IN THE EMPLOYMENT RELATIONS COURT AT SUVA

CENTRAL JURISDICTION

CIVIL JURISDICTION

ERCA: 01 of 2022

(APPEAL FROM ERT GRIEVANCES NO. 174,175,176,177,178,179 OF 2020)

BETWEEN: **LAND TRANSPORT AUTHORITY**

APPELLANT

AND: **ASESELA MATEIWAI, RUSILA RADINIVANUA, MONISHA CHAND, VENAISI TUIGASELE, RO MASIVEI SORBY AND PURNEET SINGH**

RESPONDENT

Date of Hearing : **12 December 2023**

For the Appellant: **Ms. Prasad N.**

For all Respondents: **Ms. Tavaiqia L.**

Date of Decision: **7 March 2024**

Before: **Levaci SLTTW, A/J**

J U D G M E N T

(*APPEAL FROM EMPLOYMENT RELATIONS TRIBUNAL)*

Cause and Background

1. All the Appellants Appeals against the decision of the Tribunal for their Grievances on the same or similar grounds.

2. The Appellants were employees of the Respondent and were summarily dismissed.

3. On 27 March 2020 a notice of cessation of temporary employment was issued to the following Respondents:

   (i) Asesela Mateiwai effective from 2nd April 2020 despite a letter of extension of his engagement on 17 February 2020 to 17 May 2020;
   (ii) Rusila Radinivanua effective from 2nd April 2020 despite a letter of extension of her engagement for 17 February 2020 to 17 May 2020;
   (iii) Monisha Chand effective from 2nd April 2020 despite a letter of extension of her engagement on 17 February 2020 until 17 May 2020;
   (iv) Venaisi Tuigasele effective from 2nd April 2020;
   (v) Ro Masivesi Sorby effective from 2nd April 2020;
   (vi) Puneet Singh effective from 2nd April 2020.

4. On 24 April 2020 all the said Grievers lodged an Employment Grievance with the mediator. Mediation was unsuccessful and on 18 August 2020 the Grievances were referred to the Employment Relations Tribunal.

5. The Grievers have appealed against the decision of the Tribunal. The decision of the Tribunal is as follows:

   [37] The Employer has failed to carry summary dismissal, in procedure and law by failing to comply with s33 (2) and s 114 of the Employment Relations Act 2007;

   [38] The dismissal was also unfair in the manner it was carried out;

   [39] The employer to pay the grievor's as a result of this grievance the remainder of 7 weeks as per the letter of their engagement;

   [40] The parties to bear their own costs in this matter.

Grounds of Appeal

6. The Appellant has filed three grounds of appeal and the issues of determination as follows –
   1. *''That the Tribunal erred in law and in fact in failing to consider that the dismissal of those Grievors were made pursuant to Section 29 of the Employment*

Relations Act 2007 ("Act") and not a summary dismissal under section 33 of the Act, and that the requirement as to "notice" has been lawfully met by the Employer and unchallenged in the Tribunal hearing.

2. *The Tribunal erred in law and/or in fact in its findings that the Employer failed to carry out summary dismissal, in procedure and law by failing to comply with section 33 (2) and section 114 of the Act 2007 when in fact these grievances were not in any way based on summary dismissal under section 33 of the Act, and that the application of Section 33 (2) and Section 114, with regards to "reasons" which are only specifics and pertaining to summary dismissal under the section is not relevant as to requirements for notice under Section 29 of the Act.*

3. *The Tribunal erred in law and/or fact in holding a finding of "unfair dismissal" a finding that appears to have weigh more on the time of delivering the letters of dismissal to each Grievors, when in the circumstances of each case, the dismissals were reasonable and fair, and that the unfairness findings of the Tribunal was out of proportion and exaggerated, unreasonable, and lack foundation and does not conform with the law and guidelines set by precedents as to what constitutes "unfair dismissal" in law."*

Law on Appeal

7. Section 220 (1) of the Employment Relations Act 2007 stipulates that –

'220 (1) The Employment Relations Court has jurisdiction –

(a) To hear and determine appeals conferred upon it under this Promulgation and any other written law.'

8. Section 225 of the Employment Relations Act 2007 stipulates that an Appeal to the Employment Relations Court is as of right from a decision of the first instance of the ERT.

9. An Appellate court will be slow to interfere with the factual findings of an original court unless they are plainly wrong or drew wrong inferences from the facts and the Appellate court need not exercise jurisdiction to interfere with the Tribunal's decision only because it exercised its discretion in another way (see Tuckers Employees and Staff Union –v- Goodman Fielder International (Fiji) Limited ERCA No. 28 of 2018). The Appellate Court will review a decision where from the face of the record the Court finds that the Tribunal has blatantly erred in facts or law and has acted in ultra vires or has failed to consider a pertinent issue raised before the Tribunal.

10. The Appellate Court will not overturn a decision of the Tribunal unless the above factors have been met. Consideration is made to the observations of Lord Reid in Benmax -v- Austin Motors Co Ltd [1955] ALL ER 376 at 329 :

> 'I think the whole passage, refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. That be right, I see no reason to doubt anything said by Lord Thankerton. But in cases where there is no question the credibility or reliability of any witness, and in cases where the point in dispute is the proper inferences to be drawn from proved facts, an appeal court is generally in as good a position in evaluating the evidences as the trial judge, and ought not to shrink from that task, though it ought of course to give weight to his opinion….' (underlining my emphasis).

Submissions by parties

11. In their argument, the Appellant raised that the contract of service between the parties was an oral contract based on the letters of engagement as it did not meet the requirements of a written contract under section 38 of the Employment Relations Act. The contract was later reduced to writing on re-engagement but it did not preclude it from being an oral contract referring to the case of Central Manufacturing Ltd.

12. Furthermore although letters of engagement were a fixed period, the Appellant argued that the letters was not expressed to be non-renewable nor engagement was made for a fixed task or wages were not paid on a weekly or daily basis hence the reason why section 28 of the Employment Relations Act applied. Since it is not disputed that the Respondents were paid weekly, section 29 (1) (b) of the Employment Relations Act applied in this instance requiring 1 week notification prior to cessation of contracts. The issuance of the Notice of Cessation did not require a duty on the Appellant to provide reasons for ceasing the employment but required only a notification period. The Appellant confirms all entitlements were paid and a Certificate of Service was issued.

13. The Respondent disputed the grounds of Appeal. They argument was that the issue as to whether the contract was oral or written was never raised at the lower Court. The Respondent argued that the Tribunal had correctly applied section 33 of the Act when the Appellant summarily dismissed the grievors. The grievors were engaged for a fixed period of 3 months, they were not engaged for a week thereafter and then re-engaged for another term which is in accordance with section 61 of the Employment Relations Court. The Respondent also disputed that there was no reference to section 29 of the Employment Relations Act when the

notice of dismissal was given. The Respondent argued that the dismissal was in accordance with section 33 of the Employment Relations Act for summary dismissal and hence was unfair dismissal as no reasons were prescribed for their termination.

Analysis and Determination

Ground (a) (b) and (c) of the Appeal

14. All the Grounds of the Appeal will be dealt together.

15. According to the facts in the court records, which was not contradicted in evidence by either party, the grievors were issued with engagement letters for a period of 3 months. It was prior to the end of three months that a letter of termination confirming the expiry of their engagement was issued with a 7 day notification period.

16. After the engagement had expired and before a period of 1 month from when the engagement had ceased, the grievors were again re-engaged vide a letter for another period of 3 months with similar notifications nearing the end of the 3 month period notifying them of the expiry of their engagement at the end of the period of engagement.

17. Their letter of engagement read as follows:

> *"I am pleased to inform that the Authority has accepted the request for engaging you as a Temporary E-Ticketing Officer [Valelevu] for three (3) months effective from 15/4/19 – 15/07/19.*
>
> *You will report to Mr. Suresh Kumar, TL Enforcement Central/Eastern for daily execution of duties.*
>
> *Your official hours of work will be as follows:*
>
> *Mondays – Fridays - 8.00am to 5.00pm*
>
> *An hour daily lunch from 1.00pm – 2.00pm as mutually agreed.*
>
> *You will be paid at an hourly rate of $3.41.*
>
> *However, should you be required to work overtime, prior approval will have to be sought and you will be advised accordingly with meal entitlements at 6.00am, 1.00pm, 6.30pm and 12 midnight.*

We wish you all the best on your engagement with the Authority."

18. The letter of re-engagement was the same as the engagement letter but for the term '*granted to renew'* included.

19. Their letter of termination was fashioned in such manner:

> ***Memorandum***
>
> ***To:*** *Monisha Chand, Temporary Officer* *Date: 27/03/20*
>
> *From: Chief Financial Officer* *Ref: PF 1586*
>
> *Re:* ***NOTICE OF CESSATION OF TEMPORARY ENGAGEMENT***
>
> *c.c: Payroll HR*
>
> ---
>
> 1. *Reference is made to the above subject matter and to your Extension of Engagement as Temporary Officer E-Ticketing Letter dated 11 February 2020.*
> 2. *Please note that you are given 7 days' Notice from the date of this letter that your Temporary Engagement as a Temporary Officer E-Ticketing will cease. Your last day of engagement with the Authority shall be the 2nd of April 2020.*
> 3. *The Finance Section will be advised accordingly through ha copy of this memo to process all dues owed to you.*
> 4. *Please ensure to hand over your ID card and any other material issued by the Authority before you exit.*
> 5. *Thank you for your loyal contributions to the Authority during your tenure. You will be advised accordingly, should there be a need to re-engage you as temporary officer, when the need arises."*

20. Therefore given that the terms of appointment were issued vide a letter, the letter did not contain the required particulars for a written contract set out in section 38 of the Employment Relations Act and thus can be construed as being an oral contract.

21. The Respondent had argued that the form of the letter was never determined in the Court below. However the Court finds that in their written submissions as well as in the re-examination of the witness for LTA, it was agreed that there was no employment agreement but for the letter of engagement issued to the grievors.

22. In Yashni Kant -v- Central Manufacturing Co Ltd [2002] FJCA 39 Reddy P, Gallen and Smellie JJA determined that –

> ***"****We also reject the Respondents submission that that the contract was an oral one subject to the provisions of s 24 of the Employment Act requiring a notice period of only 1 month. The contract in this case is written, (albeit in more than one document) but even if it were not it would be at least arguable that the words of the section "subject to any specific agreement" would be sufficient to import the terms of the circular applying to senior management."*

23. In this instance, no such reference to another agreement or employment policy was made in the letters of engagement or re-engagement. Therefore the contract was not written and was an oral contract. Therefore the oral contract was subject to the provisions of the Employment Relations Act in regards to termination, expiry of engagement and for grievance procedures.

24. Subsection (2) of section 28 of the Employment Relations Act provides that parties are presumed to have entered indefinitely into a contract unless as stipulated in sub-section (2):

> *"(2) Subsection (1) does not apply –*
>
> *(a) To a contract for one fixed period which is expressed to be non-renewable;*
> *(b) To a contract for a fixed task; or*
> *(c) To a daily contract where wages are paid daily."*

25. The letter of engagement and re-engagement requires that the grievors be engaged for a period of 3 months and that they be employed as temporary ticketing officers. The letters did not provide a specific term or condition as to whether the contract was renewable or otherwise. It also did not pay them on a daily basis but on an hourly basis payable at the end of each week.

26. Hence the Court finds that the letter of engagement and re-engagement was a contract of an indefinite period.

27. Section 29 of the Employment Relations Act follows on from section 28 explaining the requirements for notification prior to termination for a contract entered into for an indefinite period.

28. The provision provides that for weekly wage earners, a notification of 7 days is required prior to termination of their arrangement.

29. The Respondent has argued otherwise, that pursuant to section 61 of the Employment Relations Act, the contract was a continuing contract only because the period of re-engagement was within a month.

30. In Carpenters Fiji Limited (trading as Morris Hedstrom) -v- Sami [2020] FJHC 113; ERCA 19.2013 (28 January 2020) Wati J held that:

> *"14.The ERT found that there was no evidence that the employee was performing a fixed task or a daily contract. On that basis, to defeat the presumption, there must be evidence of an expressed provision within the contract which indicated that the contract was not renewable. Since there was no evidence to that effect, the ERT found that the contract was not for a fixed term. The presumption in s. 28 therefore applied that the parties had entered into a contract for an indefinite term.*
>
> *15. I do not have any basis in law to flaw the findings of the ERT. The contract could not be said to be a fixed contract. In this case, the employee continued to be at work for 9 months post 10 May 2011 which is the end date stipulated in the contract. Since there was continuity of employment, there is a statutory presumption of a new contract for an indefinite term.*
>
> *16. S. 28 (1) of the ERA makes it clear that such a presumption arises unless the contract is for a fixed period which is expressed to be not renewable, is a contract for a fixed task, or a daily contract where wages are paid daily. The last written contract between the parties did not state expressly that it was not renewable. It therefore cannot be a fixed contract to exclude the presumption of law that a new contract for an indefinite period had arisen when the employee continued in the employment.*
>
> *24. The evidence does not reveal the reason why the contract came to an end except for the fact that it expired naturally. Since this is a contract for an indefinite period, it could not expire naturally. The employer had to provide a valid reason for the termination. There was no reason provided. I therefore find that the ERT was correct in coming to a conclusion that the termination was not justified because the employee was entitled to be told why his employment was being terminated and that the reason could be justified."*

31. The Court finds that section 61 of the Employment Relations Act does not apply in this instance. There was no continuation of the contract despite the engagement letter expiring. The grievors also did not continue to work for the time being when the engagement letter expired or when the termination was issued. They had completely stopped work with the Appellant when their contract expired and only started work when re-engaged. When their termination was finally entered on 2 April 2020, there was no further re engagement.

32. Furthermore a month notice is issued for a term of engagement for a fixed term contract which is contrary to the terms of the oral contract given to the parties.

33. In this instance the period of notification was 7 days because the Respondents were paid on a weekly basis. The Court found that the notification period was correct in so far as section 29 of the Employment Relations Act which reads:

> 29.—(1) Subject to subsection (2), a contract for an indefinite period may, in the absence of a specific agreement between the parties to the contrary, be terminated by either party—
>
> *(a)* if the contract period is less than one week, at the close of a day without notice;
>
> *(b)* if the contract period is one week or more but less than a fortnight or where wages are paid weekly or at intervals of more than one week but less than a fortnight, by not less than 7 days' notice before the employment expires;
>
> *(c)* if the contract period is a fortnight or more but less than a month or where wages are paid fortnightly or at intervals of more than a fortnight but less than a month, by not less than 14 days' notice before the employment expires; or
>
> *(d)* if the contract period is one month, by not less than one month's notice before employment expires.
>
> (2) The notice required under subsection (1) must be given in writing."

34. The contract of an indefinite period did not in any stipulate the conditions pertaining to termination of contract. Hence when terminating the contract, the parties rely upon

section 29 of the Employment Relations Act. In this instance a notification period is required. However there is no requirement for reasons to be given.

35. This case can be distinguished from Carpenters Fiji Limited (trading as Morris Hedstrom) case (Supra) where Wati J referred to the terms of the contract and master agreement in order to determine whether or not reasons for termination were required.

36. I therefore find that Grounds 1, 2 and 3 of Appeal are upheld.

37. However, I find that the Non Legal Employment Relations Tribunal erred in law and in fact pertaining to the interpretation of the termination as being a continuing contract for which the termination rendered it a summary dismissal in accordance with section 33 of the Employment Relations Act.

38. I find therefore that the award of wages for 7 weeks of the remaining term of the re-engagement by the Non-Legal Tribunal was wrong in law and in facts.

Orders of the Court

39. **The Court finds that :**

(i) That Grounds (1) and (2) and (3) of the Appeal is upheld;

(ii) The decision of the Learned Non-Legal Tribunal is hereby quashed.

(iii) No Order as to costs.

SLTJW Levaci
A/Judge