IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 4 of 2017**
BETWEEN:	**SUVA PRIVATE HOSPITAL**
	APPELLANT
AND:	**BIMAL NARAYAN**
	RESPONDENT
Appearances:	*Mr. F. Haniff for the Appellant.*
	Respondent in Person.
Date/Place of Judgment:	*Friday 26 January 2018 at Suva.*
Coram:	*Hon. Madam Justice A. Wati.*

A. Catchwords:

Employment Law – Summary Dismissal – factors to be considered when determining whether the dismissal is fair and lawful – material evidence distinguished from irrelevant considerations - the award of remedies to be justified.

B. References:

(i). Legislation

1. ***The Employment Relations Promulgation 2007 ("ERP"): ss. 33; 34.***

Cause

1. The employer appeals against the decision of the Employment Relations Tribunal ***("ERT")*** of 27 February 2017. In its decision, the ERT found that the employee Bimal Narayan was unlawfully and unfairly dismissed from employment on 20 August 2008.

2. Upon the findings, the ERT ordered the employer to remedy the employee in the following manner:

   a. ***Unlawful dismissal – 2 years lost wages, since a period of 3 years had elapsed since the date of dismissal to the date of trial; and***

   b. ***Unfair dismissal – 1 year's salary as compensation for humiliation, loss of dignity and injury to the feelings of the worker.***

   The total award was therefore 3 years' wages which was reduced by 6 months' to reflect the contribution of the employee for giving rise to the grievance. I will comment on this aspect later.

3. Aggrieved at the decision, the employer appealed on both the finding of liability and quantum of award made to the employee.

Grounds of Appeal

4. The grounds of appeal are that the ERT erred:

   1. *in law in applying section 103(1)(a) and (b) of the New Zealand Employment Relations Act 2000 in determining the grievance instead of ss. 33(1), 33(2) and 34 of the Fiji ERP.*

   2. *in law in holding that there was an obligation on the part of an employer to hear the employee out when there is no such procedural requirement prescribed under the ERP.*

3. *in law and in fact in solely relying on a date error of 17 August 2008 for an unauthorized salary advance in the letter of termination of employment when the evidence was that the employee had taken unauthorized salary advance on 7 July 2008.*

4. *in law and in fact in failing to give sufficient weight to the fact that the employee had apologized in writing and counselled in April 2008 for taking an unauthorized salary advance and thereafter taking a further unauthorized salary advance on 7 July 2008.*

5. *in law and in fact in failing to consider at all that Orica Fiji also terminated the employee's employment for using a Orica Company Cheque to make a payment of $15,420.08 to himself and entering in the payment voucher a sum of $80.00 for that cheque.*

6. *in law and in fact in awarding two years lost wages under s. 230(1)(b) of the ERP without considering any of the factors necessary before making an award for lost wages and without providing any reasons for such award to be made.*

7. *in law and in fact in awarding "lost wages" under s. 230(1) (b) of the ERP when no such evidence was led by the employee.*

8. *in law and in fact in awarding one year's salary as compensation for unfair dismissal when the evidence was that the employee was treated with dignity at the time of his dismissal and that the award is unreasonable (Ground 9 combined)*

Background: Employment and Termination

5. Mr. Bimal Narayan was employed by SPH as an Accounts Officer from 18 December 2006 to 20 August 2008. He was suspended from duties on full pay from 14 August 2008. The reason for his suspension is outlined in the letter dated 14 August 2008. It reads:

"Following our auditors report, investigations need to be carried out in regards to the misappropriation of hospital funds in the form of salary advancements that you may have made.

Under these circumstances, we have no choice but to suspend you from duties on full pay, pending the conclusion of our investigation.

I trust you will make yourself available, to assist us in our enquiries when needed".

6. Subsequently on 20 August 2008, Mr. Narayan was summarily dismissed from his employment. The letter of dismissal of the same date clearly states the reasons for his dismissal to be:

    1. ***that Mr. Narayan had, on 17 August 2008, in the position of a payroll clerk, with facilitation by Ms. Arti Emmanuel who was in charge of the petty cash, made an unauthorized salary advancement to himself in the amount of F$250.00. This act was classified as theft.***

    2. ***that during his suspension Mr. Narayan refused to provide the hospital with the hospital's safe combination number.***

Evidence

7. At the hearing in the ERT, the employer had accepted and conceded that the date on which the letter of termination alleged Mr. Narayan made an advancement of salary to himself is wrong. The letter of termination alleges that an advancement was made on 17 August 2008. This was the time when the employee was on suspension. Then correct date should have been 7 July 2008.

8. The crux of the employer's evidence and the case was that the employee's in the Hospital were using *"petty cash reimbursement request"* form to obtain salary advancements when they were supposed to be writing letters when they needed salary advancement.

9. In evidence it tendered a petty cash reimbursement request form dated 7 July 2008 by Mr. Narayan. This was tendered in evidence as Exhibit 14. The form has details to the effect that the request was made for $200 for salary advance. It is alleged that Mr. Narayan signed the same and obtained a salary advancement of $200. The form shows that someone had approved the same and the allegation is that that person is Ms. Arti Emmanuel.

10. To support its contention that salary advances were to be made by a letter in writing, the employer tendered 3 letters from its other employees. These letters were both pre and post Mr. Narayan's termination. The tenor of all letters was basically the same. It contains a request for an advance, provides the reasons for the same and proposes how the payments were going to be made.

11. The employer also gave evidence that earlier in April 2008; Mr. Narayan was warned for obtaining salary advance in a similar fashion. The evidence of the employer further indicated that Mr. Narayan had apologized on 28 April 2008 from taking the money from petty cash without proper authorization.

12. The evidence of the employer was that after the apology was accepted, Mr. Narayan was verbally warned not to take money without proper authorization from Manager Finance, counselled on the proper procedure and was requested to formulate a policy to request for funds prior to pay and the authorization process.

13. The hospital stated in evidence that when the offence took place again, Mr. Narayan had to be terminated as that was gross misconduct on his part to steal money from the employer.

14. In respect of the other allegation, the evidence of the hospital was that when Mr. Narayan was on suspension, he was asked by Mr. David Qumivutia, the General Manager, to provide the SPH staff with a safe combination number which he refused. This caused considerable inconvenience to the hospital. When there was no alternative left, the hospital had to engage a locksmith company to assist in opening the safe. Later, Mr. Narayan called and wanted to assist but by then the locksmith had been arranged.

15. Mr. Narayan's evidence was that he had always obtained salary advance through the petty cash reimbursement request form. He stated that he had always had prior approval of the advance and as at the date of his dismissal he had a total advance of $3,901.87.

16. He said that he knew of no other procedure by which advance was being taken. He testified that even the CEO obtained salary advance in thousands of dollars using the same procedure. Even other staff followed the same procedure.

17. In respect of the advance obtained on 17 August 2008 for which he was dismissed, he stated that he was not at work to either obtain the advance or ask for it to be approved. His position was that the allegation was unfounded.

18. He also expressed his concern on the allegation that he had previously apologized for a similar offence. He gave evidence that he was never given a warning letter for a previous offence and that he never wrote any apology letter, nor was he counselled on the allegations. He also stated that he was not asked to formulate a policy to obtain advance from the hospital. He was a mere pay clerk and formulation of policy is not within his jurisdiction. This is a matter that comes under the portfolio of the CEO or the Manager Finance.

19. Mr. Narayan robustly asserted that the letter of apology is an act of fraud by the hospital to justify the case and nothing that was generated from him.

20. He evidence on his refusal to provide the information to the hospital on the safe combination was that he was called by one Veronica McCoy who was not his supervisor. The safe had a lot of cash and he was concerned about the safety of the cash. He texted the General Manager that he will provide the information in his presence and when he went to the hospital the next day, the hospital had already broken the lock.

21. I have not summarized the evidence of the parties on other matters that are not relevant to the issue at hand.

ERT's Findings

22. On the issue of whether the termination was lawful, the ERT examined both the cause of the dismissal and the procedure as well.

23. On the question whether the employer was able to establish the cause on unauthorized salary advancement, the ERT found that the date on which the letter of termination alleges an advancement was made could not be possible because the employee was on suspension during that time.

24. The ERT found that although the employer asserted that the date in the letter was wrong, it could not benefit from that assertion. The employer had terminated the employee on a specific cause and it had to establish that cause and not change its stance to justify another cause.

25. The ERT also found that there was a loose system and practice of salary advancement and that a proper policy only came into effect after Mr. Narayan was terminated. Mr. Narayan therefore could not be liable for breach of a policy which was not in place during his employ.

26. On the second cause based on which Mr. Narayan was terminated, the ERT found that Mr. Narayan's act of not providing the combination number of the safe was a responsible act to

protect the security of the safe. That could not amount to misconduct as the person who had called for the combination was not the supervisor of Mr. Narayan. He was not the only one who had the number of the safe and that evidence of the employer is material to find that the hospital could have used the help of the staff who had possession of the number of the safe.

27. In regards the procedure, it concluded that at the time when the employee was suspended, the employer ought to have given to Mr. Narayan a copy of the auditor's report based on which he was suspended. He then should have been asked to respond to the allegations and his explanations were necessary before the summary dismissal was carried out.

28. Mr. Narayan was, according to the ERT, entitled to defend himself and cross-examine the persons who made the allegations against him.

29. On the question of whether the termination was fair, the ERT examined the manner in which the termination was carried out. It found that the actions of the employer caused the employee a lot of humiliation and he felt his dignity had been affected.

30. The ERT found that to be called a thief is degrading. It also found that the employee was escorted from the General Manager's Office and handed over to the security guard who was told that under no circumstances should he be allowed back into the hospital premises. That was only during suspension and when he was at home he received the termination letter which was delivered to him by hand and that, according to the ERT, was the last straw which belittled and hurt him to an extent that could not be described.

Issues

31. The following issues are discernible from the grounds of appeal:

1. What is the procedure to carry out summary dismissal? (Grounds 1 and 2).

2. ***Was the cause for termination justified? (Grounds 3 to 5).***

3. ***Is the remedy justified? An examination on the allegation of unfair termination necessary (Grounds 6 to 9).***

Law and Analysis

32. I will decide the 3 issues encompassing all the grounds of appeal under 3 different heads. The first issue is on the question of law on procedure in regards summary dismissal.

A. Summary Dismissal Procedure

33. Although the ERT was correct in saying that in determining whether the summary dismissal was lawful, it had to assess whether the cause for dismissing and the procedure in carrying out the dismissal was proper, it erred in its finding that there is no provision in the Fiji legislation which states the proper procedure.

34. The ERT stated that it had to use s. 103(1) (a) (b) of the New Zealand Employment Relations Act 2000 to borrow the law. I have time and again denounced this to be the proper law in determining what procedure is to be followed when carrying out summary dismissal.

35. There are a number of authorities from the High Court on this point alone but it is of concern that all the judgments have been disregarded and the New Zealand approach preferred as correct.

36. Fiji has its own domestic legislation and everyone is bound by that. One cannot bypass that law and choose to follow another country's legislation at his own preference. This is an error of law and will result in error in fact.

37. I will once again, it may be in vain once again, perhaps more simply then I can ever say, that in establishing that the summary dismissal was lawful, the employer has to establish that there was a proper cause under s. 33 (1) of the ERP.

38. In addition to that, the employer has to establish that the correct procedure was used in terminating the employee. The correct procedure is outlined in s. 33(2) and s. 34 of the ERP. S. 33(2) requires that the employer must provide the worker with reasons, in writing, for the summary dismissal at the time he or she is dismissed. S. 34 requires that the worker must be paid the wages due up to the time of the dismissal.

39. The provisions of summary dismissal do not impose on the employer a requirement to hear the employee on the investigations it carried out to be satisfied whether the cause for summary dismissal exists. It also does not, as the ERT found, impose on the employer an obligation to provide the employee with a hearing equivalent to a hearing in court with a right to cross-examine the investigators and the witnesses the employer uses to make its decision that a cause exists for summary dismissal.

40. The employer is at liberty to investigate the misconduct alleged of in the manner it wishes and if it is satisfied that there is a cause to terminate, it can proceed under s. 33(1) to dismiss the employee. If the employee is not satisfied as to the reasons for the dismissal, it has the right bring the employer to the Tribunal or the Court for it to establish the reasons. It is there in the Tribunal or the Court that the employee has a right to make representations on the issue.

41. I have said time and again that the purpose of summary dismissal will be lost if the employer was to engage in a process of hearing the employee. The employer will then be obligated to keep the employee at work despite a valid cause and the hearing may take up time. The employer in most cases needs to remove an employee who could cause more damage to the employer for reasons outlined in s. 33(1) of the ERP.

42. I find that the ERT erred in law when it found that the employer was obligated under the New Zealand law to provide to the worker access to all the information it had gathered during the investigation, an explanation on the allegations, a right to hearing to the worker and a right to cross-examine the witnesses of the employer. This is not a requirement under the domestic legislation.

43. The employer, of course, like the ERT found, had to establish in the proceedings, that it had a proper cause to dismiss the employee. Was the employer able to do that? I will examine this in due course.

B. Unlawful Dismissal

(i) Extraneous Evidence

44. In respect of the findings on unlawful dismissal, the employer only challenges the findings in respect of the unauthorized salary advance and not the failure to provide the safe combination number to the employee of the SPH. I will therefore confine my findings to the challenges made against the decision. What is not challenged at the appeal is deemed to be accepted as proper findings of fact by the ERT.

45. Before I deal with the issue of unlawful dismissal and ascertain whether the ERT was correct in finding that the employer was not able to establish that the employee had made unauthorized salary advances to himself, I must attend to the issue of the material evidence that ought to have been considered and the ones that ought to be disregarded.

46. I first specifically refer to Mr. Haniff's submission that the employer had tendered evidence in court to indicate that the employee was previously terminated from Orica Fiji for using its cheque to make a payment of $15,420.08 to himself and entering in the payment voucher a sum of $80.00 for that cheque.

47. The evidence that Mr. Haniff wanted the ERT to give weight to in the employer's favour was immaterial to this case. That evidence had no bearing and did not assist the employer at all to establish the cause of misconduct at employment with the current employer.

48. Further, the allegations of misappropriation of funds from the previous employer did not affect the employee's credibility as he is the person who disclosed this information to SPH. He accepted his fault and had made material disclosures regarding this.

49. I find that the ERT was correct in disregarding evidence of the above nature to determine the matter at hand. It was even more proper for the ERT not to let the judgment on the employee's credibility be affected by that evidence.

50. Secondly the employer argued that the employee had written an apology letter before the termination to say that he would not repeat the offence of obtaining salary advance. According to Mr. Haniff, sufficient weight should have been granted to this letter of apology and a finding made in favour of the employer that the employee had breached the policy of obtaining the salary advance.

51. This letter, referred to by the employer, was always in dispute by the employee. He denied having written any letter of such a nature. The ERT did not give any weight to it because it presumably accepted the evidence of the employee. I have no basis to set aside that finding of fact.

52. There is enough evidence based on which this apology letter should be disregarded. The first is that the employer did not produce any warning letter based on which the apology was issued. If the offence was of such a serious nature, it is expected that a warning letter would have been issued and kept in the employee's file like the letter of apology.

53. The second basis is that the person who made a note at the bottom of the apology letter stating that the employee was counselled and warned against such practice should have

been called to testify on the authenticity of the letter. No such evidence was called. There was also no evidence of who counselled and warned the employee.

54. The third aspect is the notation at the bottom of the letter which asks Mr. Narayan to formulate a policy for the salary advancement. One then wonders, what was the warning for when there was no formal policy in existence at the time of the apology letter? Why would a warning be issued in the first place? The notation that Mr. Narayan was asked to formulate a policy and the evidence that he never did goes against the employer's assertion that there was an established practice for obtaining salary advance. It also then negates the warning letter.

55. The fourth basis to reject the apology letter as one which was written by Mr. Narayan was that the SPH was not able to produce any documents to say that there was a transaction showing an advance from the hospital to the employee for which a warning was issued. The hospital could have furnished the Tribunal with the petty cash reimbursement request form signed by the employee through which he obtained the advance. Only the hospital would have access to such information.

56. If I were to hear the matter fresh, I would have had no basis in light of the contention of the employee to give any weight to the letter. This leads me to conclude that the ERT did not err when it did not give the apology letter any weight against the employee's case.

(ii) Cause for Dismissal: Allegation of Salary Advancement – Was it Justified?

57. I concur with the findings of the ERT that there was no formal or acceptable procedure in applying for salary advance. Exhibits 3, 4, 16, 17, 18, and 19 shows that the employees of SPH used both the methods of obtaining salary advances, that is, the petty cash reimbursement request form and a letter.

58. There was no formal policy in place before Mr. Narayan's dismissal. One policy was drafted and issued on 1 September 2008 which was after Mr. Narayan's termination. That policy was exhibited as exhibit 20.

59. The policy states that it was drafted to provide a framework for salary advance and sets out the process of obtaining the advance. It clearly states that the advance should not exceed $200 and that every staff was to fill a salary advance application form with relevant documents if applicable. The decision to approve the advance and the form of repayment vested in the Financial Controller. There are other matters which set out the grounds for obtaining an advance and not material to outline at this stage.

60. Exhibit 20 gives clarity to two matters. The first is that there was no such policy before Mr. Narayan's termination. The employees were using whatever was suitable and whatever was easier for them. The Finance Team, as per the evidence of the employer, used the petty cash reimbursement request form. Some staff wrote letters too. Despite the uncertainty, no formal policy came in effect.

61. The second matter is that the ERT was correct in finding from exhibit 20 that the employee's version was more credible that the petty cash reimbursement form was used by him and that there was no such formal policy which set out the procedure.

62. The employee's version was that at the time of his dismissal he had obtained substantial amount in advance and that he used the petty cash reimbursement form all the time. That evidence which was so material was not challenged.

63. This evidence of the employee could be easily challenged. The employer could have easily obtained from the accounts or the employees file the procedure he used previously to apply for salary advances. The employer's version that the letter was a proper way would be given weight if the employee had previously applied in writing instead of using the petty cash reimbursement form.

64. The ERT was correct in accepting in light of the unchallenged evidence that the employee had used this procedure before and was not addressed by the supervisors for using a wrong procedure. That process of not questioning the employee or warning him gives authenticity to the process of obtaining salary advance through the petty cash reimbursement form.

65. There is of course this argument by the employer that he was warned to use the proper procedure and that the employee issued an apology letter. Neither the apology letter nor the notations by "a person" who alleges to have counselled and warned Mr. Narayan on the correct procedure states what is the process that ought to have been followed.

66. In light of the confusion on the proper procedure, one cannot blame Mr. Narayan for obtaining an advance through a petty cash reimbursement request form on the occasions he did.

67. Let me now come to the specific allegation that the petty cash reimbursement form used was not approved by the employer and that a sum of $250 was borrowed on 17 August 2008. The employer says that the date should be 7 July instead. Even if I accept that to be a mistake, there is also error in the amount that is alleged to have been borrowed. The termination letter and evidence of the employer says that the employee obtained a salary advance of $250 when the petty cash reimbursement form of 7 July 2008 indicates the amount to be $200.

68. This leads me to find that the change in the date was an afterthought and even if it was not, the termination letter ought to clearly state the specific misconduct and the misconduct alleged regarding the day and the amount alleged to have been advanced is not proper. The petty cash reimbursement form of 7 July 2008 appears to have been approved by someone. It is alleged that the same was approved by one Ms. Arti Emmanuel who was at the same level as the employee.

69. If Mr. Narayan was making a requisition, 56then Ms. Arti Emmanuel should have obtained the approval of the CEO or the Manager Finance. She was the independent person to whom the application was forwarded. If one anamoly of this nature was found, the employer ought to have immediately identified and specifically written to the employees concerned regarding the formal process and what ought to have been done.

70. The employer was very well aware that the Finance team was using the petty cash reimbursement form for salary advancement and when it became aware of this; a formal process should have been identified to all the staff. In absence of an established procedure and process, it was not proper for the employer to dismiss Mr. Narayan on the grounds of misconduct.

71. I do not find that the ERT erred in law and in fact in making a finding that the employer could establish that it has a lawful cause under s. 33(1) of the ERP to summarily dismiss Mr. Narayan.

72. The next aspect is to determine whether Mr. Narayan was unfairly terminated.

C. Unfair Dismissal

73. The ERT erred when it took into account the facts surrounding the suspension of the employee and assessed that the manner of treatment was unfair and inappropriate at the time of the dismissal. The employee was already on suspension and he was handed a termination letter at home. There was no evidence to suggest that the employer's actions in the manner in which the employee was treated at the time of the dismissal caused the employee humiliation.

74. The ERT also erred in fact when it found that the employer had called the employee a thief. That evidence was never given in court. The employer had stated in the letter of termination that the act of advancing salary without using the proper procedure is classified as theft. The employer was making reference to the cause for termination. The

cause for termination is assessed to determine the lawfulness of the dismissal. It cannot be used again to determine the fairness of the dismissal.

75. Determination of unlawful and unfair dismissal requires different considerations. When the question of the lawfulness of the summary dismissal is being determined, one has to look at the cause for dismissal and the procedure for carrying out the same whilst the manner of carrying out the dismissal is assessed to determine whether the same is fair or not.

76. I find that there was no evidence based on which the ERT could make a finding of unfair dismissal. I therefore set aside the finding that the employee was unfairly dismissed.

D. The Quantum of Award

77. I will first of all address whether the remedy of 2 years wages for unlawful dismissal was justified. There was clear evidence in this case through the affidavit that the employee was only out of employment for 7 months.

78. The employee clarified on appeal that he found work in 2 months after the dismissal. He left that work later. He found another job and the pay was not less than what he was being paid by the employer SPH. In total the employee was out of work for only 7 months. Even his affidavits do not support the fact that he was out of employment for 2 years.

79. In light of the evidence produced by the employee in his affidavits and the clarification that was provided on the appeal, I must say that lost wages for only 6 months' to the maximum would be justified. The employee had found work in 2 months and then later left that work for another. It is his duty to have mitigated the loss by finding a suitable job. He actually did find work. The award for 2 years for lost wages is not justified.

80. In light of my finding that the employer did not act in a manner which was unfair, degrading and humiliating to the worker, the remedy for humiliation, loss of dignity and

injury to the feelings is not justified. I set aside the award for one years' wages for this in full.

81. I also set aside the award of the ERT to deduct the 6 months from the remedies on the basis that the employee had contributed to the situation. There was no identification of how the employee contributed to the situation. He simply acted in the manner he considered proper and the employer was not able to justify the cause for dismissal. His remedy cannot be properly reduced.

Final Orders

82. For the reasons enunciated above, I find that the ERT was correct in holding that the employee was unlawfully dismissed but find that the ERT erred in law and in fact in making a finding of unfair dismissal.

83. I therefore allow the appeal in part and set aside the remedies awarded by the ERT and substitute it with an order that the employee is entitled to 6 months' lost wages as a result of unlawful dismissal.

84. I order the employer to pay the sum equivalent to 6 months' wages to the employee within 7 days of the date of this judgment.

85. I order that each party bears their own cost of the appeal proceeding.

Anjala Wati
Judge
26. 01.2018

HIGH COURT OF FIJI
SUVA

To:

1. *Haniff Tuitoga Lawyers for the Appellant.*
2. *Respondent in Person.*
3. *File: Suva ERCA 4 of 2017.*