

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 05 of 2015

BETWEEN: **PACIFIC COUNSELLING & SOCIAL SERVICES**
APPELLANT

AND: **JULIANNE SUTHERLAND**
RESPONDENT

Appearances: Mr. Pillay for the Appellant.

Mr. N. Tofinga for the Respondent.

Date/Place of Judgment: Wednesday 17 February 2021 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. **Catchwords:**

Employment Law – summary dismissal – no written reasons provided at the time of the dismissal – written reasons provided later – the employer cannot therefore rely on any reasons to justify the termination as none was provided at the time of the dismissal – the subsequent written reason that the employee did not perform as expected of the job description cannot be justified on the grounds that it is unfair to gauge an employee’s full potential in only 3 weeks of her being at work and in matters of probation, work performance cannot be judged so early in the probation period and it is advisable to the employer’s to allow the probation period to run its course before a determination on the worker’s competency is carried out – the employer is also required to identify to the employee during the probation period the shortcomings in his or her performance and set a guideline and time frame on how it can be improved – no evidence of unfair dismissal – employee found to be unlawfully terminated.

Cause and Background

1. The employer appeals against the decision of the Employment Relations Tribunal (*“ERT”*) of 19 January 2015 on its finding that the employment of Ms. Julianne Sutherland was unlawfully and unfairly terminated and awarded the remedy of 5 months wages lost for unlawful dismissal and 6 months wages lost for unfair dismissal.
2. Ms. Julianne Sutherland was employed by Pacific Counselling & Social Services (*“PCSS”*) as the Deputy Director. She had signed the employment contract on 28 July 2010 for a period of 2 years. She started work on 19 August 2010 and her employment was terminated on 16 September 2010. Julianne Sutherland has therefore basically worked only for less than a month before she was summarily dismissed.
3. Her contract was terminated by Ms. Joanne Cohen, the Director of PCSS. In the evidence, it unfolded that the contract was terminated for non-performance. Ms. Sutherland was not given the termination letter until she lodged her grievance and when the office of the Ministry of Labour, Industrial Relations and Employment called the employer asking for a letter of termination detailing the reasons for the dismissal.
4. The letter of termination was dated 16 September 2010 which obviously was backdated as the evidence was that when Ms. Julianne Sutherland was terminated, the letter was not ready then. The letter of termination reads:

“

Re: Termination of Probation Contract

Dear Julianne

This is to inform you that as per clause 5.2 of your probationary contract with Pacific Counselling & Social Services (PCSS) which reads as follows:

“5. Probationary Period

A probationary period of three months will apply. At any time during this period, one of the following may take place:

- 1. permanent employment may be offered to you until end of this contract;*
- 2. employment may be terminated by either party by providing the required notice; or*
- 3. a second three-month probationary period may be established.”*

Your employment is being terminated by PCSS effective immediately due to demonstrated inability to perform at the level required of this position.

We have deposited one month’s pay in lieu of notice...”

Evidence and ERT’s findings

5. Three witnesses gave evidence on behalf of the employer. The summary of their evidence in terms of Ms. Julianne Sutherland’s non- performance at work includes:
 - *Getting involved in branch operations which were not her role for which she was spoken to by Joanne Cohen not to get involved in day to day operations.*
 - *When being asked to prepare her work plan, which she did, the same was not up to the par. The efforts by the employee were not up to the standard required and was short of the person she professed to be to have so much expertise in the area.*
 - *She had to prepare a productivity analysis which she assigned the IT Manager to do.*
 - *Failure to assist and support the executive managers in developing program documents and budget, in coping with staff clinical disciplinary issues and failure to assist in implementation and periodic review of strategic plan although Ms. Julianne Sutherland was not informed about the timeframe for completion of the tasks or that she has breached the directions and could be terminated for that.*

- *Not having the proper temperament to lead the organization.*
 - *During orientation, talking about her personal matters and not allowing the other plans to be discussed.*
 - *Not understanding her role and responsibilities in the organization and as a result lacking the competence to carry out the work.*
 - *Working in breach of the policy in particular accepting a referral from the Court and making arrangements with the clinical supervisor in Suva to accept the referral when this is against the policy of the employer and is clear between the courts and the PCSS.*
 - *Looking lost during the first two weeks of orientation and since she was new she was not able to have a firm grip on the structure of the organization.*
 - *Having long discussions with staff which affected the productivity time for the staff.*
6. The ERT found that since the employee was on a probation period, if her performance had shortcomings, the employer ought to have done the following:
- *Informed the employee of the shortcomings and required her to achieve a higher standard;*
 - *Provided to her information in a readily comprehensible form; and*
 - *Allowing reasonable time for attainment of those standards.*
7. In its finding, the ERT concluded that in not complying with the standards laid down, the employer acted hastily and not allowed the probation period to run its course. The employer

failed to meet the minimum requirement of fairness and reasonableness making the termination unlawful and unfair.

The Appeal and Submissions

8. The employer had raised several grounds of appeal out of which all except two were withdrawn at the appeal hearing. The remaining grounds which were argued were grounds 3 and 4 which reads as follows:
 - *That the ERT erred in law and in fact in incorrectly applying the principles relating to the calculation of the remedies.*
 - *That the ERT erred in law and in fact in incorrectly applying the principles relating to the termination of employment of the contract between the parties.*
9. In arguing the appeal, Mr, Pillay submitted that the ERT was wrong in law in finding that the employer should have allowed the probation period to run its course when the clause on the probation period states that “*at any time during this period, one of the following may take place...*” which includes the employment contract being terminated by either party providing the required notice. The appellant therefore had the right to terminate the employment during the pendency of the probation period.
10. In arguing that the remedies are not based on a proper consideration, the employer argued that any award should have been restricted to the first 3 months of the employment and that the employee was not entitled to a second probationary period as of right. The employer could have taken any action including the act of terminating the employee after the first probation period so the award of 5 months’ salary including the second set of probationary period is not justified.
11. It was also argued that the employee had not given any evidence that the manner in which the dismissal was carried out was unfair which led to her being humiliated. As a result, the finding of unfair dismissal cannot be established. The evidence was that the termination was

carried out in a very peace and quiet way. The employer argued that since unfair dismissal could not be established, the remedies ought to be set aside too.

Analysis

12. I understand that the appeal surrounds the interpretation of the probation clause and whether the ERT's findings that the employer should have allowed the probation period to run for Ms. Julianne Sutherland to assess her performance is correct in law and in fact. I will come to that later but first of all I must examine whether the reasons for which the employee was terminated can be justified by the employer.
13. It is by virtue of the ERA that the employer, in cases of summary dismissal, is required to provide to the employee written reasons. In this case the employee was dismissed without any reasons. She was told orally to go home and no written reasons were provided. In that situation the employer now cannot come to court and ask the court to examine the reasons it had in mind to determine the lawfulness of the same. If this is allowed then the employers will start taking unfair advantage of the employees by determining their employment and then when the propriety of the action is challenged, bring in any issue to justify the termination. The principles of good faith requires the parties to the contract to act honestly during the term of the employment and even when the term is being determined by one party.
14. There was gross failure by the employer not to provide to the employee the written reasons for dismissal and as such there was no valid cause to terminate the employment. I should not even be analyzing the reasons for the dismissal as this would amount to unfairness to the employee but for the sake of completeness I will look at the probation clause.
15. The probation clause in the contract of employment is identified in the termination letter. My reading of the contract is that there is a minimum probation period of three months. In the 3 months period, the employee's employment could be terminated for a lawful cause or upon provision of the required notice. To that end, it is not necessary in some situations to allow the 3 months' probation period to be completed before summary dismissal is carried out

however there are other situations in which it would be prudent to wait for the term to be completed for the purpose of fairness and justification.

16. For example, during the 3 months' probation period, if the employee's conduct becomes gross and intolerable, then the employee can be summarily dismissed without having to wait for the 3 month probation period to be complete. In other cases such as in this one where performance is to be assessed, it may not be fair to terminate the employee without allowing the employee a full opportunity to learn the work and reflect on the task allocated.
17. In this case, the employer is complaining about various acts of non- performance which cannot be justified. Ms. Julianne Sutherland was from Australia and she came on a very executive position which required her to understand the structure and her role and responsibilities very well before she started her work proper. In such a large institution with a high profile work, it will take even the most intelligent and the hardest working person to understand the know-how of the position. For this to occur, sufficient time and clear guidance from everyone including the senior and the subordinates is expected. It unfolded in the evidence that Ms. Sutherland was working her roles and responsibilities in the way she understood what was required of her and in only 3 weeks she was assessed to be under performing.
18. This 3 weeks is usually a period where a new comer understands his or her roles and goes through the orientation in the institution. It is not expected that he or she would start work straight away and even if he or she does, it is expected that there would be mistakes, shortcomings, overlapping of duties, misunderstandings and so forth. What needed to be done was that the employer ought to have properly identified, like the ERT mentioned, what was expected of Ms. Sutherland, what she could not achieve and a time frame for her to achieve her target.
19. I am able to say that no matter how small or big profile one has in an institution, to do the work rightly, a person needs time and guidance to be able to settle in the work place and the job description. That is why it is preferred that the probation period be allowed to run its course to allow the employee a fair and just chance to prove his worth. A firm view of the

worker on his or her performance cannot be judged in 3 weeks. It is too harsh an approach by an employer. The actions of the employer in this case does not reflect good faith.

20. If there was good faith on the part of the employer then there would have been a proper assessment of the worker. There would also be written reports on the target not met by Ms. Julianne Sutherland. Ms. Sutherland ought to know the areas where she was expected to improve and concentrate on. It can be very horrifying for any employee to work in a probation period where any act can be looked and frowned upon for example Ms. Julianne Sutherland discussing her personal matters and this being brought as one of the reasons why she was terminated. What aspect of that makes her an incompetent employee was not linked except for the fact that the employer says that when she was talking about her personal matters, she took up time needed to discuss the institution's plan with her. If that was the case then the person guiding should be more focused and apt in handling such situations and orientation sessions. These things are bound to happen at workplaces. That does not make a person a bad employee or an incompetent employee. All Ms. Sutherland needed was proper guidance on what she needed to focus on to save time and resources.
21. The evidence reveals to me that when Ms. Sutherland joined the institution, instead of giving her the required help, there was an unnecessary advantage taken on her alleged shortcomings which the colleagues in most employment situation hope for when there is a new worker. Any small aspect of the employee's behavior becomes an issue as it became in this case. If the employer seriously wanted the arrangement to work, there would be a clear arrangement and guidance provided to Ms. Julianne Sutherland and she would not be asked to leave work in such a short term.
22. I therefore find that the employer acted in haste and unfairly in not allowing the employee the time and opportunity to correct any flaws that there may have been to decide whether she was able to perform the work she was hired for. If she had been given the time and clear guidance on any shortcomings that she may have had, then she should have been monitored and a proper assessment of her productivity recorded. It would then be fair and proper for the employer to decide which one of the options the employer was going to undertake in the probation clause.

23. I find that the dismissal was unjustified as the employer could not establish the shortcomings as stated in the letter and that it did not follow the proper procedure to terminate the employment.
24. In terms of the remedies provided by the ERT, I do not find that the 5 months wages for unlawful dismissal can be regarded as excessive. The ERT has justified it on the basis that there was 2 months remaining in the probation period and a second term of the probation period of 3 months makes it 5 months' of lost wages. The employer argues that there is no certainty that it would have selected this option. I find this argument naïve.
25. If the employer followed the proper process of providing the employee with ample time to settle in the new work and identified the nature of the work that she did not carry out to the expectation and provided some guidance and time frame on how and when it can be achieved, the employee could have worked in a different and better way. Upon providing the necessary tools as identified, it was then for the employer to decide what actions it was going to take under the probation clause. Who knows, the employee could have worked away with a permanent contract in her favour or entitled to another probationary period. Since the employer has not conducted itself fairly, it cannot be allowed to take advantage and say that it may have terminated the contract. That is a very premature decision without realizing the workers full potential.
26. I therefore find that the ERT was fair in accepting that out of the two remaining options, the more balanced approach was to accept that the worker may have been given another probation term. If at the end of the second probation period the worker was to be sent home then a month's notice would have had to be given to the employee. I find that to the 5 month's wages another month should be added to reflect the notice period. I therefore find that the employee is entitled to 6 month's wages for unlawful dismissal.
27. On the remedy for unfair dismissal, I find that there was no evidence by the employee to indicate that the manner of terminating her was in such a way that caused her humiliation,

injury to the feelings and loss of dignity. To that end the remedy awarded for unfair dismissal being 6 months wages cannot be justified on the facts of the case.

28. I must however comment on the aspect of the interest as well. The employee had been awarded the sum of monies from 19 January 2015. This amount remained unpaid since then until the date of hearing. Post judgment interest of 4 percent accumulates on this amount. The employer should therefore pay post judgment interest at the rate of 4% for a period of 2 ½ years.

Final Orders

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

(a) The appeal on the ERT's findings that the employee was unlawfully terminated is dismissed. The remedy awarded by the ERT of 5 month's wages is set aside and substituted with 6 month's wages to be paid within 14 days from the date of the order.

(b) The ERT's finding that the employee was unfairly dismissed and that the employee should be paid 6 month's wages for the same is set aside totally.

(c) The employer shall pay to the employee post judgment interest at the rate of 4% on 6 months' salary for 2 ½ years within 14 days,

(d) Each party shall bear their own cost of the proceedings.

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Hon. Madam Justice Anjala Wati

Judge

17. 02. 2021

To:

- 1. Messrs Gordon & Company for the Appellant.***
- 2. N. Tofinga – Representative for the Respondent.***
- 3. File: ERCA 05 of 2015.***