IN THE EMPLOYMENT RELATIONS COURT

AT LAUTOKA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 08 of 2016**
BETWEEN:	**VATUKOULA GOLD MINES LIMITED**
	APPELLANT
AND:	**JALE ULUAFE RAMASIMA**
	RESPONDENT
Appearances:	*Ms. V. Buli for the Applicant.*
	Ms. M. Motofaga for the Respondent.
Date/Place of Judgment:	*Friday 31 July 2020 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

A. Catchwords:

EMPLOYMENT LAW – Whether the employee ought to have exhausted the internal appeals procedure before the matter was heard by the Tribunal – whether the termination was lawful and fair- the proper remedies that ought to be granted.

B. Cases:

1. ***Fiji National University v. Filipo [2014] FJHC 69; ERCA 17. 2012.***

C. Legislation:

1. ***The Employment Relations Act 2007 ("ERA"): ss. 110(4)***

Cause and Background

1. The employee, Jale Uluafe Ramasima, was employed by Vatukoula Gold Mines Limited since 3 July 2008. He was employed as a Mine Team Leader. His employment was

terminated on 12 June 2009 on 2 grounds. The first is that he had damaged the company property, that is, he had cut the non-electrical aluminum detonator with yellow tubing in order to remove fuse from the same and the second was that he damaged the employer's property in order to steal the explosives.

2. Before the employee was terminated, he underwent a disciplinary enquiry hearing on 16 July 2009 where he was found guilty of the above two allegations. The termination was therefore made effective from 12 June 2009 being the date on which the employee was suspended. Subsequently the employee filed a grievance in the Employment Relations Tribunal claiming that he was unlawfully and unfairly terminated.

3. After hearing the matter, the ERT found that the employee was unlawfully and unfairly dismissed. The ERT therefore awarded the employee the following remedies:

    i. The employer to pay the employee lost wages for 1 year 5 months. The period was said to be justified on the basis that it took that period for the grievance to be heard since its referral to the ERT by the Mediation Unit; and

    ii. The employer pays to the employee 6 months wages as compensation for humiliation and loss of dignity.

4. Aggrieved at the decision, the employer appealed. The employer has raised various grounds of appeal and during the hearing compounded most of the grounds. It is proper that I reflect the issues that arises on the appeal. They are:

    i. Whether the ERT should have not entertained the grievance since the employee had not exhausted the internal appeals procedure provided in the contract of service.

    ii. Whether the ERT had properly analysed the evidence to arrive at a finding that the termination of the employment was done unlawfully?

iii. Whether the ERT had properly analysed the evidence to arrive at a finding that the termination of the employment was done unfairly?

Analysis

5. The first issue is whether the employee ought to have exhausted the internal appeals procedure provided for in the contract of employment as mandated by s. 110 (4) of the ERA which reads:

"Where an employment contract includes an internal appeal system … the internal appeal system must first be exhausted before any grievance is referred for Mediation Services."

6. Sometime back, I was faced with the same issue in the case of ***Fiji National University v. Filipo [2014] FJHC 69; ERCA 17. 2012.*** I had ruled in that matter that if the contract between the parties provides for an internal appeal system, then s. 110(4) makes it mandatory that the internal appeal system be followed.

7. However, I also found in that case that the grievors almost always fill a form in the Mediation Unit through which they make a declaration. The declaration is to the effect that he or she has exhausted all internal appeals procedure. I had ruled that that form is always served on the employer. If that declaration is incorrect and the internal appeals procedure has not been complied with, it is for the employer to raise this at the first given opportunity with the mediator who could send the parties back for compliance before conducting the mediation. If an employer does not raise this at the first given opportunity, it is taken that he has slept on his rights.

8. I see no reason why I should rule differently in this matter. I wish to add, though, that when the matter is at the litigation stage, it is too late to stay the proceedings and send the parties to exhaust the internal appeals procedure. This will only delay the process.

9. S. 110(4) clearly states that the internal appeals system must be exhausted before any grievance is referred for mediation. To my mind, if the grievance has gone past the

mediation stage, although a party has not exhausted the internal appeals procedure, s.110 (4) will not apply.

10. S. 110(4) should not be read to preclude the ERT from hearing the case when the matter is referred to it by the Mediation Unit. I therefore do not find that the ERT erred in proceeding to hear the matter.

11. The next issue is for me to find whether the ERT's finding that the employee was unlawfully dismissed proper on the evidence before the Tribunal. The employer's position is that it had obtained statements from various people. The employee, amongst others, was implicated for the offences outlined above. The employer handed these statements to the ERT at the submissions stage.

12. The ERT ruled that the statements were not admissible and found that if the statement was to be given any weight, the evidence of the makers of the same should be tested via cross-examination. After the evidence was properly tested then the question of credibility and weight was to be assessed. I could not agree more with this position of the law outlined by the ERT.

13. One must not overlook that the onus of proving that the termination was lawful is on the employer. It was therefore necessary that the employer called the witness (s) who alleged that the employee Mr. Jale Ramasima was damaging the property of the employer with the intent to steal the explosives. The employee ought to have been given a chance to cross-examine the witness to test the veracity of the evidence.

14. It was for the employer to establish that on the evidence presented before the ERT, the employer could form a reasonable belief that the employee was guilty of the offences. It was not for the employee to ask for the witnesses to be called as asserted by the employer. Why should the employee establish anything when the onus by law is on the employer? The employer had clearly failed to satisfy the ERT that it had a good cause to terminate the employee.

15. I have seen the statements which the employer attempted to introduce through the submissions. Some of the makers of the statements are the employees of Vatukoula Gold Mines Limited. Most employees have admitted in their statements that they were stealing the explosives. None of these employees who admitted stealing the explosives implicate that Mr. Jale Ramasima was part of the team. The statements make it clear that these employees had a network with others who were stealing. What this indicates is that if Mr. Jale Ramasima was part of the team, he would have been known and named. These statements therefore does not favour the employer at all.

16. Only one Samuela Dunn had implicated Mr. Jale Ramasima. The relevant portion of his evidence is paragraph 3 of his statement. The statement is not verified as being one that belongs to Samuela Dunn. It alleges that he saw from about 50 meters when he was kneeling down that Jale Ramasima was cutting the yellow detonator. After Jale Ramasima went, one Apimeleki Koto and he found the bag with the detonators.

17. If Samuela Dunn's version was correct then why was Apimeleki Koto's statement not taken? Why was he left out? How could Samuela Dunn have seen clearly from 50 meters what Jale Ramasima was doing? There are so many questions that needed to be put to these two witnesses who ought to have been brought to the ERT. They were not presented even in the disciplinary enquiry hearing for the grievor to question them because the employer is of the view that the employee should have asked to cross-examine them. This position of the employer, I agree, is like shifting the onus on the employee to prove that he did not commit the offences.

18. I do not find that without testing the veracity of the evidence, the statements could be given any weight. The ERT was correct in not admitting them and even if it was admitted in evidence I would not place any weight on it.

19. I find that the employer was not able to establish that it had reasonable grounds to believe that the employee had committed the offences as alleged.

20. In order to find that the termination was lawful, the employer had to further establish that it had followed proper procedures in terminating the employee. The procedures are that he is entitled to written reasons for dismissal, up to date pay and a certificate of service. The termination letter does not indicate that the employee was provided with a certificate of service. In that regard, even procedurally the termination was unlawful.

21. The next issue is on the aspect of unfair dismissal. In determining whether the dismissal was fair, the ERT ought to have seen whether the conduct of the employer at the time of the dismissal was such that it caused embarrassment, humiliation or injury to the feelings of the employee and not that the employee suffered from the fact of the dismissal.

22. I could not find in the summary of evidence in the ERT's judgment on how the ERT came to the conclusion that the termination was unfair. The finding was not supported by the evidence.

23. On the question of remedies, I was informed by the employee's counsel that the employee only found work on 29 October 2010. The employer's counsel stated that the judgment at page 12 indicates that the employee had been working for the past two years at Denarau. I agree that the judgment notes that but this cannot be correct.

24. The matter was heard on 11 April 2011. If the employee had been working for 2 years before that date, this would mean that he was working at Denarau from around April 2009. It is apparent from the evidence of the parties that the employee was still employed by Vatukoula Gold Mines Limited up until June 2009. In that regard, I cannot rely on the summary of evidence reflected in the judgment on this issue.

25. It was for the parties to clearly extract in the evidence as to when the employee found work and whether he could have found work earlier. If the future non-employment was as a result of the employer's conduct then the employer will be liable for the employee not being able to find work. It was also relevant to find whether the employee, after finding work, could secure equivalent or better salary.

26. In this case, I do not have proper evidence to work out the proper period for which lost wages should be granted. The ERT was handicapped as well and the best it could do in the circumstances was to award wages for the period it did.

27. I rely on the submissions that the employee found work only in October 2010. This indicates that the employee was out of employment for a period of more than 16 months which is almost a 1 year and 4 months. I do not find in that regard that the award for 1 year 5 months was wrong in law considering the fact that the employee was not awarded any costs in the ERT despite being successful. I will not set aside the award.

Final Orders

28. In the final analysis, I make the following orders:

(a) The appeal is allowed in part only to the extent that I set aside the finding of the ERT that the termination of the employment was unfair. Consequently, the remedy awarded for unfair dismissal being wages for 6 months as compensation for humiliation and loss of dignity is also set aside.

(b) The findings of the ERT that the dismissal was unlawful and that the employer must pay to the employee lost wages for the period of 1 year and 5 months is upheld. The payment shall be made within 14 days.

(c) Each party to bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

Judge

31. 07.2020

To:

1. ***AK Lawyers for the Appellant.***
2. ***AG's Chamber for the Respondent.***
3. ***File: Lautoka ERCA 08 of 2016.***