**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

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| **CASE NUMBER:** | **ERCA 21 OF 2019** |
| **BETWEEN:** | **R. C. MANUBHAI & CO** |
| | **APPELLANT** |
| **AND:** | **ARUN PRASAD** |
| | **RESPONDENT** |
| *Appearances:* | *Mr. Padarath, N. R for the Appellant.* |
| | *Ms. Mataigusu, L. for the Respondent.* |
| *Date/Place of Judgment:* | *Wednesday 23 November 2022 at Suva.* |
| *Coram:* | *Hon. Madam Justice Anjala Wati.* |

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*A. Catchwords:*

***EMPLOYMENT LAW** – summary dismissal of the employee – whether dismissal lawful and fair – the onus is on the employer to establish the allegation it makes to terminate the worker – the employer cannot expect and require the employee to establish the allegations– when an employee is being summarily dismissed, the employer must provide the worker with written reasons for the dismissal and the purpose of the written reasons is to inform the worker the specific reason for his termination – a general allegation which does not clearly state why the worker is being dismissed is not fair, prejudicial to the worker and goes against the spirit of the legal requirement to provide reasons – a worker must not be treated in a manner which humiliates him and causes injury to his feelings – an employer carrying out the termination must act in an appropriate manner.*

*B. Legislation:*

*1. Employment Relations Act 2007 ("ERA"): s. 33.*

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## *Cause and Background*

1. The employer appeals against the decision of the Employment Relations Tribunal ***("Tribunal")*** of 15 July 2019 wherein it held that the termination of the employee Mr. Arun

Prasad was unlawful and unfair. It therefore ordered the employer to pay the employee a sum of $8,840 for unlawful termination and $4,420 for unfair termination.

2. Mr. Arun Prasad was employed by R.C. Manubhai & Co since 23 October 2016 as a Yard Supervisor. His employment was summarily terminated by a letter dated 08 September 2017 which reads as follows:

***"You are being terminated due to audit queries and variance in yard as per audit report".***

3. On 8 March 2018, Mr. Arun Prasad filed a grievance which did not settle at the Mediation Unit and was therefore referred to the tribunal for hearing and determination.

***Tribunal's Findings***

4. In dealing with the claim for unlawful dismissal, the tribunal examined the reasons for the termination as outlined in the termination letter. It first looked at the allegations of stock variance. The tribunal referred to the evidence of the employer's witness Mr. Khan who was the Audit Manager. His evidence was that the issue in this case was not stock variance. After referring to the evidence of the employer's witness, the tribunal found that the employer did not provide details of a stock –take or an audit report to the tribunal. It further found that the employer failed to establish that the worker was even questioned about the variance. It therefore concluded that this allegation of stock variance was not met by the employer.

5. The termination letter also stated that the worker was terminated due to audit queries. The tribunal went onto examine this allegation as well. The tribunal stated that in presenting its case at the hearing, the Audit Manager suggested that the reason for the dismissal was failure to explain the unavailability of certain invoices. The tribunal found that this allegation is not clearly referred to in the termination letter. The tribunal stated that the phrase 'audit queries' mentioned in the termination letter is *"rather ambiguous since it does not make reference to a subject matter"*.

6. Having found that the termination letter does not state the reason for termination to be missing invoices, the tribunal still went onto analyse the reason raised at the hearing by the employer

which the employer contended was the basis for the termination as the employer had tendered some emails which made certain inquiries about the invoices.

7. The tribunal then worked out which emails were addressed to the worker where enquiries were made about the invoices. The tribunal did not consider the emails which were not addressed to the worker. It found that the emails dated 16 August 2017, 21 August 2017 (2 emails), and 23 August 2017 were addressed to the worker.

8. The tribunal then referred to the evidence of the worker. His evidence was that he was admitted to the hospital from 14 to 17 August 2017. He was given medical sick sheet until 19 August 2017. The worker testified that he returned to work on 28 August 2017 as he was on leave up till that date to recover from his illness. The worker also said in his evidence that he could not respond to the emails as he was away from work.

9. The tribunal also referred to the employer's case when it raised concerns that the worker had produced to the tribunal all medical certificates except for the most relevant medical certificate which would have established that he was on leave up to 28 August 2017. It also considered the employer's argument that the worker's preliminary submissions states that he returned to work on 21 September 2017 and gave further consideration to the employer's analysis that the reference to the month of September should be to August. The employer submission that the worker's claim form does not include what he had informed the tribunal at the hearing was also taken into account in dealing with the claim for unlawful dismissal.

10. In response to the employer's submissions and evidence, the tribunal considered the worker's contention that he had handed over all reports to the HR Division of the Company and that his preliminary submissions regarding when he returned to work was an error. It should read 28 August 2017 and not 21 September 2017. The worker's evidence and submission refuting that the employer discussed with him the issue regarding the invoices mentioned in the email of 21 August 2017 and that he is not required to give evidence in the claim form but at the tribunal was also was considered by the tribunal.

11. The tribunal referred to the evidence of the employer's witness Ms. Samy. She testified that she could not confirm whether the worker was at work when the subject emails were sent. The tribunal also referred to the medical certificates of the worker which recommended leave from 9 to 19 August 2017. The tribunal accepted the medical certificates and the worker's evidence and concluded that it was possible that he was on further leave from 19 August 2017 and that he was away from work during the period of the email communications. The tribunal accepted the worker's evidence and contention that he was unable to respond to these email messages because he was sick and away from work during that period.

12. The tribunal found that the employer could not establish that methods other than email communications were used to make inquiries from the worker about the issue. The worker's evidence that he was not physically interviewed by the management regarding the issue was not challenged by the employer.

13. The tribunal concluded that because the worker was out of work for a considerable period of time due to an illness, it would have been reasonable for the employer to seek fresh explanation from the worker about the disputed issue after return to work. The tribunal found that the employer could have interviewed the worker or sought written explanation, rather than terminating the services for not responding to the emails when the worker was away from work. The tribunal concluded that the employer had not made the inquiries from the worker regarding the disputed issue in a reasonable manner and that the employer had not afforded a reasonable opportunity to the worker to respond to the queries.

14. The tribunal stated that the employer cannot arbitrarily terminate the worker's employment. It referred to the email of 21 August 2017 by the employer which stated as follows:

***"Let's screen their loading within 24 hours, if we find any clue, we will terminate them tomorrow, even if we can't get evidence, we will terminate them tomorrow based on Yard – 03 variance.***

15. The tribunal found that this email by the group HR Manager refers to the worker and suggests that the worker was to be dismissed anyway. The tribunal stated that in summary dismissal

cases, the employer should establish that there was a proper cause under s. 33(1) of the ERA and that the correct procedure was used in terminating the worker. The tribunal then examined whether the employer satisfied the requirements. This was a case of alleged gross misconduct and disobedience of lawful orders which allegations, according to the tribunal, was not established at the hearing.

16. The tribunal found that the employer's case was drastically different from the grounds of dismissal as per the termination letter. The reasons for the termination in the letter was both vague and not supported by the evidence. Based on its analysis of the evidence, the tribunal found that the termination of the employment was unlawful.

17. In determining whether the termination was fair or not, the tribunal relied on the evidence that the termination letter was dated 8 September 2017. The worker's evidence was that he was not assigned with work and his ordinary duties after he returned to work. The worker was asked to train a fellow employee for his position. Further evidence from the worker was that the HR Manager instructed another employee to type his termination letter and dictated its content.

18. The tribunal found that an element of bad faith was present when the worker was not assigned with work after his return from sick leave. The worker had said in his evidence that he trained a fellow employee for one and half weeks. He did not have much to do at work. He was roaming around. He felt ashamed as people were asking him what he was doing. Having accepted the evidence of worker, the tribunal found that the conduct of the employer unnecessarily humiliated the worker and caused injuries to his feelings. The termination was therefore found to be unfair.

***Grounds of Appeal***

19. The employer has raised 5 ground of appeal. It says that the tribunal erred in law and in fact in:

*1. holding that the employer arbitrarily terminated the worker's employment because of an email dated 21 August 2017 in which the employer represented that even if there is no evidence, they would terminate the worker when the email that was referred to applied to*

*a 24 hour screening process only by which further evidence was being sought and the true meaning and effect of the email was that if no evidence was found within the 24 hour period, the termination would proceed based on grounds already existing and there were sufficient grounds other than evidence sought to terminate the worker.*

2. *holding that a proper cause under s. 33(1) of the ERA was not shown when the evidence clearly showed that the worker refused and/or neglected to answer the queries by the employer to clarify discrepancies found in the audit report.*

3. *holding that the auditor had to give evidence about the audit report when the issue with the worker was not the audit report itself but the fact that he failed or neglected to keep proper records and to answer the queries by the employer to assist in their investigation.*

4. *holding that the termination was done is such a manner that it caused the worker humiliation, loss of dignity and injury to his feelings when there was no evidence to support this and further erred in awarding damages under this head.*

5. *holding that the worker was away on sick leave and therefore could not answer the emails when there was no medical report or sick sheet provided to support this statement and further the worker's own evidence showed that he came back to work and claimed that he was idle which gave him sufficient time to assist the worker in their investigations.*

6. *awarding any damages to the worker.*

***Law and Analysis***

20. I will answer grounds 1 to 3 and 5 collectively. One must read the judgment of the tribunal holistically and not selectively to get confused. It is clear from the judgment that the principal reason why the tribunal found that the termination was unlawful was that on the evidence before it, the employer could not establish the reasons for the termination. It did not arrive at its findings only on the email of 21 August 2017.

21. The tribunal did state in its judgment that the email from the employer dated 21 August 2017 indicated that the employer had decided to terminate the worker anyway but that was not the sole basis for the finding on unlawful termination. With its principal findings that the employer could not establish its allegations, the tribunal used this email to strengthen its findings.

22. I am not satisfied that the tribunal erred when it looked at this email to find out the motive of the employer. The email is tainted in that it reveals that the employer had already made up its mind to terminate the worker and that it was looking for more evidence to justify the termination.

23. That email by the employer states that there is sufficient evidence on yard variance. There never was any evidence on yard variance. If there was, the evidence would have been tendered in the tribunal.

24. Further, the employer's witness testified that this case was not about stock variance. Why then did that email say that there was enough evidence on stock variance and that the termination could proceed on that basis if this case was never about stock variance? Given the disparity in the employer's position, at the time of issuing the dismissal letter and at the time of the hearing, it was prudent for the tribunal to look at the motive of the employer to assess the lawfulness of the dismissal. In doing so, the tribunal relied on the email of 21 August 2017 which I find was a relevant consideration.

25. I am not in a position to find any error in the tribunal's consideration of that email. Even if the tribunal was wrong in using this email to make a finding on the lawfulness of the termination, I do not find that the employer has shown to me that the tribunal had erred in making a finding otherwise.

26. Let me look at the reasons for the termination myself. There was no evidence that there was stock variance at the yard. No one gave the evidence of what was missing from the yard. There was therefore no proper evidential basis for the tribunal to find that there was stock variance. The tribunal was correct in holding that the allegation of stock variance was not established by the employer.

27. The tribunal further found that the employer's allegation that the worker did not respond to the email queries about the missing invoices could not be established as it accepted the evidence of the worker that he was not at work until 28 August 2017.

28. The tribunal found that the employer could not establish that the worker was at work when the emails were sent to him for him to respond to the same. The tribunal also found that the employer could not establish that other means of communication was used to inform the worker to respond to the queries regarding the missing invoices. I have no reason and basis to impeach the findings of the tribunal. Before I look at the evidence of the parties to scrutinize the allegations, it is important that I make my observations about the way the employer has outlined the reasons in the termination letter.

29. It is my view that the letter of termination did not make any allegation about the worker not responding to the queries regarding the missing invoices. If that is not specifically mentioned and outlined in the termination letter, the employer cannot rely on that reason to justify the termination. The employer had an unfair advantage over the employee when it was allowed to raise allegations at the hearing which did not form the basis of the termination. I would not have even entertained the allegations at the hearing which did not specifically form part of the reasons for the termination. The tribunal, however gave that benefit to the employer.

30. It is my finding that a mere mention that a worker is terminated for audit queries does not mean anything to the worker. The worker needed to be informed about the subject of the audit query and the issue arising from the audit query that constituted a lawful ground under s. 33 (1) of the ERA to summarily dismiss the worker.

31. A general ground under which the employer can bring in any allegation at the hearing is not fair and should not be allowed as it prejudices the worker and goes against the spirit of the requirement of the law that the worker should be provided with written reasons for the dismissal. The written reasons for the dismissal requirement is to ensure that the worker knows clearly and without any uncertainty why he is suddenly deprived of a right to earn for a living.

32. Even in the appeal before me, at ground 3, the employer is raising that the worker failed to keep proper records and that the tribunal erred in stating that there was no audit report when the issue was not about the audit report. The employer has not stated anywhere in the termination letter that the worker had not kept proper records. All it says is that the worker is terminated due to audit queries and stock variance. There was no audit report tendered in evidence to the tribunal to even establish that there were concerns about records not being kept properly and that the issue was brought to the attention of the worker.

33. If the employer is raising that there was audit queries then it must establish that there was a report to that effect. It must also show that those queries were brought to the attention of the worker who knew that he had to respond to the queries and that he was given a reasonable timeframe to do so. None of this was established. I therefore do not find that the tribunal's remarks that there was no audit report tendered in evidence can be flawed in this instance.

34. In any event, I do not find that the employer established that the worker did not respond to its queries about the missing invoice. The worker had stated in his preliminary submissions that he was not at work when the emails were sent. He maintained that position right throughout in the hearing. It was then incumbent on the employer to establish, using whatever system it uses to record the attendance of the workers, that the worker was at work and that he deliberately failed to respond to the queries within a particular timeframe which was reasonable time to respond to the issues.

35. There is no doubt that the worker was suffering from ill- health. He had tendered medical certificates to establish that he was admitted to the hospital and then on medical leave. It was open to the tribunal to accept the worker's evidence that he was on leave until 27 August 2017 and that he started work on 28 August 2017 as the employer did not provide any contrary evidence to this effect.

36. The employer overlooks the fact that it is for the employer to prove each and every allegation that it made against the worker to terminate him. It is for the employer to establish that the worker was at work at the time it made the queries. It did not establish that in evidence and

now in the appeal improperly requires that the worker must establish that he was away from work. The onus is not on the worker to provide evidence of the allegations.

37. The employer's counsel tried to establish from the emails that the worker was at work. It argued that the emails indicates that the issues were discussed with the worker and that he was also asked to stay overtime, if need be, to send the missing invoices. The employer says that if the worker was not at work, why then would the employer write and say things like "as discussed" or "work overtime?"

38. I cannot understand why the employer is asking the tribunal and the court to find from the emails that the worker was present at work. Why could it not tender some cogent evidence to establish that he was at work? Every private company has a way to record attendance of workers. It is not that difficult to provide evidence to that effect. It was the responsibility of the employer to keep its evidence properly. The worker had filed the claimed within 6 months. I do not expect the employer to destroy the attendance records so quickly.

39. By stating in the emails that the issue was discussed and for the worker to stay after hours if needed does not establish that the worker was at work. I say this because the employer was even emailing the worker on 16 August 2017 when he was admitted to the hospital. That email was also tendered in evidence. That email was addressed to the worker and made inquiries about the missing invoices.

40. This in itself shows that the employer had been sending emails to the worker when he was not at work. The employer did not even care that the worker was not at work and admitted to the hospital. It just blindly sent emails expecting the worker to respond. This strengthens the tribunal's findings that the worker had no idea that inquiries are being made from him. He was ill and at home. He had no time to respond to the emails.

41. In the appeal, the counsel for the employer argued that the worker could have responded to the emails when he returned to work. The counsel deliberately avoids the tribunal's findings that the worker was not given any work and asked to train a fellow employee. If he is not allocated work, how can the worker respond to the emails? I have no basis to hold in favour of the

employer that the worker had deliberately refused to respond to the queries regarding missing invoices. The tribunal's principal findings cannot be disturbed on any cogent basis.

42. There was enough basis for the tribunal to find that the worker was embarrassed and his feelings hurt during the process leading up to the termination when he was neglected at work and asked to train someone else for his position. He was not formally terminated but was shown that he was not wanted at work. His feelings were definitely hurt. I have no basis to upset the findings of the tribunal.

43. I am not shown any basis on which the tribunal's assessment of the compensation is flawed. I cannot disturb the findings on the award of compensation.

***Final Orders***

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

***(a) The appeal is dismissed. I affirm the judgment of the tribunal.***

***(b) I order the employer to comply with the order of the tribunal within 14 days.***

***(c) I also order costs against the employer in the sum of $3,500 to be paid to the worker within 14 days.***

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***Hon. Madam Justice Anjala Wati***

***Judge – High Court Suva***

***23.11. 2022***

***To:***

1. ***Samuel K. Ram for the Appellant.***
2. ***Ministry of Employment, Productivity and Employment Relations for the Respondent.***
3. ***ERCA 21 of 2019.***