

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 03 of 2015

BETWEEN: **DICKSON INTERNATIONAL TRADING COMPANY LIMITED**

APPELLANT

AND: **VANDHANA RAJ**

RESPONDENT

Appearances: Mr. R. Singh 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 employee was terminated or whether she abandoned her work: an examination of the evidence of the parties- the overriding aspect is the question of credibility- circumstances in which compensation for humiliation, loss of dignity and injury to the feelings of the worker should be ordered to be paid- duty to provide work to an employee under s. 24 of the ERP terminates when the relationship or the contract is terminated; the employer cannot dismiss an employee on the basis that there is no work – in such a case a proper redundancy should be carried out- the award of remedies is governed by s. 230 of the ERA where an employee is entitled to claim lost wages as a result of the grievance- whether the award could be justified- setting aside an award when there is calculation error.

B. Legislation:

1. The Employment Relations Act 2007 (“ERA”): ss. 24; s. 33; and s. 230.

Cause

1. The employer is aggrieved with the decision of the Employment Relations Tribunal (*“ERT”*) of 30 January 2015 wherein it found that the employee was unjustifiably, unlawfully, unfairly and wrongly dismissed from her employment.
2. The unlawful dismissal was found to be established on the basis that the employer should not have asked the employee not to come to work due to the business not doing well. For this the ERT awarded the employee 5 months lost wages at the rate of \$140 per week. The final award under this head was \$2,000. There is a glaring calculation error and I will discuss this later in my judgment.
3. For unfair dismissal, the employee was ordered to be paid compensation for humiliation, loss of dignity and injury to the feelings of the worker. The facts which the ERT found to have constituted unfair dismissal were that the employer had confronted the employee at her new workplace when she started work with another employer after a months’ waiting for the employer to call her back to work.

Background

4. Vandhana Raj was employed as a sales assistant since 10 May 2010. She claimed that she was summarily dismissed from employment on 9 October 2012 without a letter of termination. She contends that the dismissal was unlawful and unfair.
5. According to Ms. Raj, her employment was terminated by Mrs. Dickson. She contends that when she was at work on 9 October 2012, Mrs. Dickson told her that the business was not doing well and that Ms. Raj was to go home and that she will be called back to work when the business stabilized.
6. She went home and the employer did not contact her at all. She called and texted the employer for response but there was none. She also personally visited the workplace to see the employer and enquire on the status of her employment. However, the employer’s wife had refused to meet her.

7. Ms. Raj maintains that in every two days she continued to check with the employer about her employment and when no response was received, she went to Labasa for a short trip.
8. On 5 November 2012, she started working at Partners Accessories Shop to support her family. She stated that the day she started working for the new employer, Mr. Dickson came to the shop and assaulted her and she could therefore only work for half a day. She could not continue with the new employer. She lodged a report to the police about the assault by Mr. Dickson for which he was later acquitted.
9. The employer's position was that it did not dismiss the employee but that she abandoned her work without notification to the employer. It is alleged by the employer that Ms. Raj started working for another employer, Partners Accessories Shop.
10. The employer maintained that the employee had taken sick leave and after that she went to Labasa and did not return to work. The employer kept calling her to return to work but she did not return saying that she was in Labasa but some of its employees had seen her in Suva. Later the employer found that the employee had started work with another employer. If the employee had returned to work, she would still be working but she abandoned her work and went to work for someone else. She was not terminated by the employer.

ERT's Findings

11. The ERT was faced with different versions from each party as to how the contract of the employee came to an end. The employer had produced only one witness. The Tribunal was therefore faced with the normal dilemma as to who should be believed.
12. After having heard and analyzed the evidence and seen the demeanour and deportment of the employee and the employer's only witness, the ERT believed the employee's version that Ms. Raj was asked by Mrs. Dickson to go home as the business was not doing well and that she would be called later.

13. The ERT found that this was not a good reason to send the employee home, The ERT found that the employer had not established that there was a good cause to dismiss the employment of Ms. Raj.
14. The ERT also found from the evidence that it believed Ms. Raj that she made several attempts to have her grievance attended to by the employer but to no avail.
15. The ERT did not believe the employer's version that Ms. Raj had abandoned her duties because no evidence of attendance at work or absenteeism was provided by the employer. The ERT also stated that there was lack of evidence that the employee was asked to return to work. If the employee had abandoned work, there would have been some form of correspondence but that was not shown to the Tribunal.
16. The ERT also considered whether Ms. Raj's act of joining another employment amounted to abandonment of her employment. It found that although this was concerning, it was satisfied that the employee was left in a dilemma about her future employment and ability to fend for herself and came to a conclusion that her predicament was justified and reasonable. The ERT found that the employee did not have very wide knowledge on her labor rights and coupled with that she had the difficulty of not having a written contract which would spell out her rights in a situation when she had a grievance of the nature she was faced with.
17. The ERT found that when her concerns were not addressed by the employer, she was forced to seek another employment to fend for her family and herself but this was also taken away from her at the instance of the employer confronting the employee at her new place of work. According to the ERT, if the employee had willingly abandoned her job as per the allegation of the employer, there was then no need for a confrontation.
18. The employer's act of confronting the employee was found to be humiliating and causing unnecessary stress to the employee for which she was entitled to compensation from the employer.

19. The other reason why the employer's evidence was not believed was that the witness's evidence was classed as dicey and uncertain as she did not have firsthand knowledge of the incident relating to Ms. Raj's final days with the employer. The evidence of the witness was fed in by the employer as she only testified on what she was told by the employer. The ERT therefore stated that the witness's evidence could not be stated to be the true account of the events leading up to Ms. Raj's termination.
20. The ERT found that the employer was under a statutory duty to provide work to Ms. Raj as per s. 24 of the ERP. Since the employer failed in this duty the employee should be entitled to be paid lost wages for the period she did not work which was one month and also 2 months for each year of service. It was noted that she had worked for 2 years which calculated her entitlement to 5 months lost wages. The amount as per the ERT's calculation came to \$2000 at \$140.00 per week being the wages Ms. Raj used to receive.

Grounds of Appeal

21. The employer asserts that the ERT erred in law and in fact in:

- 1. Holding that the termination of Ms. Raj was unjustified, wrong and unlawful under section 34 of the ERA.*
- 2. Awarding \$1,000 as compensation for humiliation, loss of dignity and injury to the feelings of Ms. Raj.*
- 3. Awarding damages in the sum of \$2,000 for loss of present and future earnings which award is high and inconsistent with the statutory provisions of the ERA.*

Law and Determination

22. On the Tribunal's findings that the employer had terminated Ms. Raj and that the termination was unjustified, wrong and unlawful, Mr. Singh contends that the finding is wholly wrong on

the facts of the case. He asserts that in paragraph 38 of the judgment, the ERT found as follows :

“The termination is therefore unjustified, wrong and unlawful as ordinarily the employer must prove lawful cause required under s34 of the ERP for summary dismissals”.

Underlining is mine

23. Mr. Singh argued that as stated by The Tribunal in para. 38, lawful cause is not required to be proved under s. 34. S. 34 provides for payment of all wages until the date of dismissal. In that regard the ERT's finding is wrong in law.
24. I find that Mr. Singh has attempted to take advantage of an error made by the ERT is stipulating the correct section under which a lawful cause is required to be proved in cases of summary dismissal. The ERT is not incorrect in saying that the employer had to prove that it had a lawful cause to terminate the employment. That indeed is a requirement of law by virtue of the provisions of s. 33 of the ERA and not s. 34.
25. The inclusion of the incorrect sentence in the judgment does not affect the findings of the ERT. There is no prejudicial effect to the employer if the ERT itself corrected its error or the appellate court does so. Even if the error remains uncorrected, there will not be any prejudicial effect on the employer. The ground pledged has absolutely no merits.
26. In addition to that, I do not find that the ERT was incorrect in requiring that the employer should have provided in evidence the records of the employee's attendance sheet at work. This would have shown to the Tribunal the times she attended work, when she was on leave and when she did not report to work. The employer is under a statutory duty to keep this record so that correct wages are paid to the employee.
27. The ERT also rightfully identified that if the employee had abandoned work, there would be at least some form of correspondence to ask her about her whereabouts and warning issued to

return to work. In absence of the material evidence, the ERT was correct in dismissing the position of the employer that the employee had abandoned her work and not terminated.

28. Mr. Singh also dealt with the award of \$1,000 which was awarded for humiliation, loss of dignity and injury to the feelings of the worker. As I have identified, this award was based on the fact that the employer had confronted the employee at her new employment. Mr. Singh says that an award of this nature is made only if at the time of the dismissal; the employer behaves in a manner which is undignified and causes the worker to undergo negative feelings. He argued that the confrontation was after the relationship had ended which gave rise to a different cause of action and not associated to an employment dispute. It was also averred that the employee did not give any evidence of humiliation, loss of dignity and injury to her feelings at the time of dismissal.
29. I agree with Mr. Singh that the incident that took place regarding confrontation of the employee was not during the course of her employment or at the time of the dismissal. It is when the relationship had ended and has no bearing on the question of whether the manner of dismissing the employee was fair. The award for humiliation, loss of dignity and injury to the feelings of the worker would have been justified if the employer had at the time of dismissing the employee acted in a manner which was degrading. The date of dismissal in this instance was October 2012. I would set aside the award of \$1,000 awarded for humiliation, loss of dignity and injury to the feelings of the worker.
30. On the award of \$2,000 for unjustified, wrongful and unfair dismissal, Mr. Singh says that the maximum that the employee was entitled to was one weeks' notice as she was paid weekly and the award was excessive in the circumstances. Mr. Singh argued that in absence of any written contract, the period of contract should be presumed to be the period of wages and since the employee was paid weekly, her contract was for a period of a week. It was also contended that, the employee had started work in a month's time and so any award beyond a month is not justified.

31. Mr. Singh then went onto s. 24 of the ERA and argued that if s. 24 says that the employer had a duty to provide work and if it does not then the employee must be paid for the period the work was not provided. According to Mr. Singh, the employee did not work for a month only as she found work somewhere else so in the circumstances the award of \$2,000 is not justified.
32. I find that the proper question was the period for which the employee should be compensated for loss of wages. She gave evidence that she had started work after one month of waiting for the employer to call her back. When she went to work, she was assaulted by the employer and she left work. She then started work with Jacks in November 2013. It is therefore the actions of the employer which caused the employee to be out of work for about 13 months.
33. The ERT awarded the employee a sum of 5 months out of the 13 months she was away from employment. The employee is a sales girl and she does not have any professional qualification to find work quickly. She did after one month but that too was no sustainable because of the actions of the employer. I find that the award of 5 months wages was generous. There is no cross-appeal from the employee on this aspect and I will not increase the award as that was not the issue that was addressed by the parties.
34. Having said that, I think it is my duty to bring an error in calculation done by the ERT. It awarded the employee 5 months wages at the rate of \$140.00 per week and ordered a sum of \$2,000 to be paid. At \$140.00 per week, the employee is entitled to 20 weeks of wages and that calculates to \$2,800. I cannot fathom how the ERT rounded that figure to \$2,000. It is in the interest of justice that this amount be set aside and substituted with the sum of \$3,000 which amount shall stand as having included the 10 percent of FNPF contribution at the current rate which the employer is entitled to pay to the employee.
35. I think I must address the issue of the employer's duty to provide work to the employee. The duty is well articulated in s. 24 which also states the consequences of non-compliance. That duty exists as long as the contract subsists. When the relationship ends, the duty ends with the termination of the employment relationship. When the employment relationship of the

parties ended, notwithstanding the correctness of the termination, the employer was no longer under a duty to provide work. Having said that, I agree with the ERT that the employer could not have terminated the employment on the grounds that the business was not doing well. It was under a duty to provide the employee with work or carry out redundancy as per the provisions of the law. It is in this context that the ERT had outlined the provisions of s. 24.

Final Orders

36. I allow the appeal in part only to the extent that the dismissal was not unfair but unlawful. To that end the award of \$1000 awarded for humiliation, loss of dignity and injury to the feelings of the worker is set aside.
37. I affirm the decision of the ERT in that the dismissal of the employee was unlawful but set aside the award for \$2,000 under this head and substitute with an order for a sum of \$3,000 to be paid for loss of wages and benefit for a period of 5 months.
38. I further order the employer to pay to the employee a sum of \$2,500 in costs for the appeal proceedings.
39. The total sum that ought to be paid to the employee inclusive of costs is \$5,500. The payments shall be made within 21 days.



Anjala Wati

Judge

13. 02.2019



To:

1. *Kohl & Singh, Suva for the Appellant.*
2. *Attorney General's Chambers for the Respondent.*
3. *File: Suva ERCA 03 of 2015.*