

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 22 of 2017

**BETWEEN:** **GRAND PACIFIC HOTEL LIMITED**

**APPELLATE**

**AND:** **MAKERETA MAFILI**

**EMPLOYER**

*Appearances:* Ms. S. Saumatua for the Appellant.

Mr.J. Ulodole for the Employer.

*Date/Place of Judgment:* Thursday 25 April 2019 at Suva.

*Coram:* Hon. Madam Justice Anjala Wati.

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A. Catchwords:

*Employment Law – Award of remedies – whether justified in law and on the facts of the case – whether reinstatement is justified- whether the relationship of trust and confidence can be said to have broken down on the facts and circumstances of the parties - factors to be addressed during the hearing and in awarding the remedies for lost wages; the cause of the dismissal or termination (as this will assist in determining whether the remedies ought to be reduced based on the fact that the employee’s conduct gave rise to the grievance), the employer’s conduct in the mediation; any delay caused by the employer or employee in bringing the proceedings and ensuring expeditious conclusion of the matter; whether the employee mitigated his loss; and whether the employer has assisted or hindered the employee in finding new work; the list of factors not being exhaustive.*

B. Cases

1. *Grand Pacific Hotel Limited v. Inise Toganiyasawa [unreported] ERCA 23 of 2017.*

C. Legislation

1. *Employment Relations Act 2007 (“ERA”): s. 30(6).*

**Cause**

1. The Employer Grand Pacific Hotel Limited ("**GPHL**") appeals the decision of the Employment Relations Tribunal ("**ERT**") of 13 October 2017 wherein it found that the employee Makereta Mafili ("**Makereta**") was unlawfully and unfairly dismissed from employment.
2. Based on that finding, the ERT ordered that Makereta be reinstated to her former position or a position no less advantageous to her. In addition to that, the employee was ordered to be paid 17 months' lost wages for unlawful dismissal and compensation for humiliation, loss of dignity and injury to her feelings calculated at the rate of 4 months wages.
3. The grounds of appeal are that the ERT erred in law and in fact:
  1. *in assessing the compensation awarded when it failed to take into consideration that the employee ought to have mitigated her loss;*
  2. *in failing to consider whether the employee has contributed to the termination in assessing the compensation;*
  3. *in failing to consider that there was irretrievable differences between the parties before considering the remedy of reinstatement.*

**Background**

4. Makereta was employed by GPHL as a Public Area Supervisor in the House Keeping Department on 3 June 2014. She was transferred to the Food and Beverage when she was terminated from her employment. Her employment with GPHL ended on 16 February 2015. The employer's version of how the relationship ended is different from that of the employee's.
5. The employer's version was that the employee had abandoned her work for which she was informed in writing on 26 February 2015 that her employment has ended. The letter of 26 February 2015 reads:

*"Dear Ms. Mafili*

*Re: Self-Termination*

*This letter is a formal notification that your employment contract has been self-terminated on 20 February 2015.*

*The reason being that you walked out on 16<sup>th</sup> February 2015 at 4.37pm and thereafter you did not return to work. However, we have paid your wages for the days you have worked despite of your walking out.*

*Please feel free to consider our General Manager, Mr. Eugen Deithelm as your referee on your CV. Mr. Eugen Deitheim can be contacted on email: [gm@gph.com.fj](mailto:gm@gph.com.fj)".*

6. The employer's version was narrated by its Manager Human Resources Ms. Joyce Latchmi. She testified that the employee was trained in her new role in the new section of Food and Beverage. One of the trainings included the proper way of handling a glass. Despite the training, the General Manager ("**GM**") found out on various occasions that the employee was not holding the glass in a correct manner. A decision was therefore made that she be transferred back to the House Keeping Department as a Public Area Attendant on the same salary as she was paid in Food and Beverage section.
7. According to Ms. Latchmi, the employee was told of the decision to transfer in her presence. The GM informed her of the decision. The employee did not accept the decision and walked out of the Victoria Lounge shouting that she "*will send all expats out of Fiji and will send the GM to Gambia where he came from*".
8. The commotion, as testified by Ms. Latchmi, was witnessed by two other front office staff members and other guests in the area. Ms. Latchmi stated that she had to call the security to escort the employee out as she was disturbing the guests. The employee subsequently, it was contended, walked out of the Hotel on 16 February 2015 and made no contacts with the employer for 5 days. As a result her contract was terminated.

9. On the other hand, the employee stated that on 6 February 2015 she was at the bar with one other employee. They both noticed that the GM and a Training Manager was looking at them. The employee felt that she was being targeted by the GM.
10. The GM then entered the bar and commented that she was holding the glass wrongly when cleaning it. He therefore asked her and the Training Manager to proceed to his office.
11. At his office, the GM asked her whether she had previous working experience. She answered that she had worked at some five star hotels. To this the GM commented that those would have been some low standard hotels. The GM, according to the employee, also then mentioned that he would be keeping an eye on her.
12. The employee testified that she politely asked the GM why he was so angry on the issue of handling the glasses rather than being professional, neutral and honest with her when he told her to watch her statement and to get out of her office.
13. On 13 February 2015, the employee fell sick. She testified that she called the Training Manager and informed him about her sickness. When the Training Manager relayed the information to the GM, he stated that she is a good liar and should be demoted to the Public Area Attendant.
14. The employee then said that she warned them that if they did not accept her sick leave, she would report the matter to the media. The GM then wanted her to attend a meeting with him and that was the subject of the various text messages sent to her that morning.
15. The employee stated that she finally decided to attend the meeting with the GM that day. She arrived at the Hotel with the cannula still inserted in her hand. She was led by the Training Manager to the lobby where the GM was seated.
16. They all proceeded to the cession room for the meeting where the GM acknowledged that she was really sick and then questioned her why she had told the doctors that she had eaten the food from the hotel.

17. The employee stated that she did not answer that question but asked the GM why he wanted to demote her. The GM replied that he knew that she has made complaints to the Immigration and Labour Departments against him.
18. The employee said that she again questioned the GM about her demotion to which he replied that he would answer that the following week after his visit to the immigration department to investigate the truth of the matter as to who has reported him to the immigration department.
19. On 16 February 2015, at about 4.47pm, the GM called the employee to the Victoria Lounge. Before they entered the lounge the GM started feeling her pocket for her phone to which she protested. The GM then said *"give me your bloody phone"*.
20. The employee then tapped the GM's hand away. She could see the Manager Human Resources also present in the lounge.
21. At the lounge, the GM explained that he went to the Immigration Department but it did not mention any names of the complainant. He said that knew however that the employee had made the complaint about him. For that reason, the GM said that she would be demoted. The employee asked him for one good reason for her demotion to which the GM angrily replied *"...you listen to me you bloody Fijian. I will make sure that you struggle every day. I will make you suffer, make life harder for you, and watch your every move...you bloody Fijian f...you, you are terminated. Go home"*.
22. The employee testified that she walked out of Victoria Lounge. She felt bullied. At that time the GM and the Human Resources Manager laughed all the way down to the lobby. The GM kept of repeating *"you are terminated"*.
23. The employee said that she felt that she had to reply and she said *"I will let Fiji know about what you are doing to the staffs and I will go to media to the Minister Konrote and Prime Minister Bainimarama and will let the people of Fiji know about your work history in Gambia"*.

24. The GM continued laughing and said "...I am not scared. Nobody can remove me. I am a strong man. I am not scared of anyone including the Prime Minister and Mr. Konrote the Minister for Labour".
25. According to the employee, the Chief Security, the GM and the Manager Human Resources all went inside the locker room to escort her out whilst the GM continued laughing and repeating "you are terminated".
26. It is clear that after hearing the evidence and having seen the demeanour and deportment of the witnesses, The ERT believed the employee's version of how the termination occurred.

#### ***Determination***

27. The appellant has not at any point challenged the findings on unlawful and unfair dismissal. The effect of this is that it accepts the ERT's decision that the dismissal was unlawful and unfair. It only challenges the remedies that were awarded to the employee.
28. My focus therefore will only be on the issues raised on the appeal and that would be limited to determining whether the remedies awarded were proper or not. The first aspect is to determine whether reinstatement was a proper remedy. The appellant's counsel suggests that it is not, as the relationship of trust and confidence has broken down between the parties.
29. I do not find that the personal issues between the General Manager and the employee had anything to do with the functioning of the hotel institution and that those issues do not have the effect of destroying the relationship of trust and confidence between the employer and the employee.
30. GPHL is a huge institution and for it to run, it has a huge staff base. Two employees having problems with each other can be adequately addressed and catered for. It does not necessarily have to be that one must leave the employment. It would have been another matter if the GPHL was owned by the General Manager in that he was the sole owner in which case keeping the employee at work would have affected his business.

31. The General Manager is also an employee like Makereta. The issues are between the two employees. Reinstatement of Makereta will not affect the functioning of the Hotel or that it will have adverse effect on the operations. Makereta has supervisors who will be monitoring her work and she need not work unsupervised. If her work is not up to the standard, it will and should be addressed by the supervisor.
32. I do not find that there is any impropriety in reinstating Makereta back to her position or one that is no less advantageous to her former position.
33. On the challenge of the award of 17 months lost wages on the basis that the employee was supposed to have mitigated her loss and that the remedies ought to be reduced because of the conduct of the employee which gave rise to the grievance, I repeat what I have said in my earlier judgment in *Grand Pacific Hotel Limited v. Inise Toganiyasawa [unreported] ERCA 23 of 2017*.
34. These two matters, this and *Inise Toganiyasawa* (supra), involves the same employer. The matters were heard together. It was agreed by the parties that the issues can be dealt with together. I, however, preferred that separate judgments be issued for sake of clarity although some arguments and reasoning on appeal will overlap and cross-references can be made.
35. I find it comprehensive to repeat what I said in *Inise Toganiyasawa* (supra) to address the remaining issues on the appeal (*restricted to the question of mitigation of damages and reduction of the remedies on the grounds of contribution by the employee*):

*"I will first deal with the question of mitigation of loss. I have said in very many judgments before, that although an employee is entitled to lost wages, the award must be justified in law and on the facts of the case.*

*I repeat once again that the court has discretion to fix a proper amount as lost wages. The discretion must be exercised judicially. The court awarding the remedy has to consider various factors such as the cause for the termination (as this will assist in determining whether the award ought to be reduced in view of the fact that the employee's conduct gave*

rise to the dismissal); the employer's conduct in the mediation and the progress of the case, the delay caused by the employer and the employee in bringing the matter before the tribunal or the court and in ensuring an expeditious conclusion, the employee's employment status since the termination, whether the employee mitigated his loss, and the conduct of the employer which assisted or hindered the employee in finding work. The list of factors is not exhaustive.

Both the parties were represented by counsel and none of them attempted to extract evidence along the lines I have mentioned above to assist the ERT in arriving at a proper remedy. The only evidence that was before the ERT was that the employee had not found work till the date of the hearing which was 17 months post termination. On that basis the ERT fixed the award at the rate of 17 months.

To add to the uncertainty and lack of evidence by both parties which would even assist me in reassessing the remedy, I have before me no evidence that the employer had issued a certificate of service to the employee at the time of termination. This is a mandatory obligation on the employer imposed on it by s. 30(6) of the ERA. It reads:

***"Upon termination of a worker's contract or dismissal of a worker, the employer must provide a certificate to the worker stating the nature of employment and the period of service".***

This certificate of service is always important for an employee to look for a new job in a similar industry or profess experience in having worked before. A clearance is needed by all employees. That is the minimum standard that needs to be observed by the employers. If the employer fails to provide such a certificate, it then must be taken to have caused an impediment to the employee in finding the employment.

The employer's motives can be deduced when it does not comply with the law. It cannot behave in a vindictive way in carrying out dismissals.



*I find that in the absence of a certificate of service and the fact that employee did not find work until the date of hearing, the award of 17 months is justified and I will not interfere with the same.*

*The appellant's counsel has also raised the issue of the employee contributing to the situation ....The ERT has not accepted the employer's version of why the termination was carried out. To use the employer's version to reduce the remedy in this situation would bring the verdict to inconsistency.*

36. I do not think that having said what I said in the above case, any further elaboration is needed.

***Final Orders***

37. In the final analysis, I find that the appeal does not have any merits and ought to be dismissed. I therefore dismiss the appeal and order the appellant to reinstate the employee forthwith and to comply with the orders of the ERT for payment of lost wages for 17 months and compensation for humiliation, loss of dignity and injury to her feelings in the sum of 4 months wages within 21 days.

38. The employer shall also pay costs to employee in the sum of \$2,500 within 21 days.



*Anjala Wati*

Judge

25. 04.2019

To:

1. *Lateef & Lateef Lawyers for the Appellant.*
2. *Mr. J. Ulodole for the Respondent.*
3. *File: Suva ERCA 22 of 2017.*