

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 03 of 2013

BETWEEN: **SHERATON FIJI RESORT**
APPELLANT

AND: **ETUATE NAQAI**
RESPONDENT

Appearances: Mr. V. Prasad for the Appellant.
No Appearance for the Respondent.

Date/Place of Judgment: Friday 22 October 2021 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. Catchwords:

Employment Law – Unlawful and Unfair Termination - Whether the worker was away from work without the approval of the employer thus enabling the employer to terminate his employment as per the final agreement between the Union and the Employer that any further breaches for absenteeism without prior approval will lead to termination – Whether there was evidence that the worker’s conduct in dismissing the worker was such that it caused the employee humiliation, loss of dignity and injury to his feelings.

Cause and Background

1. The employer appeals against the decision of the Employment Relations Tribunal ("*Tribunal*") of 16 January 2013 on its findings that the worker Etuate Naqai was unfairly terminated. To compensate for the grievance the Tribunal ordered that the employer pays to the worker 1 year's lost wages as that was almost the time period taken from the date of dismissal until the date of hearing. The worker's request for reinstatement was denied in view of his past records of staying away from work without leave and approval.
2. The worker was employed by the resort as an Activities Attendant since 2002. During his employment he had constantly been on warnings for being absent from work without approvals or without informing the authorities. The employer had provided to the employee enough opportunities to improve but the conduct continued.
3. The employee's conduct was viewed as grave and this led the parties including the worker's union to enter into a final agreement on 29 December 2008 which clearly stated that should there be any other breach, the worker would be terminated from work.
4. Subsequently, the employee was alleged to have been absent from work on 18 June 2009 without approval. The employer thus activated the disciplinary process and a hearing was conducted. The worker was dismissed thereafter.
5. It is important to identify the events leading to the day on which the worker is alleged to be absent without approval and for which he was dismissed. The worker had requested the Head of Department for two days leave being 15 and 16 June 2009 to attend a funeral in Suva. His request was approved. The Head of Department in fact asked the worker to take the whole week off. The employer says that this was done keeping in mind his past records. The employer says that it was expected that he would not report to work the whole week and a reliever would be needed to replace his position. The worker rejected the employer's proposal to take the whole week off but instead only requested for 2 days. That was approved by the employer.

6. On the morning on 16 June 2009, the worker informed the Head of Department that it was raining heavily in Suva and that the burial was postponed to Wednesday 17 June 2009. The Head of Department then approved his leave for Wednesday 17 June 2009.
7. The dispute surrounds what happened on Wednesday and Thursday being 17 and 18 June 2009. The worker says that on the evening of Wednesday 17 June 2009, he informed his Head of Department that the vehicle he was using was involved in an accident which rendered the alternator defective. He said that he also told that he was trying to find a mechanic to fix the alternator and if he could not find a mechanic that night he may not be able to attend work on Thursday 18 June 2009.
8. According to the worker, the Head of Department said it was alright. The worker says that he again called the Head of Department at 8am on Thursday morning which was 18 June 2009. The worker said that he confirmed that the mechanic was fixing the alternator and that he will not be able to attend work on the day. The worker says that the Head of Department said that it was alright.
9. The worker says that he reported to work on Friday morning but was directed by the Head of Department to report to the Human Resources Office. He was subsequently suspended.
10. The employer's position is that when the worker called the Head of Department on Tuesday 16 June 2009 asking for an additional day off, he had assured that he would be at work on Thursday. The worker called again on Wednesday 17 June 2009 at midnight to advise that he was involved in an accident and could not be at work on Thursday. The Head of Department says that he did not approve his leave and instructed him to report to work at 10.00 am on Thursday 18 June 2009. The worker called again on the morning of 18 June and the Head of Department put the phone down as he was frustrated. Succinctly, the position of the employer is that the Head of Department did not approve any leave for Thursday 18 June 2009.
11. A disciplinary hearing was conducted on 25 June 2009. At the disciplinary hearing the Head of Department confirmed to the panel that he had instructed the worker to report to work at 10.00 am on Thursday 18 June 2009.

12. The Disciplinary Panel had found that the worker's contention that his leave was approved for Thursday 18 June 2009 could not be substantiated and that he did not report to work as instructed by the employer. He was to be terminated from work. He was thus terminated by a letter dated 26 June 2009 and also advised that he could appeal the decision of the Panel within 3 working days. He did and the appeal was not allowed. His appeal was dismissed on 14 July 2009.

Tribunal's Findings

13. The Tribunal started off with the termination letter dated 26 June 2009. It found that paragraph 1 of the letter stated that "*You attended a Disciplinary hearing on Thursday 25/06/09. With Joseva Vatunitu, Green Belt and the undersigned Panel, regarding your absence from duty without proper authorization on 17th and 18th June, 2009*". On this the Tribunal stated that this is rather ironical as there is no dispute that leave was approved for Wednesday 17 June 2009. According to the Tribunal, if leave was approved for Wednesday the 17 June 2009, it follows that leave would be extended for Thursday 18 June 2009 as the approval to be away on Wednesday 17 June 2009 was automatically subject to the fitness of the rental car to hit the road.

14. The Tribunal found that there were others issues that the appeals panel took into account and not only whether leave was approved for 18 June 2009. From this the Tribunal found that when the worker called the Head of Department on Thursday 18 June 2009, the Head of Department got frustrated and put the phone down. This, according to the Tribunal was rather unwise given that the worker was stuck after his vehicle suffered an accident. The Head of Department ought to have listened to the worker's situation and advised him to only hit the road when the car was certified fit. The Head of Department's reasoning was clouded by prejudices based on the worker's past performances. Since the worker was on a final notice, it was for the Head of Department to ensure that he did not commit further breaches and in good faith, the Head of Department ought not to have hung up.

Grounds of Appeal

15. The employer's position is that the Tribunal erred in law and in fact in:

1. *Holding that the worker was unfairly terminated by the employer.*
2. *Awarding compensation of one year's lost wages.*
3. *Failing to take into account the mitigating factors and income which the worker would have earned during the period starting from his termination until the delivery of the decision making the award of one year's wages excessive.*
4. *Failing to properly evaluate the evidence and to give weight to the evidence adduced by the employer leading to the termination of the worker.*
5. *Failing to hold that the employer had taken all necessary steps and accorded the worker a fair due process before terminating him.*
6. *Giving undue weight to the evidence of the worker.*
7. *Not giving any consideration or weight to the worker's past employment record and breaches of the contract of employment.*

Analysis

16. There are three issues arising from the grounds of appeal. The first is whether the employer had approved the employee's leave for 18 June 2009 for him to be away from work and if leave was not approved, is the termination justified for not attending work without approval. The second is whether there was unfair termination of employment. The third issue of course affects the issue of the proper award that ought to be made if the worker was unlawfully and/or unfairly terminated.

17. I will first of all deal with the issue of unfair termination. When it comes unfair termination, the worker must establish that in dismissing him, the conduct of the employer was such that it caused him humiliation, loss of dignity and injury to the feelings. There was no evidence of the employee that the employer's actions and what actions in particular caused him the agony. The finding of unfair dismissal thus cannot be supported by the evidence.
18. It is on the question of the lawfulness of the termination when the reasons for the termination is examined. It is not disputed that the worker was a habitual absentee from work without approval. His conduct was such that despite the existence of the collective agreement, his Union and the employer had entered into a final agreement that any further breaches would lead his employment to be terminated.
19. Had it not been for the final agreement between the employer and the Union, the worker would have been entitled to be terminated under clause 12 (1) (d) (i) and (ii) of the Collective Agreement which reads as follows:
- (d) (i) Warnings for lateness, incompetence, absenteeism, malingering and other similar offences may be given by the Supervisor of the employee. Such warnings, if they are to be held against the employee, shall be confirmed in writing to the employee by the Manager or, in his absence, his authorized deputy with copies to the Hotel House Committee and to the General Secretary of the Union and having signed for as received by the employee concerned.*
- (ii) Two (2) such confirmed writings may render an employee liable for dismissal for a third offence, provided that the Manager may determine some lesser penalty as may be appropriate; provided that no written warning shall be valid for a period of more than twelve (12) months.*
20. By entering into an agreement with the Union the employer showed good faith which indicated that it wanted to retain the employee and improve him. Its target was not to get rid of the employee despite him breaching the above clause.

21. Let me now examine whether the Tribunal had given proper considerations to the evidence before it come to a finding that the employer had a valid reason to terminate the employment of the worker. The Tribunal makes an initial observation that since leave for 17 June 2009 was approved, it follows that leave for 18 June 2009 was also approved because the worker can only report to work if his vehicle is in a roadworthy condition.

22. I find that the Tribunal had assumed that the leave for 18 June 2009 ought to be automatically approved due to the accident that occurred in the worker's rented vehicle. There was no evidence of any accident happening in the rental vehicle driven by the worker. There was no police report, no evidence of the mechanic who allegedly repaired the vehicle and no report from the rental car owners. If there was any evidence of the accident, I may have considered the issue of "*circumstances beyond the control of the worker*".

23. In this case, the worker knew that he was on a final warning and that he had to report to work if leave was not approved. The first thing that he ought to have done was to at least establish that his claim about the accident was genuine and that he was not faking the incident. He was already on several warnings and his records were not very impressive. He needed to establish a genuine cause to be away from work. He failed to establish that at the disciplinary hearing and as such there was no evidence to establish that there was any genuine reason on the part of the employee for the employer to consider.

24. The employee had tendered to the Tribunal a letter from the mechanic dated 7 May 2010 which indicates that he was called on the evening of 18 February 2009 to attend to a breakdown. There is also a receipt dated 19 February 2009 for repairing of the alternator. This evidence was not referred to by the Tribunal which shows that the worker is not honest about the accident on 17 June 2009. The receipt and the letter indicate that the accident occurred in February not June. Even if the month is written in error and should read June, the letter of the mechanic still shows that he was called on the evening of 18 June 2009 which means that there was no accident on 17 June 2009 as alleged by the worker.

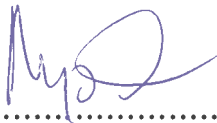
25. If these documents were genuine then it would be produced in the disciplinary hearing. Why was it not? The only conclusion is that it was subsequently made to justify the worker's case which has no credibility.
26. Now, whether the leave was approved, the Tribunal seems to have accepted the version of the employer that the leave was not approved because it goes onto make a finding that the employer hung up on the phone when the worker called on the morning of 18 June 2009 at 8.00 because he was frustrated. It found that that act was improper as the worker was in a difficult situation and the Head of Department should have in good faith ensured that the worker did not breach any policies of the company as he was already on a final warning letter.
27. It was from the appeals hearing findings that the Tribunal found that the employer had hung up on the employee when he called the Head of Department in the morning of 18 June 2009. This is the evidence of the Head of Department which he gave in the disciplinary hearing and regurgitated by the appeals panel. If the Tribunal has accepted that the employer had hung up the phone, it is axiomatic that it had accepted that the worker's leave was not approved. If the leave was approved then there was no need for the Head of Department to put the phone down without saying anything as there would be no cause for frustration.
28. If the worker's leave was not approved, he ought to have been at work around 10am the next day. He could have made arrangements with the rental car company to take the vehicle and should have engaged another transport to leave early morning the next day to be at work as scheduled or directed. A worker who needs work and wants to show that he is genuine would make attempts to follow the directions. He was already on several warnings before and a last warning making his case one which needed to be dealt with carefully by the worker.
29. What concerns me further is that if the worker says that his leave was approved around 11pm on Wednesday 17 June 2009 when he called the Head of Department and informed about the accident, he need not have again and sought approval the next day? His evidence is unreliable and cannot be given weight.

30. There is no need for the Head of Department to be concerned about the worker's absence on 18 June 2009 if he had approved the leave. The matter would have ended there. He would not take it any further. If there was any malice on the part of the employer, why would the Head of Department then approve leave for Wednesday 17 June 2009 when it was not initially sought and approved and in light of the fact that the worker had rejected the offer of the employer to take the whole week off to enable the employer to engage a replacement for that week?
31. I am also surprised that on Wednesday, when the funeral was over, and it would definitely be over in the daytime, the worker did not but ought to have left for Nadi the same day to report to work the next day. It appears that he left after 10pm, if his evidence is to be accepted giving himself no room to attend to unseen situations on the road. A worker, who is on final warning would not act in this way. His paramount concern would be his work as that earns him a living but he shows signs of no improvement and a repeated disregard for the employer's concern to be at work. His termination thus, I find was justified.
32. I find that there was no basis on which the Tribunal found that the termination was unfair and if it meant that it was unlawful then again there was no basis for the finding.
33. In light of my findings, I need not deal with the issue of the remedies save to say that there was no evidence of any mitigation of loss by the employee and why he did not look for work to support his family. What hindered him from looking for alternative work was not extracted in the evidence. It is important that the issue of mitigation of loss, reasons why there could not be any mitigation of loss, whether the employer's conduct affected the worker in looking for new work, and whether there was delay in finalizing the matter by one party are some of the factors that needs examination when the issue of remedies is examined.

Final Orders

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

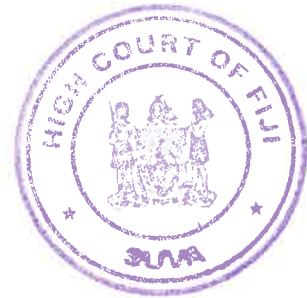
- a. *I allow the appeal and set aside the Tribunal's findings that the termination was unfair. Consequently, the remedies for one year's wages lost as a result of the grievance awarded by the Tribunal is also set aside.*
- b. *I find that the employer had valid reasons to terminate the employment of the worker and that the termination was justified both substantially and procedurally.*
- c. *Each party shall bear their own costs of the appeal proceedings.*



.....
Hon. Madam Justice Anjala Wati

Judge

22. 10. 2021



To:

1. *VP Lawyers for the Plaintiff.*
2. *Colavanua Law for the Respondent.*
3. *File: ERCA 03 of 2013.*