

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 06 of 2017

**BETWEEN:** **GOUNDAR SHIPPING SERVICES**  
**APPELLANT**

**AND:** **PILI IELI**  
**RESPONDENT**

*Appearances:* Ms. Kinivuai for the Appellant.

Ms. L. Mataigusu for the Respondent.

*Date/Place of Judgment:* Thursday 1 April 2021 at Suva.

*Coram:* Hon. Madam Justice Anjala Wati.

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**JUDGMENT**

A. *Catchwords:*

*Employment Law – whether worker terminated from work or did he fail to report to work as required by the employer – if the worker was terminated, was the same lawful and fair?*

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*Cause*

1. The employer appeals against the decision of the Employment Relations Tribunal ("*ERT*") of 22 February 2017 on its findings that the employee Pili Ieli was unlawfully and unfairly dismissed for which the employer was ordered to pay a sum of 3 months wages for unlawful dismissal and 3 months wages for unfair dismissal to compensate him for the humiliation, loss of dignity and injury to the feelings of the employee.
2. The employer is in the shipping industry providing transportation to the public from the outer islands. The employee was engaged by the employer as a second officer on board the vessel, Lomaiviti Princess 2.
3. Both parties have a conflicting position on the issue of whether the employee was terminated from work. The employee says that he was terminated from work on 13 December 2013 and the employer says that it was the employee who did not report to work after an incident on 13 December 2013.
4. There is even conflict on the turn of events culminating to the employee leaving work. In order to correctly identify each party's version of the event, I will refer to the material evidence of all the witnesses in the ERT.

*Evidence*

5. The first witness for the employer was Captain Inoke. He had been working for Goundar Shipping Services since 2011. He said that he remembers having a conversation with Mr. Ieli on the morning of 13 December 2013. Mr. Ieli had requested him if he could get time off to attend a family function. He wanted to sign off and not go to Koro Island. He told Mr. Ieli that a replacement needed to be found for him before he can get the time off.
6. Captain Inoke said that Mr. Ieli was part of the manning crew. Since it was a Friday and it was late in the afternoon, a replacement could not be found. According to the Captain, he told the management that a reliever needed to be found for him.

7. In cross- examination he stated that he cannot confirm whether the ship was properly manned when it sailed to Koro Island because he had signed off.
8. The next witness for the employer was Mr. Rakesh Parasad. He is the Manager Finance of the employer. He said that on 13 December 2013, the vessel was to return to Koro Island and Mr. Ieli had to be part of the manning crew.
9. According to Mr. Prasad, at about 6pm, the Master of the vessel Mr. Robert Sosene asked him on the whereabouts of the 2<sup>nd</sup> Officer. It was only then when he realized that Mr. Ieli had left the ship following which he attempted to contact Mr. Ieli. He called on Mr. Ieli's mobile which was switched off. He then referred to his file to get an alternative contact. He found his wife's number. The wife answered the phone and he managed to talk to Mr. Ieli.
10. Mr. Prasad says that he asked Mr. Ieli why he was not on board and he replied that he was in a family function. Mr. Prasad said that he told Mr. Ieli that the vessel needed to sail and he needed to report to duty. Mr. Ieli replied that he could not as he had provided a sick sheet to the office. Mr. Prasad said that he told Mr. Ieli that the sick sheet could not be relied upon as he was in a family function and that he needed to report to duty.
11. Mr. Ieli again responded that he would not come as he was on sick sheet. Mr. Prasad said that he then sent a text message to Mr. Ieli to the effect that if he failed to report to duty within 30 minutes then his employment may be terminated. Despite that message, Mr. Ieli did not report to work. Attempts were made to locate a reliever but to no avail. The vessel had to sail without a reliever. She was delayed by 2 hours.
12. On the sick sheet, Mr. Prasad said that it was not provided to him but to one of the officers. Mr. Ieli had tendered the sick sheet and gone. The sick sheet says that he was supposed to return to work the next day but Mr. Ieli did not come back to work. He however did come to the vessel on Monday where he packed his belongings. After that he came to the office and informed that he was leaving. He was there in the office with Mr. Goundar when Mr. Ieli came. Mr. Ieli came to the office to let them know that he was leaving the office.

13. After that Mr. Ieli did not contact the office. The employer had not terminated him. It was Mr. Ieli who left on his own accord after failing to report to work. The issue was reported to The Maritime Safety Authority of Fiji. If Mr. Ieli reported to duty the next day, the employer could have taken disciplinary action against him but he was not terminated. He was not told that he would be terminated but that he may be terminated because he needed to be warned. Deserting a ship is a serious offence.
14. In cross-examination Mr. Prasad said that he had the powers of firing and hiring the crew on the vessel. He did not accept the sick sheet because when he called Mr. Ieli he said that he was in a family function and for Mr. Prasad not to disturb him.
15. He also admitted that when the vessel sailed without a 2<sup>nd</sup> officer on board, it was given clearance by one of the officers from Maritime Safety Authority of Fiji. One of the officers is always there to clear the vessel for sail. Even on this occasion the clearance was given for sail after the passengers and the cargo was checked.
16. Mr. Prasad denied that he had only given Mr. Ieli 15 minutes to report to work or that when he called Mr. Ieli, he was told that he was at work with the sick sheet. He also said that he cannot recall whether there was a ship sailing on the very next day of the incident but that the office was open. He denied that he told Mr. Ieli on the Monday he reported to work that he was terminated.
17. The employer's 3<sup>rd</sup> witness was Ms. Maureen Lata Prasad. She said that on 13 December 2013, Mr. Ieli came to the office. It could be around midday but she is not sure of the time. He left his sick sheet on the table. She saw the sick sheet. She told him to fill in the leave form which needed to be filled and authorized by the Captain. Mr. Ieli however just walked away. She followed him but he went away. She did not see him after that day.
18. In cross-examination she said that when Mr. Ieli had handed over the sick sheet, she did not show it to the Captain but showed it to Mr. Rakesh Parasad. She had no idea what Mr. Rakesh Prasad did with the leave. She said that his sick sheet was paid after two years.

19. The worker stated in his evidence that he had been working for this employer for the past 6 months. On 13 December 2013 Mr. Robert Sosene was the second in command of the ship. The Captain was not there. The Captain is the Master. He therefore had to approach Mr. Robert Sosene. He told Mr. Robert Sosene that he needed to go and see a dentist. Mr. Sosene allowed him to go. This was about 8am.
20. He was given the approval to leave the vessel. When he visited the dentist, they did some filling of the tooth and since there was still some pain, a sick sheet was given to him. He got the sick sheet around midday which he took to the office and gave it to Maureen Prasad.
21. When he handed the sick sheet, Maureen asked him what it was. He said it was a sick sheet and she did not say anything after that so he left straight for home. At around 6 pm, Mr. Rakesh Prasad called him on his wife's phone. He told Rakesh that he was sick and that he had handed the sick sheet around midday. Rakesh then disconnected the line. A few minutes after he called again and said that they have not found a reliever so he had to report to work. He informed Rakesh that he had a sick sheet. Mr. Ieli said that he then disconnected the line.
22. Mr. Ieli said that it was the duty of the employer to find a reliever. Rakesh sent him a text that evening that he should be on board in the next 15 minutes otherwise he will be terminated from work. He still did not report. He was on sick sheet. He had to report to work the next day but since Rakesh had sent him that message and there was no ship on the next day he did not go to work. He was to report to the ship and not the office.
23. He went back to the office on Monday. He saw Captain Inoke, Rakesh and one Tarun there. Rakesh informed him that they were discussing about his case and why he was not answering the phone on the subject day. Rakesh then said that there is nothing that they can do but to terminate his employment. After hearing this from Rakesh, he went to the ship and collected his belongings.
24. In cross-examination he denied that he had any discussion with Captain Inoke on 13 December 2013. He also denied that when he handed over the sick sheet to Maureen, she asked him to fill in the leave form. He denied that she followed him and that he did not flee from there. He

does not know about the procedure of filling in a leave form. He does not have a contract so he does not have the obligation of finding a reliever. He said that the way Rakesh had written the text message indicated that he had been terminated.

25. He did not discuss the matter with the Director of the Ship Mr. Goundar. He does not deal with him but deals with the Operations Manager and the Masters of the ship. He insisted that the message from Mr. Rakesh was that he will be terminated if he did not report to work in 15 minutes not that he may be terminated. He clarified that on Monday, Rakesh had told him that there was nothing they could do as he was terminated from work.

#### ***ERT's Findings***

26. The ERT found that since the employee was in employment for more than 3 months, he was entitled to be on paid sick leave. The employer had wrongly refused to accept the sick sheet. The sick sheet has not been challenged. The same was issued by a registered medical practitioner certifying the worker's incapacity to work. If the employer doubted the sick sheet then action should have been taken against the worker and the medical practitioner. When it did not, it is deemed to have accepted the same. Having accepted it, it could not behave the way it did when the worker did not turn up for work.
27. The sick sheet was supplied around midday and this constitutes reasonable notice to the employer. The employer therefore should not have been calling the worker. Instead it should have been actively involved in looking for a reliever for the worker. The evidence of Captain Inoke also suggests that he had asked the employer to look for a reliever.
28. The employer's act of sending a text message saying that the worker may be terminated constitutes termination of the worker in the circumstances which was unjustified, unlawful and unfair. The ERT accepted that the worker could not go to work the very next day because there was no ship but when he did go to work it was confirmed that he was terminated.

#### ***The Appeal and Analysis***

29. The employer raised 2 grounds of appeal. The 1<sup>st</sup> is that the ERT erred in law and in fact in finding that the worker was terminated when the same could not be established on a balance



of probability and the 2<sup>nd</sup> is on the award of 3 months wages for humiliation, loss of dignity and injury to the feelings of the worker.

30. The 1<sup>st</sup> ground requires me to examine whether the ERT was correct in making a finding that the worker was terminated and not that he failed to report to work as required by the employer. I must say that since there was conflicting evidence on whether the employee was terminated or that he left work, it was for the ERT to accept one version and reject the other. It accepted the employee's version and I find that it was open to the ERT to do so on the basis of credibility of a witness. I do not find that there is any material upon which I can impeach the finding of the ERT.
31. The employer says that the message sent to the employee was not conclusive that the employee had been terminated or will be terminated but that he may be terminated if he did not report to work in 30 minutes. If that is so, the employer should have produced the text message in court as it could have been retrieved. That evidence was not produced in the ERT for it to make an assessment or to even accept the employer's version.
32. In any event, if the employer had not terminated the employment then when it saw Mr. Ieli collect his belongings and leave the ship, it should have taken an immediate step to clarify the position that he had not been terminated and that he was required at work. This was necessary in light of the text message that was sent by the employer. It was not difficult for the employer to work out from the conduct of Mr. Ieli that there could be a possible misunderstanding.
33. One must not forget that it is the employer's version that Mr. Ieli reported to work on the Monday and collected his belongings. He came to the office and informed that he was leaving. He was not asked why he was leaving. Why not and why was he not told that he had not been terminated? It only makes sense that this was not done because the employer had already terminated the employee.
34. From the evidence, I too do not find Mr. Rakesh Prasad's evidence reliable. He informed the ERT that it was only around 6pm when Captain Robert Sosenc called that he realized that Mr. Ieli was missing from the vessel. On the contrary, Ms. Maureen Prasad says that she had

handed the sick sheet to Mr. Rakesh Prasad and that she has no idea what he did with it. Captain Inoke also testified that he informed the office to look for a reliever.

35. The two witnesses' evidence is clear that Mr. Rakesh knew that Mr. Ieli will not be at work and that he had to find a reliever for Mr. Ieli. It appears that Mr. Prasad did not take any immediate steps to find a reliever and when it was too late, he decided to put the blame on the worker. To save himself because of his shortfall, Rakesh conducted himself in a manner that is unacceptable and unfair.
36. Mr. Rakesh started hassling and threatening the worker which is not permissible. A sick worker is entitled to rest and not to be hassled and made to worry about his work. He need not worry about dealing with text messages threatening him of his employment future with that employer. This is grossly unjustified.
37. What also makes Mr. Rakesh Prasad's evidence suspicious is when he told the ERT that when he called Mr. Ieli he was told by Mr. Ieli that he is in a family function and that he will not report to work as he had tendered a sick sheet. Even if Mr. Ieli was in a family function, he would not dare say that as his livelihood was important and he needed to have work for himself. Having given the sick sheet, Mr. Ieli would have simply indicated that he was sick. Why would he say that he was in a family function? I find that the issue of attending a family function is concocted by Mr. Rakesh Prasad.
38. What also concerns me is that the employer failed to call Captain Robert Sosene to give evidence. He was a very material witness in the matter since Mr. Ieli says that he had approved Mr. Ieli's time off to see a dentist.
39. I do not endorse the employer's views that Mr. Ieli needed to have his sick sheet approved. This may hold true for annual leave but if a worker falls sick and is not able to work, he need not have to wait for the employer to approve his leave. That would be most absurd because in that situation the employee would be expected to work until his sick leave is approved. The request then becomes redundant.




40. I also do not agree with any insinuation by the employer that it was Mr. Ieli's duty to look for a reliever. It is for the employer to make arrangements for such situations. It is in the sailing business and such matters can always arise. Sufficient provisions ought to be made to cater for sick employees.

41. I have no reason to overturn the decision of the ERT that through the text message, the worker had accepted that he was terminated which was confirmed on the Monday by Rakesh. Although Rakesh denies this, it was for the ERT to accept which version of the evidence was more credible.

42. I also find the termination to be unfair. I accept that Mr. Ieli was terminated by the text message of Mr. Rakesh. In terminating him, he was not treated fairly as he was definitely harassed when he was sick and put to unnecessary inconvenience. This action does not show good conduct on the part of the employer in dismissing him. I therefore do not find that the award of the 3 month's wages for unfair dismissal is unjustified.

***Final Orders***

43. In the final analysis, I find that the appeal has no merits and I dismiss the same. I uphold the orders of the ERT. The employer is to comply with the orders of the ERT within 21 days from the date of this judgment. I also order costs in favour of the employee in the sum of \$3000 to be paid within 21 days.



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*Hon. Madam Justice Anjala Wati*

*Judge*

01. 04. 2021



**To:**

1. *Reddy & Nandan Lawyers for the Appellant.*
2. *Labour Officer for the Respondent.*
3. *File: ERCA 06 of 2017.*