

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 04 of 2019

BETWEEN: **SANGAM INSTITUTE OF TECHNOLOGY**
APPELLANT

AND: **MERELITA ROUNDS**
RESPONDENT

Appearances: Mr. D. Nair for the Appellant.

Ms. V. Singh for the Respondent.

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

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. Catchwords:

Employment Law – Can an employment contract be determined “without cause” – is the worker entitled to written notice for dismissal when there is termination “without cause” – could the tribunal make a finding of unlawful dismissal in this case or should it only have restricted the hearing to unfair dismissal – appropriate remedy in the case.

B. Legislation:

1. *The Employment Relations Act 2007 (“ERA”): ss. 29; 114.*
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Cause and Background

1. The employer appeals against the decision of the Employment Relations Tribunal ("*Tribunal*") of 5 February 2019 on its finding that the worker was unlawfully dismissed when the employer terminated her work without cause upon payment of 2 month's pay in lieu of notice and ordered that the employer pays to her 3 month's salary as compensation. The Tribunal had dismissed the worker's claim for unfair termination.
2. The worker was a Clinical Tutor at the Sangam College of Nursing from 23 January 2012. On 7 December 2016, she was informed that the employer had decided to terminate her employment with effect from 13 December 2016. She was paid two months wages in lieu of the notice.
3. The worker's reason for bringing an action was that when she was given the letter for termination, she requested the employer for the reasons for termination but the employer failed to respond making the termination unlawful and unfair.
4. The employer's position was that the employer had dismissed the worker without cause and therefore not required to provide reasons for the dismissal. It contended that it had paid the worker 2 month's wages in lieu of notice and that is sufficient under the contract. It was contended by the employer that no reasons are needed in the instance. The employer also averred that under s. 29(1) of the ERA, the notice period is 14 days as the worker was paid on a fortnightly basis.
5. I was informed by the parties that at the Tribunal they had agreed not to go into the merits of the case as the ERA, the contract and the termination letter was sufficient to argue the necessary issue of whether the employer was entitled to terminate the contract for no cause and whether written reasons for the dismissal was necessary. Having gone through the matter, I find that the ERA, the contract and the termination letter was sufficient to deal with the issue as those documents are not disputed and the parties did not consider it necessary to tender any evidence on those documents. The issue was simply legal in nature to be determined according to the facts of this case given the necessary documents. What may have been necessary was evidence

on the issue of quantum but relevant to this case, I will make my observations when I deal with the aspect of quantum.

Tribunal's Findings

6. The Tribunal found that since this was not a contract for an indefinite period, s. 29(1) of the ERA did not apply to this case and the notice period in that provision has no bearing in this case.
7. It also found that s. 114 of the ERA specifically provides that the employer must provide to an employee written reasons for dismissal. The Tribunal went onto find that the concept of dismissal without cause no longer applies since there are procedures in place under Part 12 of the ERA. It stated that even if the employer terminated the employee for reasons of economic, technological, structural or similar nature, Part 12 of the ERA is to be adhered to.
8. The Tribunal went onto further find that the *"principle of good faith dedicates that the employer must treat the employee based on mutual trust, sincerity, honesty, humility, confidence, fair dealing and a genuine desire to settle their differences amicably. Parties are not to directly or indirectly mislead or deceive each other. This concept is intended to permeate all aspects of employee/employer relationships. Transparency is thus the key to maintaining and cultivating a culture of trust and confidence in this often volatile relationship"*.
9. The failure of the employer to give reasons for terminating the grievor violates the principles of good faith. The modern law of employment requires that reasons be given. One of the many pillars supporting the ERA is the concept of justification.

The Appeal

10. Aggrieved at the findings of the Tribunal, the employer appealed the decision. The issues that arise in the appeal are:
 1. *Whether an employer can terminate the contract "without cause"? Whether in this case the employer could terminate the contract "without cause"*.

2. *Whether the employee was entitled to the reasons for termination of the contract?*
3. *Whether the Tribunal could make a finding of unlawful dismissal when it found that the termination was fair.*
4. *Was the compensation for 3 months lost wages fair in the circumstances?*

Analysis

11. I must first make it clear that the issue of terminating “*without cause*”, the issue of “*notice period*” and the issue of “*written reasons for dismissal*” are not the same concept. One should not be confused that if the contract provides for termination without cause, it means that the employer can avoid providing the worker with information in writing about the reasons for the terminations and the reasons in this case would be to inform the worker that he or she is being dismissed without cause. That would be sufficient reason under the ERA.
12. I now turn to the concept of “*dismissal without cause*”. The Tribunal found that this is not permitted under the law. There is indeed no specific provision for dismissal without cause in the ERA. There is also no specific restriction in the law which prohibits the parties to the contract from entering into a contract with allows for “*dismissal without cause*”. If the law does not restrict parties from that, then a contract with such a clause is perfectly legal and sustainable under the law. If the parties in this case have agreed to that provision in the contract then they are free to exercise that right under the contract. To that extent the Tribunal’s finding that the concept of “*dismissal without cause*” does not exist is not supported by law.
13. Let me now examine whether the parties in this case had specifically agreed to “*termination without cause*”. I have examined the clauses in the contract which appears to be signed on 13 September 2014. There is only one provision in the contract which says how a worker can determine the contract. That is the provision on resignation. There is also only one provision in the contract which states how the employer can determine the contract.
14. I will outline the two provisions:

“Resignation *You must give 2 months’ notice of resignation and exit Clearance form must be filled on your last day of Employment.*

Termination *The Termination of employment at the College can be event of unsatisfactory performance or breach of College rules or on breach of SCN Staff Policies”.*

15. There is no provision in this contract that allows for termination “*without cause*”. If the employer wanted to exercise that right that provision should have been included in the contract of employment. In absence of that, the worker could only be terminated under the provisions of the termination clause.
16. The employer must not confuse itself with the resignation provision. That is the provision which is applicable if the worker wishes to determine the contract. Even if there was no provision, the worker cannot be stopped from resigning from work. The provision that is applicable in this case is the termination clause provision and that unfortunately for the employer is of no assistance to it in this case when it decided to terminate the employment without cause.
17. For that reason I find that the employer did not have any basis to terminate the contract. Now to the reasons for the termination. I have already said and repeat that just because a contract allows for termination without cause, the employer cannot just give a notice and say that your contract is being terminated. It is fundamental under s. 114 of the ERA that written reasons for the termination must be provided and yes indeed as the Tribunal found that is the basic foundation on which the modern law of employment law is based on. The principle of good faith, I agree also requires that the worker be told why he or she is being terminated.
18. In a case where the termination is without cause, the employer must write and inform the worker the provisions under which it is exercising its rights to terminate the contract and must state that the termination is without cause. That would constitute sufficient reasons under the law. “*Reasons*” does not just mean “*reasons to show fault of the worker or beyond control of*

the employer". It means a clear indication of the basis on which the contract is determined. Termination without cause is a proper basis if the contract provides for one.

19. Let me examine the termination notice and see whether any reasons for the termination was provided. The termination letter reads:

"The Executive Board of the Sangam College of Nursing has decided to terminate your employment contract which is to be effective from 13 December, 2016.

In accordance with your employment contract, you will be paid two (2) months' salary in lieu of notice.

You will be paid all your outstanding unutilized leave upon satisfactory completion of the discharge and exit forms..."

20. The termination letter only constitutes a notice for termination. It has no written reasons for termination. It does not say why the worker is being terminated and if there was termination without cause; that should have been mentioned. I find that the worker was entitled to reasons under the law and that the employer failed to provide the reasons.
21. The worker is not challenging the notice period. Indeed the payment in lieu of notice means that the worker was given two months' notice. I have said before that this does not equate to written reasons for dismissal.
22. The employer argues that s. 29 allows it to terminate contracts without cause. S. 29 is not a provision on termination without cause. It is a provision on the required notice period for terminating indefinite contracts.
23. I now turn to the employer's contention that the Tribunal could not have come to a finding of unlawful dismissal when it made a finding that the termination was fair particularly when there was no claim for unlawful dismissal made.

24. Unlawful termination deals with the substantive and procedural justification on the termination and the concept of unfair termination deals with the manner in which the dismissal is carried out. For the latter concept, the employer is required to determine the contract in a dignified and proper manner to avoid any humiliation, loss of dignity and injury to the feelings of the worker.
25. Although the worker had not specifically pleaded unlawful dismissal, the concern she had raised from the beginning was about not being given the reasons for the dismissal and this concern comes under the head of unlawful dismissal. The employer was not prejudiced when the Tribunal went onto make a finding on the issue of unlawful dismissal because the context of the complaint was unlawful dismissal.
26. The employer was given the full benefit of the argument on the issue of unlawful dismissal and for it to now argue that the Tribunal ought not to have determined that issue is preposterous and an act designed to deprive the worker a full chance to vindicate her rights.
27. Finally, I turn to the remedy. The award was for 3 month's wages lost as a result of the grievance. There was no evidence led on the remedy. The parties had agreed to only determine whether the employer can determine a contract without cause and whether written reasons were to be given for the termination. Since the worker is happy with the award and no appeal has been raised, I will not disturb the award. I will make an observation that the award is at the lower end. In the circumstances of this case, more severe remedies against the employer could have been made. I will leave it at that.
28. Before I leave the topic, I must briefly state that s. 29 of the ERA does not apply to this case as this is not a case for an indefinite contract. This is a contract with provisions on how it can be terminated. That needs to be followed. Further, s. 29 speaks of the requisite notice period. There is no contention about notice in this case.

Final Orders

29. In the final analysis:

- a. *I find that an employment contract can be terminated without cause if the contract provides for the same. To that end I allow the appeal on the Tribunal's finding that the concept of dismissal without cause does not exist.*
- b. *I dismiss the appeal on the grounds that in this case the employer could determine the contract without cause. The Tribunal's finding on unlawful dismissal is upheld in that the termination was unlawful as it could not be terminated without cause in this instance.*
- c. *I also dismiss the appeal that the employer is not required to provide reasons for the dismissal if it is exercising its rights to dismiss without cause. An employee is entitled to be told that he or she is being dismissed for no cause and that would constitute sufficient reasons under the law.*
- d. *I dismiss the appeal on the grounds that having found that the termination was fair, the Tribunal could not arrive at a finding that it was unlawful. These are two distinct issues for consideration.*
- e. *The appeal on quantum is also dismissed.*
- f. *I affirm the findings of unlawful dismissal and the award of remedy for 3 months wages lost as a result of the grievance.*
- g. *I also order costs against the employer in the sum of \$2, 500 to be paid within 21 days.*



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Hon. Madam Justice Anjala Watkinson

Judge

22. 10. 2021



To:

1. *Mr. D. Nair for the Appellant.*
2. *Attorney – General's Chambers for the Respondent.*
3. *File: ERCA 04 of 2019.*