

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 16 of 2011

BETWEEN: **LATEEF & LATEEF LAWYERS**
APPELLANT

AND: **ROBERTA TAYLOR MOSESE**
RESPONDENT

Appearances: Mr. R. Prakash for the Appellant.

Ms. T. Sharma for the Respondent.

Date/Place of Judgment: Wednesday 13 February 2019 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

A. Catchwords:

Employment Law – Whether the resignation of the employee constituted constructive dismissal; whether the dismissal was lawful and fair – whether the Tribunal was correct in dealing with another aspect of the grievance when the claim was on a different aspect and the employee had not raised any issues on another aspect of the grievance- what is the statutory requirement in regards notice to the employer when the Tribunal exercises its powers to consider another aspect of the grievance in respect of which there is evidence –employer has the onus to disprove that the employee was asked to resign on grounds of her pregnancy- whether the employer was entitled to summarily dismiss the employee for poor performance at work- whether the employer had carried out the termination in a manner which was degrading and humiliating – whether the award of remedies are justified to any extent.

B. Legislation

1. Employment Relations Act 2007 (“ERA”): s. 33; s. 104; and s. 112.

Cause/Background

1. The employer Lateef & Lateef Lawyers has appealed the decision of the Employment Relations Tribunal ("**ERT**") of 29 June 2011 wherein it found that the employee Roberta Taylor Mosese's ("**Taylor**") resignation from her employment amounted to unlawful and unfair dismissal.
2. Upon that finding, the ERT ordered that the employer pay to the employee 3 months lost wages for unlawful dismissal and further 6 months wages as compensation for humiliation, loss of dignity and injury to the feelings of the worker. The total of 9 months wages was then reduced by 4 months wages on the basis that the employee had contributed to the situation which gave rise to the grievance.
3. In form of brief background, Ms. Taylor started her employment with Lateef Lawyers as a Receptionist/Typist in June 2004. By this time she had acquired 7 years work experience in a legal firm.
4. On 6 November 2007, Ms. Taylor resigned from her employment at Lateef Lawyers to join another firm which had offered to pay her more salary.
5. On 3 April 2008, the employee was rehired by Lateef Lawyers. She was given the position of a personal assistant of the managing partner of Lateef Lawyers, Mr. Lateef. Lateef Lawyers, upon rehiring her, paid her the same salary as her previous employer.
6. During her employment, Ms. Taylor had some health issues for which further medical diagnosis was needed. On 18 August 2008, she was referred by the Raiwaqa Health Centre to the Colonial War Memorial Hospital for further medical check. The initial diagnosis from Raiwaqa Health Centre had revealed concerning results. She discussed this with her employer for which she was given one week's paid leave.
7. On 20 August 2008, Ms. Taylor was given medical clearance. The diagnosis was sound and the employee resumed employment with Lateef Lawyers after her paid leave. Subsequent to this, the employee was asked to resign from her employment.

8. The employer alleges that Mr. Lateef noticed that Ms. Taylor's performance at work had declined and that her deteriorating performance was discussed with the employee on various occasions but she showed no improvements.
9. Mr. Lateef then transferred her to the litigation team as a paralegal under the supervision of another partner in the firm Ms. Bhavna Narayan. The employer's contention is that this was done to avoid dismissal.
10. It is the employer's version that the employee did not improve in her performance even then. She made simple errors in her work which the firm could not entertain given the nature of its business which demanded meticulousness and precision.
11. The employer says that the employee needed constant supervision and corrections to her work despite having acquired 11 years of experience in the field. Her performance deteriorated over time and issues surrounding her performance were raised with her. The employer says that she was issued several verbal warnings.
12. It is the employer's position that Ms. Taylor's poor performance continued and there was no sign of any improvement. This resulted in Mr. Lateef calling the employee into his office and informing her about the several complaints against her. The employer contends that in good faith, it then gave her two options: to either resign or be summarily dismissed.
13. The employer says that the employee resigned on the same day of 2 October 2018 but then immediately wrote and withdrew her resignation letter on the grounds that she was forced to resign on medical grounds.
14. The employees' first resignation letter was in the following terms:

"I hereby tender my resignation with your firm effective from 15 October 2008 due to personal health reasons.

I thank you for your support and giving me the opportunity to be a part of the team here at Lateef & Lateef”.

15. The second letter of resignation read:

*“Reference is made to my earlier resignation of even date. I hereby withdraw the said resignation and wish to state that I had been **forcefully told** to resign on the grounds of medical reasons. I also would like to state that I had been cleared of earlier cervical cancer findings. I could produce you with a copy of a medical report.*

Mr. S. Lateef had during our discussion this morning also mentioned that I had had issues with one of the partners of the firm namely Ms. Bhavna Narayan. For this reason I also would like to state that I had never at anytime had any issues with Ms. Narayan or anybody else in that matter. However she may have issues with me. He had also mentioned that according to Ms. Narayan I was not concentrating on my work and that I had constantly made mistakes. I admit that I had made mistakes...nobody is perfect. Everyone makes mistakes. I also would like to stress that I had at all times performed to the best of my ability (which apparently wasn't good enough to her). I had on numerous occasions been spoken harshly to by Ms. Narayan but it is never in my nature to bear a grudge against someone for such reasons. So I don't see why she could say I had issues with her.

Further I wish to state that I believe I have been unfairly dismissed. I have never in the course of my employment here at Lateef & Lateef ever received a warning letter from either of the partners for non-performance or any other reasons.

As such I put you on notice that should my grievances not be addressed, I shall pursue legal action against the firm”.

16. I do not think that Ms. Taylor's grievance was addressed by Lateef Lawyers which caused her to file a grievance with the Permanent Secretary on 7 October 2008. Her complaint was

that she was forced to resign due to her pregnancy. She asserted that she was 3 months pregnant.

ERT's Findings

17. The ERT found that the reason why Lateef Lawyers had asked the employee to resign was not because of her pregnancy but due to her poor performance at work. It further found that the poor performance of the employee affected the legal firm.

18. Having made those findings, the ERT went further to examine the procedure invoked in dismissing Ms. Taylor. The ERT found that Lateef Lawyers should have put the employee on a performance management process for over six months and warned her that lack of improvement or any act of incompetence or negligence would result in summary dismissal. The ERT found that since the procedure was not followed, the dismissal became unlawful.

19. In addition, The ERT found that Mr. Lateef's conduct in calling the employee in his office and asking her as to what she was going to do with the baby or pregnancy amounted to his concern regarding her non-performance due to her pregnancy and associated illness. This, in the findings of the ERT amounted to destroying the relationship of good faith, trust and confidence which terms were implied in the contract between the parties. The ERT stated that the conduct of Mr. Lateef amounts to treating his employee arbitrarily, capriciously or inequitably.

20. The ERT found that the failure of the employer to put the employee on the performance management program as well as the conduct of Mr. Lateef amounted to a breach of the contract of employment and the ending of the same as unlawful and unfair on the part of the employer.

21. It is on these findings that the award was made in favour of the employee. The employee has not challenged any findings of the ERT. It is only the employer's appeal on which the matter is being determined.

Grounds of Appeal/Issues/ Determination

22. The employer has raised 9 grounds of appeal, some of which are repetitive, overlapping verbose and includes arguments. I do not endorse this as a proper way of drafting the grounds of appeal. The grounds must be succinct, precise, free of any arguments and not overlapping. I will summarise the issues that arise from the 9 grounds of appeal. They are:
- 1. Whether the ERT was correct in determining that Ms. Taylor was unlawfully dismissed because she was not put on performance management to improve her poor performance which caused her to be terminated?*
 - 2. Whether the ERT was correct in finding that the employer had acted in a manner which was unfair causing the employee to suffer humiliation, loss of dignity and injury to her feelings?*
 - 3. Whether the employee is entitled to any remedies at all?*
23. The crux of the grievance before the Tribunal was that the employee was forced to resign on the grounds of her pregnancy, which action, it was contended, amounts to constructive dismissal and was unlawful.
24. The ERT found that pregnancy was not the reason for Ms. Taylor being asked to resign but her poor performance was. It is important to outline at this stage that the employee had never raised in the evidence that she did not perform poorly or even if she did, she ought not to have been dismissed for that reason or in the manner she was.
25. Therefore, the only issue before the Tribunal was resolved by making a finding in favour of the employer. I repeat, there was no other allegation raised during the hearing such as poor performance giving rise to the dismissal on which the Tribunal was required to deliberate and make a finding on.
26. Section 112 of the ERA grants the ERT powers to deal with another aspect of the grievance even though the claim is not brought on that grievance as long as there is evidence of a

grievance in relation to another aspect provided that the employer is advised during the proceedings of such matter.

27. In this case, neither the employee brought another aspect of grievance before the Tribunal nor was the employer told that another aspect would form part of the determination. If that was done, the employer would have had a chance to bring evidence of the nature of the poor performance and the steps the employer took to correct the problems.
28. I do not lose sight of the fact that the employer itself raised the issue of poor performance but that was to discharge the onus imposed on it by s. 104(2) of the ERA which states that *"where a termination occurs while a woman is pregnant, the burden of disproving that the termination was related to the condition rests with the employer"*.
29. The employer did not come fully prepared to the Tribunal to prove the poor performance and the process taken to correct it. It came prepared to disprove that pregnancy was not a reason for the employee's termination. The employer did tender evidence of how the employee had been given maternity leave before and continued to be employed by the firm.
30. I therefore do not find that the Tribunal had properly gone into the aspect of dealing with another aspect of the grievance when it was not raised and the employer had not been notified of the same. Delving into another aspect of the grievance finally had an impact on the determination of the issue of whether the dismissal was lawful notwithstanding that the ERT had found in favour of the employer that Ms. Taylor's poor performance had affected the business of the employer.
31. Having delved into another aspect of the grievance, the ERT was not only required to examine the reasons for the dismissal but the procedure that was used to carry out the dismissal and to decide whether that was proper in the circumstances. It is on the question of procedure that the finding was made against the employer. If the ERT had not wrongly dealt with another aspect of the grievance, there would have been no need to examine the question of procedure and the dismissal would not have been found to be unlawful.

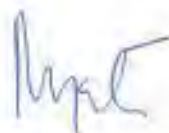
32. Be that as it may, to examine the procedure, the proper question that the Tribunal should have asked was whether the performance of the employee was such that it affected the business of the employer which left the employer with no choice but to invoke summary dismissal procedure.
33. The Tribunal did make a finding that the poor performance of Ms. Taylor affected the business of the employer but instead of examining whether the law or the contract of the parties provided to cater for such a situation, the ERT proceeded to subjectively pronounce what the correct procedure should be in such cases. It was the ERT's private sense of what should be the right procedure instead of examining the law and the contract. That is where another error occurred.
34. One has to be objective about the process that is warranted in the circumstances. The employer gave evidence to the fact that the employee was advised so many times to improve on her skills and not to make silly errors. She was even transferred to another partner so that she could improve but to no avail.
35. The ERA provides for summary dismissal in cases where the worker has lack of skill or qualification which the worker expressly or by implication warrants to possess or for habitual or substantial neglect of the worker's duties: *s. 33(1) (c) and (d)*.
36. In a case where a situation of a nature prescribed in s. 33 arises, the employer can dismiss the employee without notice and a concerned employee can raise the correctness of the reason as part of his or her claim.
37. S. 33 does not impose on the employer a duty to include and provide any internal structure to correct the problems. If any employer, in absence of any contractual obligation, wishes to invoke any such mechanism such as "*performance management system*" before terminating an employee; they can do so, as that is their prerogative. The law does not require any such procedures to be offered to the employees when a problem identified in s. 33 arises.

38. In the case at hand, an experienced employee started neglecting her duties and despite being warned and corrected several times, her poor performance continued to the extent that it had a negative effect on the employer. Based on that background, the employer was entitled to take a decision to summarily dismiss the employee without notice. It did not summarily dismiss the employee but asked her to resign. That is constructive dismissal but it must not be overlooked that the employer was entitled to summarily dismiss the employee without any notice as long as she was paid for the period until dismissal. There are no concerns regarding the pay of Ms. Taylor.
39. The mere fact that the employee was asked to resign and not summarily dismissed does not affect the lawfulness of the dismissal as there was an acceptable reason why the employee was asked to resign and not summarily dismissed. The employer did not want the employee to have that tag of being terminated as she had been with the firm for many years.
40. I find that the ERT was not correct in law in making a finding that the dismissal was unlawful for want of the employee being given a chance to improve and be put on a performance management system.
41. Since the finding of unlawful dismissal was based on incorrect provisions of the law and incorrect assimilation of facts, I find that the employee is not entitled to any remedies for unlawful dismissal.
42. The employee was also awarded remedies for humiliation, loss of dignity and injury to the feelings of the worker. The purpose of awarding this remedy is not to compensate an employee for humiliation arising from the fact of the dismissal itself. The purpose is to ensure that even at the time of the dismissal, the employer shows good faith to its employees and carries out the dismissal in a dignified manner. This principle forbids the employers from conducting itself in a manner which is inappropriate (*based on the circumstances of each case*) and tends to cause the employee embarrassment, humiliation and injury to his or her feelings. There was no evidence from Ms. Taylor that the employer had conducted itself in a manner which humiliated the worker or caused injury to her feelings.

43. The ERT was concerned on Mr. Lateef's intention about questioning Ms. Taylor as to what she was going to do with the baby. Mr. Lateef had given evidence in this case and he was not asked any questions surrounding that aspect. Without that opportunity being afforded to Mr. Lateef, it is wrong in fact for any assessment of Mr. Lateef's intention being deduced as negative. The finding is not supported by proper analysis of evidence. The award for humiliation, loss of dignity and injury to feelings is not justified.

Final Orders

44. In the final analysis, I allow the appeal and set aside the ERT's findings on unlawful and unfair dismissal and the award of the remedies.
45. I find that the dismissal was procedurally fair on the facts of the case and as such the employee is not entitled to any remedies from the employer.
46. In light of the employment status of the Ms. Taylor, I order that each party bear their own cost of the appeal proceedings.



Anjala Wati

Judge

13. 02.2019



To:

1. *Lateef & Lateef Lawyers for the Appellant.*
2. *Office of the Attorney-General for the Respondent.*
3. *File: Suva ERCA 16 of 2011.*