

**IN THE EMPLOYMENT RELATIONS COURT**

**AT LAUTOKA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 09 of 2015

**BETWEEN:** PACIFIC DESTINATION

**APPELLANT**

**AND:** TEVITA TIKOMAILEPANONI

**RESPONDENT**

Appearances: Mr. C. B. Young for the Applicant.

Mr. K. Tunidau for the Respondent.

Date/Place of Judgment: Friday 17 February 2023 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

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**A. Catchwords:**

*Employment Law – Whether the termination of the worker is unlawful – is there a provision in the law which allows for indefinite suspension of a worker- what does indefinite suspension amount to and what procedure then should be followed if indefinite suspension amounts to summary dismissal – can an employer ask the court to examine the reasons for the termination when it does not provide any to the worker at the time of the dismissal - whether award of lost wages justified.*

**B. Legislation:**

1. *The Employment Relations Act 2007 (“ERA”): s. 30, 33, 34, 171 and 230.*

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**Cause and Background**

1. The employer appeals against the decision of the Employment Relations Tribunal (“**Tribunal**”) of 16 March 2015. The Tribunal had made a finding that the

employee was unlawfully terminated from his employment. The employer was ordered to pay to the employee 9 months lost wages arising as a result of the grievance.

2. The employee was recruited by the employer as a driver with effect from 9 June 2010. He worked until 21 October 2011 when he was suspended for one week for being absent from work. The letter of suspension outlines various allegations as follows:

*"Dear Tevita*

*This is to inform you that you are suspended from your duties as Driver, effective Friday 21/10/2011. This is due to various niggling behavioral problems affecting your work performance as noted below:*

- *On Wednesday 28/9, you were rostered for your first movement at 12pm to pick up clients from Denarau. You called Aliti at 10.50am to inform her that you could not make it to work due to vehicle breakdown in Lomaiwai. Then you called again to inform her that you were returning to Deuba to sort out your family due to domestic issues.*
- *On Saturday 9/9, you were rostered for your first movement at 7.55 am. You called Aliti at 4am to inform her that you could not make it to work due to being sick.*

*The above actions contravenes compnay procedures for driving duties as you are required to inform your Team Leader at least 8 hours before shift if you cannot report to work.*

*On Thursday 20/10/2011, you attended a counselling session with me to establish your nigging behavioural problems as this is affecting your performance. I noted that you had been spotting a red/black eye and I pursued to investigate this further. You then informed me that you were involved in a brawl somewhere close to your home at Meigunyah on Friday, 8/10/2011 after returning from drinking party. When asked why would you be consuming alcohol late into the evening knowing that you were to start work at 6.55 am for your 7.55 pick up, you replied that you had stopped drinking at 11pm. I then requested for your contact numbers for your family members to verify your information and you concurred. I then asked you again if you were disclosing correct information and you had affirmed it.*

*Aliti was asked to make enquiries with your family, however she was given information by other Transport coordinators that:*

- You did not leave the drinking venue, NASA compound, until after 2am.*
- You were involved in a brawl at NASA compound.*
- You were in the company of other workmates [Transport Coordinators] – Ana Veiqali, Vasemaca, & Talei.*

*You had blatantly told a lie to cover up for your excuse of not reporting to work on 9/10/2011. This is very disturbing and totally unacceptable character!*

*Your current presentation, spotting a red/black eye, is not acceptable image to be representing Pacific Destinations to our clients in the course of your duties as a Driver.*

*It must also be noted that you had already attended various counselling sessions within the last two months relating to your attitude and poor work ethics with James, Managing Director and Aliti, Transport Team Leader.*

*You will be suspended from work for one [1] week, effective Friday 21/10/2011 pending further instructions from the Managing Director upon his return to office.*

*I implore you to take heed of the above from here and make that extra effort to improve on your behavioural and attitude towards your work and workplace in general”.*

3. When the employee returned to work after his suspension period was over, he met with the management team consisting of his immediate supervisor, the Human Resources Co-coordinator and one of the Directors.
4. The employer filed a preliminary submission in the Tribunal where it stated its position. It contented that after the worker met with the personnel identified in paragraph 3 above, the employee was informed that his recent conduct was unacceptable, unbecoming and that his demeanor even resulted in wasted company resources which justified summary dismissal. The employee was therefore told that he would be indefinitely suspended. The employer says that its intention was to terminate the worker if no genuine remorse was shown.
5. In the evidence, the employer has taken the position that the worker has been now terminated a she chose to report a grievance without appealing the suspension. In its preliminary submissions the issue of appealing the decision was addressed. The employer stated that *“all employees including the grievor before the publication of the employee handbook were made aware of their right of appeal against any decision made by a superior to the next in line. In this case the next in line was the Managing Director. The Grievor did not make any such appeal”.*

6. The employee says that the issue of being absent from work had been resolved with the Managing Director who had advised him to resume work. However, when he reported to work after one week suspension, the Human Resources Coordinator told him to stay home and that he would be called at the appropriate time. His suspension was extended indefinitely. He was not called back to work. He felt that he had been disadvantaged by the unfair action of the employer in sending him home without finalizing his status.
7. According to the employee he waited from the date of suspension until 23 March 2012. He then went and reported a grievance to the Ministry of Employment, Productivity and Industrial Relations.
8. His grievance was registered and mediation was held on 4 and 18 May 2012. The matter between the parties did not resolve. The matter was then sent to the tribunal and the terms of reference was that the employee was "*being disadvantaged by the unfair action of the employer*".

#### ***Tribunal's Findings***

9. The Tribunal found that the act of indefinitely suspending the employee is unjustified as an indefinite suspension is not a concept that is recognized by the Employment Law in Fiji. The ERA is about maintaining the employment relationship through an employment contract in good faith and it also had provisions for ending that relationship. Indefinite suspension meant that the worker was out of work waiting for the employer to call him back at work. There is no ending of the employment relationship which meant that the employee could not look for work whilst being unemployed.

10. In this case, the Tribunal found that the employee waited for 4 months before reporting the grievance and that is when he was terminated without a termination letter. That conduct was unjustifiable leading to the termination being unfair.

11. The award of 9 months wages was justified by the Tribunal as follows:

*“Under section 230 (1) (b) ... the Tribunal orders the reimbursement to Tevita of nine (9) months wages lost as a result of the grievance; the Tribunal calculates the wages from the date of the second suspension about 28 October 2011 to the date of hearing of the matter in the Tribunal which was 17 August 2012. A period of about 9 months and that includes the four (4) months of indefinite suspension”.*

12. The findings on unlawful dismissal and the award of damages are both subject to the appeal.

### **Grounds of Appeal**

13. The employer has raised 2 grounds of appeal. They are as follows:

1. *The Tribunal erred in law when it failed to render its decision on a matter referred to it without delay and, in any case, within 60 days from the date of the completion of the hearing on 28 October 2012 and in so doing was in contravention of section 171 of the ERA.*

2. *The Tribunal failed to give appropriate or proper weight to the fact that:*

(i). *the employer was employed in the tourism industry;*

- (ii). *the employee had a history of breaches of the terms of his employment which included repeated acts of speeding, not turning up to work when rostered to do so and turning up to work to drive when he was in no proper condition either physically and or emotionally to do so; and*
- (iii). *the employee had found alternative employment.*

14. I will deal with each ground of appeal separately.

### **Analysis**

15. Section 171 of the ERA states that ***“the tribunal must make its decision on a matter referred to it ...without delay and, in any case, within 60 days from the date of the completion of the hearing”***. It is not disputed that the judgment was not delivered within 60 days. The provisions of the law was not followed.
16. The difficulty however is that the Act does not state the consequence of a late judgment. Should it be set aside because of the delay? I do not think that that is the intention of the legislature. If there is a judgment which has not been delivered within the 60 days period, then, unless some miscarriage of justice or prejudice which cannot be corrected can be shown, the judgment will not be set aside. If I were to set aside the judgment just because there was non-compliance of s. 171 of the ERA, the purpose of an early judgment will be lost. The matter will have to be sent back for re-trial and a lot more time will be consumed in finalizing the cause.
17. Non- compliance of s. 171 of the ERA cannot automatically set aside a good judgment unless the delay has affected the findings of the Tribunal. I will look

into the other grounds of appeal. If it has a bearing on the issue of delay then I will deal with the same.

18. In the second ground of appeal the employer has raised various reasons why the employee was dismissed and asserts that the Tribunal should have given weight to the evidence of the employer and arrived at a finding that there were just causes to terminate the worker.
19. Let me start off with the suspension letter of the worker. The suspension letter of 21 October 2011 outlines various reasons why the employee was suspended from work. He was informed in the suspension letter that he was suspended for one week with effect from 21 October 2011 pending further instructions from the Managing Director upon his return to office. When the employee returned to his office, he was suspended indefinitely.
20. He was not told why he was suspended indefinitely. He was not given a written letter of indefinite suspension. The act of the employer is grossly unjustified on the basis that an employee cannot be suspended indefinitely from work. This would mean that the employee is engaged by the employer but not provided with work which is a concept that goes against the principles of good faith that is promoted by the Employment Relations Act and the duty of the employer enshrined in s. 24 of the ERA to provide work to the employee.
21. The employment contract dated 8 June 2010 does not provide for suspension at all or indefinite suspension. On what basis the employer chose to exercise that right is not supported by the contract of employment or the ERA.
22. The actions of the employer in suspending the worker indefinitely amounts to summary dismissal of the employee. By using the term indefinite suspension, the employer cannot escape the requirements of the ERA that the contract has to be



properly brought to an end. In this case, neither the terms of the contract was followed nor the ERA to bring the contract to an end properly.

23. The employer refused to take the employee back to work. That is not disputed. It had therefore summarily terminated the contract of the worker. When it terminated the contract, it should have advised the worker of the reasons for the termination and provided the worker with up to date pay and a certificate of service: **Ss. 30 (6); 33 (2); and 34 of the ERA.**
24. There was no written reasons for the termination of the contract. Since that is a specific requirement of the law, I cannot allow the employer to expect the employee to presume that the allegations in the suspension letter was the basis for the termination of the contract. The suspension was effected to punish the worker not to investigate into any allegation or issue. The suspension letter does not state that any investigation was to be carried out.
25. After he was punished by suspension, he was to be taken to work. That is what the letter indicated. It indicated that he would be taken back to work. There cannot be any other interpretation to the last paragraph of the suspension letter which states ***"I implore you to take heed of the above and from here on make that extra effort to improve on your behavior and attitude towards your work and workplace in general"***. The suspension was to be uplifted after a week. That did not occur. The employer acted unfairly and unjustifiably in not calling the worker back to work.
26. When the worker was dealt with for his poor conduct and performance, it is not fair to then impose another set of punishment for the same conduct unless there is no improvement on the part of the worker. Here, the worker was not even allowed to show whether he has improved as directed in the last paragraph of the letter. That is again an act of bad faith on the part of the employer.

27. When the employer has failed to give written reasons for an indefinite suspension which amounts to summary dismissal, it cannot require the court to examine the reasons it is putting forward to see whether the causes for dismissal were justified. This court and tribunal is only obliged to examine the reasons for termination as those stated in the termination letter. I would have even considered the reasons if any was outlined in the indefinite suspension letter but there was no letter implementing indefinite suspension.
28. If the Tribunal and the Court allows the employer to ask the court to examine the reasons which were not provided at the time of termination, it will be condoning the unfair act on the part of the employer. Why should the employer be privileged to have their reasons examined when none was provided to the employee?
29. The law also mandates that the employee should be provided with a certificate of service when his contract comes to an end. There was no proper ending of the relationship and so this requirement was not followed.
30. The employer may have had concerns about the conduct and performance of the worker but that had to be properly identified in a letter to finally bring his contract to an end.
31. I find that since the employer had not provided any written reasons for the dismissal, it had no cause to terminate the worker. Further it failed to follow the correct procedure to bring the contract to an end. The termination is unlawful both substantially and procedurally.
32. The award of 9 month's wages is justified. The employee was out of work from 21 October 2011. He drove taxi in December 2011. There was no evidence that the

worker found permanent work. His friend had assisted him and gave him a taxi to drive, however, he needs to be compensated for being out of work for the period he did not work.

33. The matter was heard in August 2012. The employee was out of work for 10 months until the date of hearing. Since he drove taxi for one month, he was not given compensation for that month. The loss of income until the date of hearing is for 9 months and the award is justified under s. 230 of the ERA which allows for compensation for part or full loss of wages as a result of the grievance.

### ***Final Orders***

34. In the final analysis, I find that the appeal is without any merits and therefore dismiss the same. I order the employer to pay to the employee 9 month's lost wages with 21 days from now. The employer is to also pay 4% interest on the 9 months gross wages for 2 years as this is the period that it took for the appeal to be heard since the delivery of the judgment of the tribunal. The employer had not paid the compensation when ordered by the tribunal due to the pending appeal.

35. I further order the employer to pay costs of the sum of \$5,000 to the employee within 21 days.



*Anjala Wati*  
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**Hon. Madam Justice Anjala Wati**  
**Judge**  
**17. 02.2023**

**To:**

1. *Young & Associates for the Appellant.*
2. *Tunidau Lawyers for the Respondent.*
3. *File: Lautoka ERCA 09 of 2015.*