

IN THE EMPLOYMENT RELATIONS COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 11 of 2018

BETWEEN: **RAJESH KUMAR**

APPELLANT

AND: **FASHION BUTTONS (FIJI) LIMITED**

RESPONDENT

Appearances: Mr. A. Nadan for the Appellant.

Mr. N. Sharma for the Respondent.

Date/Place of Judgment: Tuesday 23 July 2024 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

Catchwords:

Employment Law – Whether the employer could terminate the work of the worker for no cause under the contract of employment– the procedure to terminate under no cause provision of the contract- whether the worker had been short paid his wages after variation of the wages.

Cause

1. The worker appeals against the decision of the Tribunal on its findings that he was not unlawfully or unfairly dismissed from his employment.
2. Rajesh Kumar was employed by Fashion Buttons (Fiji) Limited as its Branch Manager, Fiji from September 2001 till 7 April 2011 when he was terminated from his employment.

3. The worker claimed that he was unlawfully and unfairly dismissed from his employment and as a result should be compensated by payment of 6 months wages calculating to \$10,110.00. He also claimed a sum of \$11, 147.50 as arrears in salary which was increased and not fully honored for 35 months.
4. The employer's position was that the worker had left work on his own accord as he was not content with the pay he was earning. It says that the worker left the job as he had better offer from other companies.

The Tribunal's Findings

5. There were two issues before the Tribunal. The first was whether there was dismissal from employment and whether it was justified and the second was whether there was arrears of salary which ought to be paid to the worker.
6. In respect of dismissal from employment, the Tribunal made two contrary findings. It first said that there was a lawful dismissal as the employer had terminated the employment for cause as the Managing Director had reached the end of his tether with the worker since the worker was not agreeing to the salary negotiation. The Tribunal said that the dismissal could occur upon giving of one month's notice or pay in lieu which the employer did comply with by paying the worker one month's pay in lieu of notice.
7. Then contrary to the above finding the Tribunal found that the worker had left at his own accord as shown by the fact that he voluntarily returned all the employer's properties.
8. The Tribunal stated that it saw no reason why the worker had to complain about the recruitment of his replacement, as that was management prerogative to put a worker on standby for appointment when the worker's loyalty and permanence of employment are being questioned through his actions and attitudes.
9. The Tribunal said that the worker had agreed to leave the company and accepted one month's pay along with his respective salary for the month of April 2011 and as such there was no dismissal.

10. The Tribunal made no finding on the other remaining issue of arrears of wages.

The Appeal

11. The worker raised 3 grounds of appeal. They are as follows:

1. *That the Tribunal erred and/or misdirected himself in law and in fact by striking out the claim when:*
 - (i) *There was no evidence before the Tribunal that the Appellant was given various job offers by other companies.*
 - (ii) *The witness, Ms. Latchmi Sharma had confirmed in court that the replacement staff for the appellant, Ms. Lal was appointed prior to the departure of the appellant.*
 - (iii) *There was no evidence before the Tribunal to prove that the Appellant had actually threatened to leave for a rival company.*
 - (iv) *There was evidence produced before the Tribunal during Hearing that the Appellant was short paid by the Respondent.*
 - (v) *There was evidence before the Tribunal that the appellant had received an increment but the same was not fully honored and paid to him.*
2. *That the Tribunal erred in finding that the Appellant left on his own accord by voluntarily returning all the company's properties when:*
 - (i) *There was evidence before the court that the Appellant was directed by the Managing Director of the Respondent Company to return all the company's property.*
3. *That the Tribunal's ruling is wrong and erroneous and tantamounts to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole.*

Law and Analysis

12. The first issue is whether the worker was dismissed.
13. The worker gave evidence that he had been asking for a salary increase from the employer. On 4 April 2011, during his regular visit to a client's office, he discovered that Mark Neighbour, the Managing Director of Fashion Buttons (Fiji) Limited, had hired one Anjana Lal to replace him as the Manager and the change was to be effective from 11 April 2011.
14. He told his office administrator Ms. Latchmi Sharma of this. She enquired from the office of the employer's accountant HN Pandey. The office of HN Pandey confirmed the same to be true.
15. The worker said that he then confronted the Managing Director who agreed that there was a replacement. The worker said that he offered to work until end of April 2011 but the Managing Director sent an email on 5 April 2011. It reads as follows:

"Rajesh hi

Have thought about this. I feel you can finish up this Thursday the 7th of April 2011. You can leave the car parked out the front of the office and give Latchmi the keys for the car and the office and as the company phone is no longer working can you pull out the sim card and give it to Latchmi as well.

On Monday I will meet with Mr. Pande and he will confirm what payout is required. I need for Mr. Pande to confirm a time but around 8am would suit me. Once that is done payment will be made directly to your bank account.

Any queries please let me know.

Regards".

16. It is clear that the worker and the employer had been negotiating a salary increase and no agreement could be reached. The employer says that the worker was threatening to leave and had been saying that he was getting many offers.

17. Both parties had been discussing their positions but it was the employer who had to take a step to end the contractual relationship. It indisputably hired another person to work for it whilst the worker was still employed. The issue is whether the employer could terminate the contract in such a manner under the contract of employment.
18. This was not a case of termination for cause. It was ending the relationship without cause as it could no longer continue in the circumstances that the employer felt threatened that the worker may leave anytime and leave a vacuum. Any employer will want to think about smooth functioning of its business. Knowing that one worker may leave anytime, it cannot sit back and wait for that disruption to occur.
19. The threatening of the employer is clear from the worker's email of 24 March 2011. He writes to the Managing Director as follows:

"Mr N,

You should have the week ending report 2moro afternoon.

I think our discussions have dragged on for 3 weeks now and still no answers from your end.

Its time either of us should make a decision, I think it will have to be me as I assume you have not seriously taken my request into account,

Look forward to our meeting this afternoon, when I will let you know of my dicision.

*Thanks and regards
Rajesh"*

20. Clause 9 of the Contract of Employment permits termination without cause. It reads:

"The engagement may be terminated by either party with four (4) weeks' notice."

21. On 5 April 2011, the employer told the worker to leave by 7 April 2011 without giving the 4 weeks required notice. The employer however paid to the worker 4 weeks' pay in lieu of

notice. In that way the termination was in accordance with Clause 9 of the Contract of Employment.

22. On the issue of arrears of payment, I find that the employer had agreed for a change in the contract by agreeing to pay \$600 a month net for the worker's rent. The payment was to be effective from 15 April 2008.
23. If the employer had not agreed to pay rent, it would not require its accountant to pay the worker the rent of \$600 per month from 15 April 2008. The email of 9 October 2008 from the employer is very clear on this. It reads:

"Abdul Hi

Just speaking to Rajesh regarding his salary.

As per previous emails. Current salary is \$1085.00 per month. As discussed we had a meeting in March 2008 where we agreed we would pay the rent of \$600.00 per month. This give total per month of \$1685.00.

The above arrangement was effective from the 15th of April.

Please confirm if Rajesh is paid in advance.

Please confirm what Rajesh been paid from that date and what he is owed.

From 1/11/08 the \$600.00 will be paid to Colonial Bank Account Number 4277537 branch at Nausori.

Regards Mark."

24. Further the worker's net salary before the variation was \$1085.00 per month. The worker started getting paid a sum of \$1366.50 net per month after the discussion on variation of salary. A shortfall of \$318.50 remained for 35 months until termination. If the employer did not agree to increase the salary, how did the accountant pay an increased amount of \$281 per month?
25. The fact that an increased amount was paid indicates that the employer had agreed to pay \$1685 net per month which it failed to honor in full. The worker should be paid the shortfall in wages.

Final Orders

26. The appeal is allowed in part. I uphold the decision of the Tribunal that the worker was properly terminated under his contract of employment.
27. I however find that the employer had short paid the worker in the sum of \$11,147.50. The employer shall pay to the worker arrears of wages in the sum of \$11, 147.50.
28. The worker is entitled to interest on the unpaid wage at the rate of 3% from the date of claim until date of appeal hearing (6/4/11 to 15/2/2022) for 11 years equating to \$3,678.68.
29. There shall be costs in favour of the worker in the sum of \$5,000.
30. I tabulate the payment as follows:

<i>Arrears of Wages</i>	<i>11,147.50</i>
<i>Interest at 3% (11 years)</i>	<i>3,678.68</i>
<i>Costs</i>	<i><u>5,000.00</u></i>
<i>Total</i>	<i><u>19,826.18</u></i>

31. The above sums shall be paid within 21 days to the worker.



Anjala Wati

Hon. Madam Justice Anjala Wati

Judge

23.07.2024

To:

- Messrs Neel Shivam Lawyers for the Appellant.***
- Nilesh Sharma Lawyers for the Respondent.***
- File: Suva ERCA 11 of 2018.***

