IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: **ERCC 02 OF 2016**

BETWEEN: **NATIONAL UNION OF FACTORY AND COMMERCIAL WORKERS**

APPLICANT

AND: **BLUESCOPE LYSAGHT (FIJI) LIMITED**

RESPONDENT

Appearances: *Mr. J. Serulagilagi for the Applicant.*

Mr. N. Tofinga for the Respondent.

Date/Place of Judgment: *Tuesday 28 January 2020 at Suva.*

Coram: *Hon. Madam Justice Anjala Wati.*

A. *Catchwords:*

***EMPLOYMENT LAW** – Summary Dismissal of the Employees – Whether Dismissal fair and lawful – Whether the Employment Court can order compliance of a Deed of Settlement entered into under an employment dispute (the same result will be achieved if the court were to award reinstatement as a remedy under s. 230 of the ERA) - What are the proper remedies that ought to be awarded: a matter of evidence which the court needs to hear: is it reinstatement and compensation for lost wages until reinstatement or loss of wages as a result of the grievance?*

B. *Legislation:*

1. *The Employment Relations Act 2007 ("ERA"): ss. 30 (6); 212 (1) (a); and 221 (1) (a) and (b).*

Cause

1. The National Union of Factory and Commercial Workers ***("NUFCW")*** is representing two of its members in this matter, Mikaele Seru and Vetaia Vulagi. They are former employees of the respondent company.

2. The applicant has filed an originating summons through which it seeks the following reliefs against the former employer:

   a. *that the employer complies with the Deed of Settlement entered into by it on 15 September 2014 in an action filed in the Employment Relations Court ("ERC") being ERCC 5 of 2014.*

   b. *for an interpretation of the word "re-employed" in the Deed of Settlement.*

   c. *for an interpretation of the Deed of Settlement in whole and whether the employees were to be re-employed for a short term period or unconditionally under the existing terms and conditions of their employment prior to them being made redundant.*

   d. *that the employer's act of summarily dismissing the two employees after entering into a Deed of Settlement constitutes unlawful, unfair and discriminatory termination.*

   e. *that the employer acted in bad faith in offering the employees 3 months contract under the Deed of Settlement.*

3. Since the entire application revolves around the 15 September 2014 Deed of Settlement, it is essential that the Deed be identified in full first followed by the circumstances under which the parties entered into the same.

Background

4. The salient part of the Deed reads as follows:

"NOW THEREFORE the parties have agreed as follows:

1. ***The 3 affected workers referred to in the application shall be re-employed as Assistant Machine Operators.***

2. ***That the said workers shall keep the 8 weeks' pay they received as redundancy payout.***

3. ***That the 3 affected workers shall commence work on Monday, 15 September, 2014.***

4. ***The injunctive and order for compliance application before the court be withdrawn by consent."***

5. As I have said before, the Deed was entered into in this Court in action brought by the Union on behalf of some employees, including the subject two. In that action, the Union had sought two distinct orders. The first was to restrain the employer from making the employees redundant with an order for stay of the decision for redundancy. The second application sought was for a declaration that the decision to make the four workers redundant was irrational, unjustified and tainted with discrimination.

6. The action was discontinued when the parties entered into the Deed. Following the entering into the Deed, the employer offered the employees 3 months contract. The Union's position was that the 3 months contract was in breach of the Deed as it stated that the employees would be re-employed which meant that they were to be re-employed on their previous terms and conditions and not on 3 months contract.

7. The Union then wrote to the employer on 18 September 2014 and made its concerns known to it. It stated that by requiring the employees to enter into 3 months' contract under the Deed was bad faith on part of the employer and that the employees should be given an employment contract without any conditions attached to it. The terms of the letter from the Union to the employer that I have discussed reads as follows:

"On 15 September, 2014 the undertaking before the Employment Court was for the members of the Union namely ..., Vetaia Vulagi, ..., and Mikaele Seru to be reinstated from the same date and further there was no conditions attached. Copy of the consent order is attached.

We have now been reliably informed that you are imposing a three month contract upon these employees. This is outright contrary to the agreement that was made in good faith which the Court had endorsed. I now request that you do comply with the consent agreement, failing which we will again move the Court and in this instance compliance with the consent agreement".

8. A day after the Union wrote to the employer, the employer wrote to the two employees and noted that they were informed to formalize their employment contract but they did not on instructions of the Union. It further stated in the letter that the employees were directed to acknowledge the directive to formalize the employment contract which they failed to do. The employer stated that it views the acts of the employees as failure to comply with lawful instructions.

9. Through that same letter the employer gave the employees' time until 8.00 am of 22 September 2014 to show cause in writing as to why they should not be summarily dismissed. The letter from the employer to the Union reads as follows:

"It has come to my attention that when you were specifically directed to formalize your contract of employment by your supervisor yesterday, 18 September, 2014. You refused to do so because the union had apparently told you not to sign it. You were further directed to acknowledge that the directive to formalize your employment contract was given to you and you refused to comply with this lawful instruction.

Management views your direct refusal to acknowledge the directive to formalize your contract as blatant and wilful disobedience to lawful orders. You are to show cause (in writing) as to why you should not be summarily dismissed by 8.00 am on Monday 22nd September, 2014.

Your refusal to formalize the employment contract by close of business on Monday, 22nd September, 2014 shall be deemed as your refusal to be re-employed as Assistant Machine Operator".

10. Come 22 September 2014, the two employees were summarily dismissed from employment. They were given a letter on 22 September 2014 indicating that they were summarily dismissed. The letter of dismissal to Mikaele Seru reads as follows:

"Reference is made to my letter dated 19 September, 2014 whereby you were directed to show cause in writing as to why you should not be summarily dismissed for blatant and wilful disobedience to lawful orders by no later than 8.00 am on Monday 22nd September, 2014.

You called your supervisor this morning at 6.13 am that you would report to work by 10.00 am without any regard and/or concern at all to my 8.00 am deadline. You have further compounded the matter by not arriving to work at all.

Given the circumstances and your failure to respond to my explicit directive, effective immediately, you are hereby summarily dismissed.

For ease of reference and your pay slip and the letter dated 19 September, 2014 has been attached to this correspondence. Please feel free to contact Rizwam in the pay office if any queries concerning your pay arises."

11. The letter to Vetaia Vulagi summarily dismissing him reads as follows:

"Reference is made to my letter dated 19 September, 2014 whereby you were directed to show cause in writing as to why you should not be summarily dismissed for blatant and wilful disobedience to lawful orders by no later than 8.00 am on Monday 22nd September, 2014.

Further reference is made to your supervisor who reported that when he directed you to wait for me this morning, you refused to comply with his directive and told him that you were leaving. You then left the work premises.

Given the circumstances and your failure to respond to my explicit directive, effective immediately, you are hereby summarily dismissed.

For ease of reference and your pay slip and the letter dated 19 September, 2014 has been attached to this correspondence. Please feel free to contact Rizwam in the pay office if any queries concerning your pay arises."

12. The Union then wrote to the employer on the same day and informed the employer that since the employees were permanent workers, the short term contracts offered to them was contrary to the agreement reached and as such the employees were advised not to sign the contract of employment to which they had agreed. The Union indicated in the letter that it intended to file an action against the employer. The letter reads as follows:

"Following our agreement to withdraw the application at the Employment Court, it was clearly decided that our members would be re-instated without and conditions attached which was conveyed to your office in our letter dated 18 September, 2014.

By giving our members namely…, Vetaia Vulagi, …, and Mikaele Seru short term contracts of three months is utterly contrary to what was agreed. In consideration of the fact that they are permanent workers due to the years of service with the company, we are at loss to understand how they can be employed on short term contracts.

Upon consultation with our members, they find that the three month contract is unacceptable and as such, we have advised them not to sign the contract to which they have voluntarily agreed.

Please note that their refusal to formalize the contract is based on their non-acceptance of the duration of the contract. We would also like to inform you that we have been instructed by our members to pursue the matter further as an Employment Dispute."

13. The Union then filed the current action on behalf of the employees seeking various orders as identified in the earlier part of this judgment.

Issues

14. I have to determine the following issues:

1. ***Whether the employer's act of offering the employees' 3 months contract was in breach of the Deed of Settlement?***

2. ***Whether the employer's act of summarily bringing the employment of the employees to an end unlawful and unfair?***

3. ***If the answer to (2) above is yes, then, what is the appropriate remedy that ought to be granted to the employees: is it compliance of the deed of settlement (as a remedy for unlawful termination or under the relief sought for compliance with the Deed) or damages for unlawful and/or unfair dismissal?***

Analysis/Findings

15. The Deed of Settlement made it very clear that the employees were to be re-employed and to start work on 15 September 2014. The Deed is silent on the duration of the contract and any new terms that were to be applied to the workers apart from the existing ones under which they were employed.

16. In absence of any such clarity and explicit agreement of the contract to be for three months only, it was improper of the employer to confine the terms of employment of the employees to 3 months and require the employees to enter into the same.

17. The employees ought to have been allowed to work without entering into a new contract. They were supposed to work under the previous contract. The employer has not shown to me any evidence that the previous contract was only for a period of 3 months due to which they imported the duration in the Deed.

18. The employer ought to have provided work to the employees from 15 September 2014 and when it drafted the new contract with the duration of 3 months stipulated in it, it acted in

contradiction of the Deed and breached the same. The employer has not fulfilled its duty under the Deed and it cannot say that the employees failed to report to work.

19. The date on which work had to start was 15 September 2014, on which date, there is no evidence that the employer called back the employees to work. Instead what is clear is that the employer got the employees entangled in the new contract by stipulating the duration of the employment period which led to the employees declining to sign the contract.

20. I find that it is the employer's act of malice and bad faith by making a short term contract that precluded the workers from signing the contract. There was nothing wrong in preparing a new contract for the purposes of tidiness but the inclusion of the most important term of the contract, that is, the period of the same, without an agreement by the employees was incorrect and made the new contract improper under the Deed.

21. The employer's position is that the word *"re-employed"* was fraudulently included in the Deed and that the term of 3 months was always the subject of the settlement in the previous action. There is no evidence of this. Mr. Tofinga who acted for the employer signed the Deed. He was not forced to sign the same. He ought to have examined the terms carefully and then sign it. The Deed was not an exorbitant document which would have taken more than a minute to read. The employer cannot blame the Union for fraud when it was open to it to refuse to enter into any settlement it did not approve of and proceed to the hearing of an action which was pending in court.

22. I now turn to the next issue of whether the employer could have summarily terminated the employment of the two employees. A perusal of the 2 letters of the employer which includes the letter for summary dismissal, indicates that the employees were terminated for not signing the employment contract, for not acknowledging that they were given a directive to sign the employment contract, and for not showing cause why they should not be summarily dismissed. At least this is what I understand the reasons to be.

23. Additionally, in case of Mikaele Seru, the employer also viewed the employee's act of not turning to work on 22 September 2014 as breach of lawful instructions. In case of Vetaia

Vulagi, the additional reason was that when he attended work on 22nd September, he was told to wait but he did not and returned from work.

24. The employees were dismissed for wilful disobedience of lawful orders for failing to abide by the directives. On the first refusal to sign the contract, I find that the employer cannot use its powerful position to require an employee to sign an employment contract which the employee feels does not reflect the agreement on which the parties agreed for an employment relationship or the continued employment.

25. I also find that the employer could not have required the employees to acknowledge a directive to sign the employment contract for three reasons. First, the entire matter was not independent of the contract of employment which the employees did not want to sign. Since the principal matter affected their employment contract, the employer's directive to acknowledge the directive to formalize the contract was inter-related. The employees were therefore free to refuse to acknowledge that they received the directive to acknowledge that they were given a directive to formalize the contract.

26. Secondly, on 19 September, 2016 the Union had already written to the employer notifying it that its act of requiring the employees to sign the 3 months contract was improper and contrary to the Deed. This letter in itself is an acknowledgment that the employer had required the employees' to sign the 3 months' contract. What more acknowledgment was the employer requiring? By putting the employees to unreasonable demands and asking them to follow the same does not constitute wilful breach of the lawful orders.

27. The third reason is that the term wilful disobedience of lawful orders means orders issued to employees for performance of task(s) that are genuinely necessary for the functioning of the employer. In this case the directives were relating to the employees contract and the employer could not issue directions to the effect of signing the same or signing any acknowledgments.

28. The employer also views the employees act of not showing cause why they should not be dismissed as act of wilful disobedience of lawful orders. First of all, I note that the employer did not give the employee a single working day to show cause why they should not be

dismissed. A letter to show cause was written on 19 September 2014. That was a Friday. The explanation was required by Monday 22 September, 2014.

29. The employer's act of putting the employees to such unreasonable deadline is unfair and maliciously designed to remove the employees from work. The employees needed time to consult the Union and finalize their response. The Union did respond on the same date of 22 September 2014. The letter may not have reached the employer's precious time of 8.00 am but the employees did explain why they refused to sign the contract. Although the explanation did not include why they did not acknowledge the directive to acknowledge that they were asked to formalize the contract, I find that the employer was not entitled to such an explanation and that the absence of such an explanation did not constitute wilful disobedience of lawful orders which could give rise to summary dismissal of the employment.

30. In case of Mikaele Seru, an additional reason was given that he failed to report to work on 22 September 2014. The employer had not at any instance required Mr. Seru to report to work. In fact the employer was required to call him back to work on 15 September 2014. It did not. The blame cannot be laid at the employee's door.

31. In case of Vetaia Vulagi, he reported to work and not given work. He was told to wait. Vulagi then rightfully returned as he was not provided work but told to wait. The employer also failed to comply with the Deed by not providing work to Vulagi.

32. I find that the employer did not have proper reasons to dismiss the employees and the reasons for which the employees were terminated is improper and unlawful.

33. Procedurally, in case of summary dismissal, the employees were entitled to written reasons for dismissal, up to date pay and a certificate of service. The evidence apparent from the letter of termination indicates that the first two requirements of the law had been met but not the third one which is the handing of the certificate of service to the employees.

34. S. 30(6) of the ERA states that ***"upon the 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"***. There is no evidence that either the certificate of

service was given with the letter of termination or handed over to the employees on any other day. In that regard the dismissal was not procedurally proper either.

35. On the issue of unfair dismissal, I do not find that there is any evidence of improper conduct of the employer at the time of the dismissal. I therefor do not find that the dismissal was unfair.

36. I now proceed to determine the aspect of what should be the proper remedy in this case. My first concern would be to look at the remedy of reinstatement. The Union has asked for a compliance of the Deed which means that they want the employees to be sent back to work in a position which they held before being terminated. When it comes to an application for compliance with the Deed, I do not have the jurisdiction to grant an order for compliance with the Deed.

37. Under. s. 221 (1) (a) and (b) of the ERA, the Employment Relations Court ***('ERC")*** only has powers to order compliance with the provision of the Act or an order, determination, direction, or requirement made or given under the Act by the ERC.

38. The ERC does not have powers to order compliance with the contract. This power is specifically vested in the Employment Relations Tribunal ***("ERT")*** pursuant to s. 212(1) (a) of the ERA. However, this does not mean that the court cannot consider the remedy of reinstatement as a remedy for the unlawful dismissal or alternatively loss of wages for unlawful dismissal.

39. I must say that this is technically not an action founded on an employment contract that I can order the same remedies as the ERT. The action is founded on a Deed of Settlement which is technically not an employment contract.

40. None of the parties have addressed me on what is the best remedy that ought to be granted. I am yet to be informed that if I were to order reinstatement, the effect it would have on both parties and if loss of wages were to be fixed, what is the actual loss sustained by the employees.

41. A lot of factors need to be taken into consideration in considering the remedies. The matter was heard on originating summons and the parties had only concentrated on the aspect of the

Deed of Settlement and summary dismissal. No specific addresses were made on the question of the proper remedy that the employees ought to be given. It would be unfair if I were to venture on my own and work out a remedy for the parties. I therefore need the parties to address me on this aspect.

42. In the final analysis, I order:

(a) That the summary dismissal of the two employees is unlawful.

(b) On the issue of remedies, I shall hear the parties on a date to be appointed in consultation with the parties.

(c) That the employees shall have costs of the proceedings in the sum of $3,500 to be paid with 7 days.

HIGH COURT OF FIJI SUVA

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Hon. Madam Justice Anjala Wati

Judge – High Court Suva

28.01. 2020

To:

1. *MC Lawyers for the Applicant.*
2. *Mr. N. Tofinga for the Respondent.*
3. *ERCC 02 of 2016.*