

IN THE EMPLOYMENT RELATIONS COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

ERCA No. 13 of 2019

BETWEEN : **SCORPION INVESTMENTS LIMITED**

APPELLANT

AND : **POOJA ARCHANA DEVI**

RESPONDENT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. V. Singh for the Appellant**
: **Ms. M. Rabele for the Respondent**

Date of Hearing : **29 July 2022**

Date of Judgment : **4 January 2024**

JUDGMENT

EMPLOYMENT LAW:

Appeal – Dismissal – Abandonment of

employment – Employment Relations Act 2007

1. The respondent filed an employment grievance alleging that her employment was terminated by the appellant on 6 November 2014. She commenced employment in November 2013, and was employed as a sales person. Upon dismissal she referred her employment grievance to mediation services on 7 November 2014, the day after she was said to have been dismissed. As there was no settlement the grievance was referred to the Employment Relations Tribunal.
2. Before the tribunal, the appellant denied dismissing the employee, and claimed that she voluntarily left employment and refused to return to work. After a hearing, the resident magistrate, by determination dated 22 September 2017, held that the respondent's employment was terminated.
3. The court allowed the appellant's summons for leave to file the appeal out of time. As the facts in this appeal and the facts in *ERCA 12 of 2019* – in which another employee, Radeshna Goundar is the respondent – arise from the same incident and related circumstances, the parties moved that hearing into both matters be taken up together.
4. The appellant raised the following grounds of appeal:
 - i. "The Tribunal erred in law and in fact in finding that there was an immediate threat to health informed by the Grievors to their immediate supervisor.
 - ii. The Tribunal erred in law and in fact in finding that the Employer did not take action according to section 25 of the OHS Act.
 - iii. The Tribunal erred in law and in fact in finding that the Employer should have complied with section 25 (3) of the OHS Act.

- iv.* The Tribunal erred in failing to consider that neither the Employer nor its solicitors was advised during the proceedings of a grievance in the aspect of section 25 of the OHS Act.
 - v.* The Tribunal referred to section 25 of the OHS Act in making its decision when the grievances filed by the Respondents did not make any reference or reliance on the said section.
 - vi.* The Tribunal failed to consider that there was insufficient evidence showing that the employer was notified of the Grievor's pregnancy.
 - vii.* The Tribunal failed to consider that the employer and the Supervisor were not aware that the Grievor was pregnant.
 - viii.* The Tribunal failed to consider that the Grievor wilfully left her employment without being terminated.
 - ix.* The Tribunal erred in failing to give consideration to the evidence in submissions presented by the Appellant and failed to assess this in the delivered on 22 September 2017.
 - x.* The Tribunal erred in its decision in failing to consider the contradictory evidence given by the Respondents and their witnesses.
 - xi.* That the Tribunal erred in its decision in awarding the Respondents 3 months wages as compensation for unlawful dismissal."
5. On the day of the hearing, counsel for both parties submitted that they would rely on their written submissions.
 6. The appellant submitted that the respondent was required to stay back at work to help oversee the unloading of new stocks at the shop. However, she refused to stay back and assist, but gave no reason for her refusal. The respondent did not, the appellant submitted, mention any risk to health by performing her work.
 7. The appellant submitted that the respondent did not provide any evidence that her pregnancy was a medical condition and to work at the shop that afternoon would be a threat to her health.

8. It was contended that the tribunal erred in saying that the appellant should have complied with section 25 of the Health and Safety at Work Act 1996, which places the onus on both parties where there is an immediate threat to a worker's health or safety.
9. The appellant submitted that the tribunal's conclusion is against the weight of evidence, and that the tribunal did not give reasons for the evidence it accepted or rejected. The appellant says that the tribunal failed to consider the contradictions in the evidence of the respondent. The appellant submits that there was no basis upon which to award three months wages as compensation as the worker was not dismissed, and she had kept away from work on her own and did not respond to calls to return to work.
10. The transcript of evidence led before the tribunal is not recorded in the clearest terms. The appellant's evidence is that the respondent left her job following arguments with staff, and did not respond to telephone calls. The appellant says that the respondent and Radeshna, the respondent in ERCA 12 of 2019, wanted the sales person, Aggie to be dismissed because of differences with her, but the appellant did not comply with the demand to dismiss her. The appellant's testimony is that it was unaware of the respondent's pregnancy.
11. Akanisi Vunisa, who worked as a sales assistant for the appellant, said in her evidence that after Pooja and Radeshna went away, the appellant tried contacting them, but the two workers did not respond. When they returned to the shop and met the boss, they were asked to return to work. The witness denied that Mei, the general manager, instructed her to terminate the employment of the respondent and Radeshna.
12. Form 1 by which the respondent referred her employment grievance to mediation is dated 7 November 2014. In her statement, she referred to an incident that took place on the previous day, 6 November 2014. She states that her employment was verbally terminated by her employer. The statement says that she showed her boss the medical transcripts regarding her pregnancy on

Wednesday, 5 November. She was asked to collect her wages on Friday, 7 November 2014.

13. In her evidence, the respondent said that Mei and Aggie told her to collect her wages, her bond and submit a resignation letter. However, she did not submit her resignation. She says that Aggie told her that she would have to lift heavy material. When she refused and explained she could not lift anything heavy, she was asked to go home. She went away, and reported the matter to the labour department on the following day. She told the tribunal that Radeshna informed her that pregnant women could not be dismissed. She mentioned a meeting attended by Mei, Aggie and Radeshna. She said that Radeshna was dismissed because of her, and that they were forced to leave work. She said two other workers were also dismissed because of pregnancy. The respondent said that Aggie knew she was pregnant, having seen her medical report. She did not receive a written letter of termination.
14. The tribunal has chosen to believe the evidence given by the respondent. Deciding upon the credibility of the witnesses is a matter for the tribunal. It is true that the tribunal has not specified the reasons for accepting or rejecting evidence. The availability of reasons in a judicial determination is most useful to an appellate court in understanding the rationale of a court of first instance. Nevertheless, the tribunal has heard the witnesses and come to a finding. The determination shows that the most important issues have been considered in light of the evidence. Once the tribunal decided upon the credibility of witnesses and made the primary findings of fact, it was able to reach its conclusions. The tribunal's failure to consider inconsistencies will not suffice in this instance to overturn the findings.
15. The court notes that the respondent did not make reference to the Health and Safety Act 1996, although this has been considered in the tribunal's determination. The critical issue is whether the tribunal was of the opinion that the worker was dismissed. The resident magistrate has reached the conclusion that the respondent's employment was terminated and rejected the argument that she left employment on her own volition.

16. In these circumstances, the court's intervention is not warranted.

ORDER

- A. The appeal is dismissed.
- B. The appellant is to pay the respondent costs summarily assessed in the sum of \$1,000.00 within 21 days of this judgment.

Delivered at **Suva** this 4th day of **January, 2024**.



M. Javed Mansoor

M. Javed Mansoor
Judge