide a link between the facts of the case and the analysis of evidence and the submissions of both parties in order for it to arrive at the decision that the 8 workers be awarded the remainder of their contracts.*
 7. *That the ERT erred in fact by failing to consider the submissions based on the facts and evidence submitted.*
6. Grounds 1, 2, 4, 5, 6 and 7 raise the same issue, that is, whether the evidence and submissions of the parties including that of the employer was given due and proper weight in arriving at the finding of unlawful and unfair termination.
7. The above grounds of appeal appear lethargic and lifeless when it is repeated so many times. Counsel should exercise some vigilance in putting grounds which make sense and are not repetitive. The success of the appeal does not depend on quantity or the number of grounds of appeal.

Evidence and Findings of the ERT

8. At the ERT, two witnesses gave evidence. The witness for the employer was Ms. Vera Madigibuli. She testified that she was the Company Secretary during the period when the workers were employed at the resort. She was also part of the management team that reviewed the resort's project and made a commercial decision to terminate the contracts of all the workers whose services were no longer needed as the Club Villas were completed. She said the security workers became surplus.

9. Ms. Madigibuli further testified that the workers were terminated pursuant to the provision in their contract which says that "*this contract may be terminated by NBRL as per their requirements without notice*". She said that since the resort no longer required the security officers, they could be terminated under this provision.
10. It was said in evidence that the employees were given termination letters through the new security company being Homelink which took over the work of these workers as there was need for security officers at the resort. Homelink security officers did not stay in Yatule Resort like these workers for whom food and liquor was provided.
11. One of the employees gave evidence on behalf of the others. He was Mr. Maciu Naisoso. He testified that one of the security officers from Homelink gave him his termination letter. He was helpless as when the letter was given, he was surrounded by 30 security officers from Homelink.
12. On the nature of their work, he testified that they provided security for Yatule Resort and Golf Course and trained the local villagers on security work.
13. He said that the termination cannot be a commercial decision as when 8 of them were terminated, 30 more were hired in lieu.
14. Having heard the evidence, the ERT found that the contracts were "*diabolic*" in nature. On one hand it stated that the contract was fixed term and on the other it stated that it can be terminated without notice.
15. The ERT found that the terminations were for a cause and that notice was given to the employees. That termination was not proper because all the workers were engaged on a fixed term contract and as per *Williams v. A-G [1999] 2 ERNZ 457* "*a fixed term contract can include provisions which allow both parties to terminate early. Such contract can only terminate before the expiry of its term upon the happening of an event defined in the contract, which may include redundancy situation as well as other particular events*". The ERT found

that in the employment contracts of these employees there was no clause which defined the basis on which the contracts can be terminated. It was found that the contract only said that it can be terminated "by NBRL as per their requirements without notice". It did not make a specific reference to a situation which could give rise to termination.

16. The ERT also found that the situation leading to termination was similar to redundancy but the resort did not communicate this to the employees. There ought to have been consultation if redundancy was the reason why the fixed term contracts had to be brought to an end.

Issues/Law and Analysis

17. The position of the employer in its preliminary submissions at the ERT was to treat this termination as redundancy of the workers. It was said that the employees had consumed food and liquor at Yatule Resort for 6 months and got the same billed to the employer which exceeded the amount of \$40,000. There was increasing costs so a commercial decision was made to terminate the workers.
18. The employer said that although this was a fixed term contract, there is a provision in the contract which says that "*notwithstanding the fixed term nature of this Contract, this contract may be terminated by NBRL as per their requirements without notice*"
19. The workers had created a situation which incurred rising costs for the resort and a commercial decision had to be made so the workers were made redundant.
20. At the appeal stage, although the employer still maintained that the workers were made redundant, it in the same breath argued that the workers were terminated for misconduct as they increased costs for the resort and became a liability on it. It was said that the contract provided for termination without notice upon serious misconduct or misbehavior.

21. The two pronged argument by the employer's counsel is contradictory. It fails to realize that it cannot make a worker redundant and terminate for cause at the same time. It has to exercise either option and both options have to follow a particular method which I will speak of in a while.
22. I will first of all start with the redundancy. The issue is whether the employer had a right to make these workers redundant. For that finding to be made, let us examine when a redundancy can be effected and the procedure that ought to be followed.
23. Section 4 of the ERP defines redundancy to be "*no longer needed at work for reasons external to a worker's performance or conduct pursuant to the reasons and processes set out in Part 12*".
24. What is clear from the definition is that the employer cannot use the employee's act of incurring expenses by eating and drinking as a reason to make them redundant because a worker's performance or conduct cannot be used to make him redundant.
25. Further, the evidence tendered in the preliminary submissions was never extracted in evidence from the employer's witness or through cross-examination of the employee's witness. The employer's witness never testified regarding the unauthorized bills that the employees had incurred. Similarly, the employee's witness was never asked any question to this effect.
26. The ERT was thus not bound to consider this as evidence. Evidence cannot be tendered through submissions as they are not subject of scrutiny in court. It is simply a view which one holds and submits and not evidence which needs to be considered.
27. The employer says that this termination should specifically be considered as redundancy for economic reasons. Redundancy for economic reasons means that employer is not making profits from the business and it is not able to sustain some workers. The inability to make profits must be external to a worker's performance or conduct.

28. What then are the reasons and processes that the employer ought to have used to effect redundancy? That is provided for in Part 12 as indicated by the definition of the term "redundancy".
29. S. 106 of the ERP provides the objects of the provisions and processes on redundancy. It says that the object is to provide *"the workers with some degree of uncertainty about the problems faced by the employer and the assurance of compensation"*.
30. There was no evidence that the workers were told that the employer was contemplating redundancy and the problems that it faced regarding the profits that it was making. How can the employer then claim to have acted in spirit of the legislation? On the evidence, there is gross breach of the objects of the ERP.
31. S. 107 sets out the reasons why redundancy can be carried out. It says that it can be carried out for economical, technological, structural or similar nature. It also defines what economical, structural and technological means. I will confine the finding to what economical means as the employer says that the redundancy was due to economic reasons.
32. Economical means to be maintained for profit. I have already said that the aspect of profit must be external to the worker's performance or conduct. The employer in this case is using the employee's conduct to justify that it had increased expenses. That is not permitted by law to be used to carry out redundancy.
33. There is no evidence to support the finding that the workers became surplus and that they were no longer needed in the resort. It was never extracted in evidence that since they became surplus, they could not be maintained for profit.
34. The employer's own evidence was that 30 security officers were hired from Homelink. If 30 security officers were hired from Homelink, why could not the employer maintain the 8 and

ask them to find their own accommodation and food? That is the reason it gives why it needed Homelink in lieu. It was said that Homelink securities did not need food and shelter. Well, the employer could have maintained these employees on the same condition.

35. The employer's letter of termination states the reason for termination. It clearly says that the employees were terminated because the "*construction of the Inter Continental Resort is now almost complete with Club Villas on the hill due to be handed over by the builder today. As a consequence, NBRL has reassessed its security and other labor requirements*".
36. The above clause in the termination letter clearly indicates that there was no longer need for the security officers as the building was complete. If that is so, why then were Homelink security officers employed? The employer failed to establish the reason for redundancy as per the termination letter.
37. There was therefore no basis on which the redundancy could be carried out, although there is provision in the fixed term contract that it could be carried out for reasons of redundancy.
38. I do not find that the ERT was correct in saying that a fixed term contract cannot be terminated without notice. It can be terminated if there is provision in the contract to be so done without notice for example in cases of causes like misconduct. However in cases of redundancy, the contract cannot curb the employees' statutory right to be told 30 days in advance that they would be terminated. I will deal with this in detail shortly.
39. I must deal with the last two clauses of the termination letter which reads:

"Once we have had an opportunity to review our staffing we may be in contact about re-employment opportunities.

We thank you very much for your hard work to date which has resulted in such a first class facility for FNPF for which Fiji can be very proud".

40. The above is quite contrary to the submissions of the employer that the employee's incurring huge bill at Yatule Resort did not make it economically viable to continue with their employment. If that was the case, why did the employer falsely give hope to the employee that depending on the need they may be contacted again? This is definitely not good faith on the part of the employer to make false representations to the employees who have worked very hard as per the employer's claim to make the resort something for which the country could be proud of.
41. Let me also examine whether the right process was followed in carrying out the redundancy. S. 107 (1) (a) and (b) of the ERP outlines the process that ought to be followed if the workers are to be terminated on the grounds of redundancy.
42. It says that if an employer contemplates termination of the employment by redundancy of the workers, *the employer must provide the workers, their representatives and the Permanent Secretary not less than 30 days before carrying out the terminations, with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.*
43. The above section also provides that *the employer must give the workers or their representatives, as early as possible, an opportunity for consultation on measures to be taken to avert or minimize the terminations and on measures to mitigate the adverse effects of any terminations on the workers concerned, such as action to attempt to find alternative employment.*
44. My first observation is that the ERT was correct in finding that the process of redundancy had not been followed although what appears is that there was redundancy. 30 days prior to the termination, the workers, their representatives and the Permanent Secretary were not provided any relevant information as required by law. The employees were also not provided with an opportunity for consultation.

45. In that regard the employer's contention that the contract allows redundancy without notice is contrary to law and not sustainable. The ERT was correct in finding that in a fixed term employment the redundancy cannot be carried out without complying with the spirit of the legislation. This applies to all contracts whether it be fixed term or otherwise. One cannot contract out of providing a statutory right which is less advantageous to the workers.
46. It was further argued by the employer that they had paid one week's notice in lieu of wages. The statutory 30 days period to provide the requisite information and the workers right to consultation cannot be curbed by a week's wages. The weeks' notice therefore is of no help to the employer's case.
47. On the question of redundancy, I find that the employer had no basis to carry out the terminations on the grounds of redundancy nor did it follow proper procedure in doing so making the termination of the employees unlawful.
48. The next contention of the employer was that the employees were terminated for gross misconduct. That evidence was never led during the trial or any information put to the employee's witness regarding their conduct. If the employer says that it treats the billing for food and beverages as misconduct then it must explain how the misconduct arose? Why were the employees allowed to eat and drink by the Yatule Resort? The employer should have made it clear to the resort that it is not responsible for the employee's food and drinks bill. If the employer made that clear, the employees would not have been served with the food on the resorts account. The employer allowed the bills to escalate for the 6 months. It did not take sufficient action to put a halt to what it says was unauthorized.
49. In any event, this aspect of bills and misconduct as a result was not put to the employee for him to answer the allegations. Even the employer's witness did not tender any evidence in court to that effect for the employee to clarify the position. There was also no evidence

from the employer as to the basis on which these bills were incurred in its name and how it was permitted to be when they had not authorized the employees. Yatule Resort would not provide and bill the resort if it is not permitted to do so.

50. Moreover, the letter of terminations does not mention any aspect of misconduct. Misconduct can give rise to summary dismissal without notice and that is provided for in the contract. However the employer must provide the reasons for the dismissal and that is required by s. 33 (2) of the ERP. The letter of dismissal does not include any reasons which show that the employees were terminated for cause.
51. If s. 33(2) requires that written reasons be given for summary dismissal then those reasons must be proper and true reasons otherwise the purpose of the requirement is lost. What is the need to give false reasons when the real reasons for termination are something else? This is again one area where the employer must show good faith. If misconduct was the real reason why the termination occurred, the employer would not have said in the termination letter that the employees could be reconsidered for work if there was a need.
52. I do not find that there was enough evidence to terminate for misconduct of the employees and that proper process of giving proper reasons in writing at the time of the dismissal was followed. This again makes the termination unlawful.
53. I find that the ERT was correct in its final determination that the termination was unlawful. There was no evidence however to say that the termination was unfair due to the manner in which the employees were treated at the time of the dismissal.
54. Most employees had completed half of their contract. They had almost 6 months more to complete the contract except one employee who had started work in October and terminated in October. Since this was a fixed term contract, the expectation of the employees was to earn wages for one year. It is only fair that they be asked to be compensated for the balance of the contract.

55. It takes at least parties between 6 months to a year to find work when they do not have any special qualification. There is no evidence to suggest that these employees had special skills or qualifications which would make it easier for them to find work very early.

56. I appreciate that the employees must always mitigate their loss and with that principle in mind I find that between 6 to 12 months' time they ought to have found work for themselves.

57. I do not have any reason to disturb the findings of the ERT on the question of proper remedies to be paid to the employees.

Final Orders

58. In the final analysis, I find that the ERT was correct in finding that the termination of the employees was unlawful.

59. I also find that the ERT's finding that the termination was unfair was not supported by evidence and thus set aside the same.

60. I uphold the remedies that the ERT had ordered to be paid to the employees. I re-affirm the order of the ERT that all the employees must be paid the balance of their contract.

61. The employer must pay the employees the balance of their contract no later than a month from the date of the order.

62. I also order the employer to pay costs of this proceeding in the sum of \$2,500. The sum shall be paid within 21 days.


Anjala Wati

Judge

03.02.2017



To:

1. *FNPF Legal Services for the Appellant.*
2. *Mr. D. Nair for the Respondent.*
3. *File: Suva ERCA 13 of 2012.*