IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 19 of 2013

BETWEEN: **CARPENTERS FIJI LIMITED T/A MORRIS HEDSTROM**

APPELLANT

AND: **RATTAN SAMI**

RESPONDENT

Appearances: *Mr. E. Narayan for the Appellant.*

Mr. Serulagilagi for the Respondent.

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

Coram: *Hon. Madam Justice Anjala Wati.*

A. *Catchwords:*

Employment Law – termination of employment – contract expressed to be for a period of one year but after the expiry date the employee continued in employment – statutory presumption of new contract arises for an indefinite period – the terms and conditions of the employment would otherwise deem to be the same – the employee therefore can only be terminated according to the provisions of the contract or the law – in this case, the contract provides for the giving of notice and a cause to be established for termination to be carried out and since this is a provision that is more beneficial to the employee, the employer ought to have followed this instead of the provision of the law which allows for termination of indefinite contracts by giving of appropriate notice only – remedies justified due to the length of service of the employee and also considering that approximately the same time for which loss of wages was granted would be needed for the employee to find new employment – loss of benefits payment also justified.

B. *Legislation*

1. *Employment Relations Act 2007 ("ERA"): ss. 22; 28; and 29.*

Cause/Background

1. The employer appeals against the decision of the Employment Relations Tribunal ***("ERT")*** of 7 October 2013 wherein it held that the employee's contract was unjustifiably and unfairly terminated.

2. The ERT rejected the employer's contention that the contract was for a fixed term and since it had expired, the employment relationship could be brought to an end without a valid reason.

3. It was ordered that the employer pays to the employee a total sum of $12,158.55 made up as follows:

(a) 34.75 weeks lost wages at the rate of $271.90 per week amounting to $9,448.55.

(b) 10 week's salary for lost benefits amounting to $2,710.

4. The employee had been employed under several employment contracts as follows:

- 22 April 1977 to 2 November 2009.
- 9 November 2009 to 9 November 2010
- 10 November 2010 to 10 May 2011.

5. The last written contract that was entered into by the parties was dated 4 March 2011. While this was signed by the grievor on 10 March 2011, it had the intended effect of operating retrospectively, as it was intended to cover the period from 10 November 2010.

6. The contract of the employee was brought to an end by the employer on 1 February 2012 on the basis that his contract had expired. The letter reads:

"We refer to your employment contract dated 10th November 2010.

Upon review of your file, we note that your contract had expired on 10th May 2011.

Please be advised that your contract will not be renewed and your services are no longer required effective immediately. You shall be paid one month's salary in lieu of notice.

By a copy of this letter the Salaries Clerk is asked to pay you all monies due after the necessary clearances are made".

7. Succinctly, the ERT found that the employer could not have treated that the employment was for a fixed term and therefore expired by time because a fixed contract should be expressed to be not renewal as one of the conditions required by law.

8. The ERT concluded that since the contract was not for a fixed term, it was a contract for an indefinite duration and was to be terminated with valid reasons and proper notice. In this case, the ERT found that the employer did not want to fully disclose what the reasons were for the termination.

9. The ERT was of the finding that the employee's *"personal contribution to the employer over such a lengthy period of time, was not so irrelevant, that he did not deserve either some forewarning of his impeding termination, or at least an opportunity to canvass whether or not there were any possible roles or opportunities that he may be eligible for consideration in".*

10. It was found that if there was no complaint of the worker's conduct, he was surely entitled to be treated in a different manner than he was. The dismissal was therefore neither justified nor fair.

Grounds of Appeal and Analysis

11. The employer brings the appeal on the grounds that the ERT erred in law and in fact in holding that:

    1. ***Upon the expiry of the fixed term of the contract, the employee then continued to be employed on an indefinite contract.***

2. ***The employee was subject to the Master Agreement and employed on a monthly basis.***

3. ***That the termination of the employee was akin to redundancy when there no such basis to make the finding.***

4. ***The employee was entitled to compensation pursuant to s. 108 of the ERA.***

5. ***The employee was entitled to compensation for loss of benefits equivalent to 10 weeks.***

12. In respect of the first ground, it was argued that the final written agreement between the parties was executed on 4 March 2011. The agreement specifically set out the contract period from 10 November 2010 to 10 May 2011. By implication therefore, the written contract came to an end by effluxion of time, that is, 10 May 2011. There was no evidence that the last contract was renewed or extended. The employer was therefore entitled to treat that the contract has come to an end by a notice dated 1 February 2012.

13. In making a finding whether the contract was for a fixed term and that it expired by effluxion of time, the ERT referred to s. 28 of the ERA. S. 28 specifically states that each party to a contract is conclusively presumed to have entered into a contract for an indefinite period unless it is a contract for a fixed period which is expressed to be not renewable, it is a contract for a fixed task, or it is a daily contract where the wages are paid daily.

14. The ERT found that there was no evidence that the employee was performing a fixed task or a daily contract. On that basis, to defeat the presumption, there must be evidence of an expressed provision within the contract which indicated that the contract was not renewable. Since there was no evidence to that effect, the ERT found that the contract was not for a fixed term. The presumption in s. 28 therefore applied that the parties had entered into a contract for an indefinite term.

15. I do not have any basis in law to flaw the findings of the ERT. The contract could not be said to be a fixed contract. In this case, the employee continued to be at work for 9 months post 10 May 2011 which is the end date stipulated in the contract. Since there was continuity of employment, there is a statutory presumption of a new contract for an indefinite term.

16. S. 28 (1) of the ERA makes it clear that such a presumption arises unless the contract is for a fixed period which is expressed to be not renewable, is a contract for a fixed task, or a daily contract where wages are paid daily. The last written contract between the parties did not state expressly that it was not renewable. It therefore cannot be a fixed contract to exclude the presumption of law that a new contract for an indefinite period had arisen when the employee continued in the employment.

17. There is no appeal against the ERT's finding that the employee was entitled to a valid reason for being terminated in light of the enormous service he has provided to the employer. I am therefore not required by the grounds of appeal to re-look at this finding of the ERT.

18. However for the purposes of my own convenience, I must say that since there was statutory presumption of a new contract, the employee could only be terminated under the existing terms of the contract or under the provisions of the law.

19. A contract of employment can provide more benefits to an employee than that prescribed by the law: ***s. 22(2) of the ERA***. In this case, if the law was to be followed alone, then the employee's contract of employment could be brought to an end by giving one month's notice which is the provision consistent with the Master Agreement.

20. However, the contract of employment prescribes more benefits to the employee and since it does so, it is only proper to hold that the contract was for an indefinite period but the terms and conditions of the employment remained the same which means that the termination provision of the contract should be used to terminate the contract as it offered the employee an added benefit of not being terminated without a cause.

21. What does the contract say in respect of the termination provision?

> ***"Termination:*** ***Employment may be terminated at any time by either party giving not less than one month's notice in writing or by payment of one month's wages in lieu of notice. The employer reserves the right to pay out the employee's notice period instead of requiring the employee to work out his/her notice***

period. If the employee gives less than the proper notice, the employer is entitled to deduct the balance of unworked notice from any money owed to the employee or to otherwise recover the sum.

The employer is entitled to terminate this Contract:-

(i) The employer is unable to fulfill the Agreement;

(ii) Owing to any sickness or accident the employee is unable to fulfil the Agreement.

(iii) The employee is found to have repeated poor performance or misconduct.

Upon termination of employment, the employee must immediately return and must not copy all or any of the employer's property, documents, information. Keys and access or security cards which the employee has in his/her possession or use".

22. The termination contract is drafted in such a way that my reading of it is that the employer can at any time terminate the contract by giving one month's notice or pay in lieu, if one of the grounds for the termination is met. The grounds are identified in the clause and in the preceding paragraph of my judgment.

23. If the employer was simply entitled to termination the contract by giving notice than the inclusion of the second paragraph becomes meaningless. The employer would have simply said that the contract can be terminated without cause.

24. The evidence does not reveal the reason why the contract came to an end except for the fact that it expired naturally. Since this is a contract for an indefinite period, it could not expire naturally. The employer had to provide a valid reason for the termination. There was no reason provided. I therefore find that the ERT was correct in coming to a conclusion that the termination was not justified because the employee was entitled to be told why his employment was being terminated and that the reason could be justified.

25. The second ground of appeal states that the ERT found that the employee was employed on a monthly basis subject to the Master Agreement but indefinitely is a finding that contradicts and therefore cannot stand. The employer once again argued that the contract was for a fixed period and not for an indefinite period.

26. I do not find that the ERT made a finding that the contract of the parties was a monthly contract. The appellant is not reading the explanation provided in the judgment correctly. What the ERT discussed was how a contract of an indefinite period could be brought to an end.

27. In making a finding on what should be the required notice period (since this was not a case for summary dismissal), the court relied on both s. 29(1) of the ERA and the Master Agreement.

28. The ERT found that s. 29(1) and Clause 4 (i) of Schedule C of the Master Agreement were consistent. S. 29(1) set out the basis by which a contract for an indefinite period came to an end. It states that the notice of termination must be in writing. Secondly, in absence of a specific agreement between the parties, the various time periods are given, that correspond with the deemed contract period. Clause 4 (i) of the Master Agreement also required the giving of one month's notice.

29. It was the ERT's finding that if it was wrong in its interpretation of the law that the contract between the parties which the employer treats to have come to an end, remained on foot, than the best argument that remained for the employer was that s. 29(1) and the Master Agreement provides that the contract could be terminated by giving one month's notice. The contract could therefore be treated as a monthly contract after it came to an end on 10 May 2011 and thereafter when the worker continued to work.

30. The ERT found that at best the employer could only rely on the argument that it had a monthly contract that continued to be renewed monthly unless otherwise brought to an end by giving of one month's notice.

31. In my finding, a new contract had been formed for an indefinite period and the terms and conditions of the previous contract would apply to the employees. The employee could only

be dismissed with one month's notice and valid reasons. That is what the ERT found. I do not see any contradictions in its findings. The second ground of appeal has no merits.

32. I will deal with the last 3 grounds of appeal together. It says that the ERT did not have any basis to treat the termination akin to redundancy and use s.108 as a guide to grant the remedies. It is further submitted in the grounds of appeal that the granting of 10 week's salary as loss of benefits is also not justified on the evidence.

33. The ERT found that there was no evidence before it to make a finding that his role had been made redundant nor that he was incapable of performing his task. However, in assessing the remedies, the ERT opted to treat the termination as more akin to redundancy rather than gross unfairness.

34. The ERT found that the employee had been in service for 34 weeks. Due to his service, the ERT awarded the employee 34.75 weeks' pay at the rate of $271.90 per week which equaled to $9.448.55. It was found by the ERT that that is how redundancy pays are calculated under s. 108 of the ERA.

35. 34 weeks' equates to 8 ½ month' pay. In attempting to fix the remedy, the ERT was not incorrect in looking at the length of service and calculating what would be fair in the situation. Even if s. 108 was not used to calculate the remedy, the employee would anyway be entitled to about 8 to 9 months lost wages within which time he would be required to look for another work for his living to mitigate his loss.

36. I do not find that the ERT had erred in making a finding that 34.75 week's salary was apt in the circumstances.

37. The ERT made an award of 10 week's salary for lost benefits. That amount equated to $2,710.00. The award for lost benefit cannot be flawed on the facts of the case. The employee would have been entitled to leave and the employer's contribution towards his Fiji National Provident Fund if he worked until his retirement. That would have accumulated interest for the employee's benefit until he withdrew that amount for his retirement. In this case, the employee

loses out on that benefit until his retirement. The award of the lost benefits therefore is fair in the circumstances.

38. I find that there is no merits in the remaining grounds of appeal.

Final Analysis

39. In the final analysis, I find that there are no merits in the grounds of appeal and I dismiss the same.

40. I uphold the decision of the ERT and order the employer to pay to the employee the ordered sum of $12,158.55 within 14 days of the date of the order.

41. The employee shall also have costs of the appeal proceedings in the sum of $1,500 to be paid within 7 days.

.....

Hon. Madam Justice Anjala Wati

Judge

28. 01.2020

To:

1. ***Patel Sharma Lawyers for the Appellant.***
2. ***MC Lawyers for the Respondent.***
3. ***File: Suva ERCA 19 of 2013.***