IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU 0043 of 2016
(On appeal from the Employment Relations Court at Suva under ERCA No. 10 of 2014)

BETWEEN : **FOOD FOR LESS (FIJI) LIMITED**

Appellant

AND : **ELIZABETH CHAND**

Respondent

Coram : **Basnayake JA**
Lecamwasam JA
Almeida Guneratne JA

Counsel : **Mr. R. K. Naidu for the Appellant**
Mr. A. Prakash with Ms. G. Naigulevu for the Respondent

Date of Hearing : **9 May 2018**

Date of Judgment : **1 June 2018**

JUDGMENT

Basnayake JA

[1] This is an appeal by the appellant to have the judgment dated 26 April 2016 of the learned High Court Judge sitting in the Employment Relations Court set aside. The

learned Judge has (pgs. 4-15) heard this case in appeal against the decision of the Employment Relations Tribunal (ERT). In terms of section 3 (4) of the Court of Appeal Act, an appeal lies to the Court of Appeal from final judgments of the High Court given in the exercise of their appellate jurisdiction only on a question of law. The section reads as follows:

> Section 3(1), (2) and (3) are not reproduced.
>
> (4) *Subject to.....appeals lie to the court on a question of law only from final judgments of High Court given in the exercise of the appellate jurisdiction of the High Court.*

[2] The jurisdiction of this court was considered in **Bijma Wati v Gaya Prasad** (ABU 33 of 2016 (14 September 2017). The Court of Appeal held that, *"There is a plethora of authoritative judicial precedents interpreting as to what constitutes a question of law.* ***Chunilal Mehta v Century Shipping and Manufacturing Co. Ltd*** *(1962) 1 AR (SC) 1314,* ***Chand v Fiji Times Ltd*** *(2011) FJSC 2 (8 April 2011),* ***Bulu v Housing Authority*** *(2005) 1 FJSC 1 (8 April 2005),* ***South Sea Cruises Limited v Samsul Mody*** *(CBV 0009 of 2014 (23 April 2015))* ***Sen v Khan*** *(CBV 0008 of 2014 (23 April, 2015),* ***Simeli Bili Naisua v The State*** *(CAV 0010 of 2013 (20 November 2013)) referring to* ***Robinson*** *(1953) Cr App R 95,* ***Pagett*** *(1983) 76 Cr App R279,* ***R v Majewski*** *[1975] 3 All ER 296,* ***Lemon*** *[1978] 67 Cr App R 70,* ***R v Thomson*** *[1984] 3 All ER 565,* ***Skipper v R*** *[1979] FJCA (29 March 1979). Also* ***Collettes v Bank of Ceylon*** *(1982) (2) Sri LR 514. Considering the principles set out by many authorities, the question whether a tribunal has misdirected itself on the law or on the facts or misunderstood them or has gone fundamentally wrong in certain other respects would amount to a question of law which empowers this court to hear this appeal*".

[3] The learned counsel for the appellant submitted that the several grounds of appeal involve questions of law. The learned counsel relied on the judgments of **De Costa v The Queen** [1968] HCA 51; 118 CLR 186 at 194, **Robert John Sheridan v British Telecommunication PLC** (1989) EWCA Civ 14, **Prince Vyas Muni Lakshman v Estate Management Services Limited** [2015] FJCA 26; (27 February 2015). The

learned counsel for the respondent does not dispute the existence of questions of law in this case. One argument in this case is whether there are findings without evidence. This is concerning ground 1 of the appeal. There is a finding that the Managing Director of the appellant, namely, Mr. Prasad had threatened the respondent and got her to admit to theft. No such evidence is found in the oral evidence of the proceedings (pgs. 98 & 99 of Record of the High Court (RHC)). The respondent states in evidence that she was interviewed alone in his office (referring to the General Manager, Mr. Prasad). Considering all the issues involved in this case I am of the view that there are questions of law and the appellant is qualified to come before this court.

The facts in brief

[4] The respondent was employed as head cashier with the appellant, a super market, from May 2007 to June 2010. Her services were terminated by letter dated 11 June 2010 (pg. 91). The letter states that, *"Your employment with Food 4 Less is hereby terminated on grounds of incompetence, whereas funds went missing and your access card was used. Further investigations are still pending"*. This letter was signed by Mr. Prasad who was the General Manager. Although an investigation was done by the police on a complaint made, no case was filed and she was informed by the police (Pg. 90) on 1 August 2011 that the investigation file was closed due to insufficient evidence. No evidence of incompetence of the respondent was produced by the appellant.

[5] In terms of section 200 (1) (a) of the Employment Relations Act 2007 (ERA) and Regulation 3 (2), the respondent completed ER Form 1 on 20 July 2010 and mediation proceedings began. However due to the failure to arrive at a settlement, the case was referred to the Employment Relations Tribunal (ERT) on 12 November 2010 for a decision on the unfair dismissal and compensation (pg. 80). The Tribunal after hearing (pgs. 102-107) determined on 14 July 2014 that the respondent had been unfairly dismissed and awarded one years' wages lost under section 230 (1) (b) of the ERA and 6 months' wages as compensation for humiliation, loss of dignity and injury to feelings under section 230 (1) (c) (i) of ERA 2007.

[6] The appellant filed a notice of appeal pursuant to Order 55 r3 of the High Court Rules 1998 (pgs. 36-37) to set aside the orders of the ERT on the grounds of excessiveness of the awards. The ERT made an award of six months for humiliation, loss of dignity and injury to feelings when no such claim was made or pleaded by the respondent and for holding that the dismissal was unfair. The learned High Court Judge of the Employment Relations Court (ERC) found that the respondent was unlawfully and unfairly terminated and ought to be compensated. However the wages of one year had been reduced to 8 months and unfair termination reduced to 3 months and in all, the appellant was ordered to pay the wages to the respondent for a period of 11 months. The appellant now appeals to this court to set aside the orders of the learned High Court Judge.

The grounds of appeal

[7]

i. *The learned Judge erred in law when she failed to properly and/or adequately evaluate the evidence, thereby holding that the respondent was threatened and hence unfairly terminated, which finding cannot be supported having regard to the evidence as a whole.*

ii. *The learned Judge erred in law when she proceeded to determine whether the termination of the respondent was lawful whereas the terms of reference before the Employment Relations Tribunal was "unfair dismissal" of the respondent.*

iii. *The learned Judge erred in law in holding that the respondent was unlawfully dismissed.*

iv. *The learned Judge erred in law in holding that the respondent could find a job in the first 8 month period, in the absence of any evidence.*

v. *Alternatively, the learned Judge erred in law in awarding the respondent 11 months wages (8 months wages for unlawful dismissal and 3 months wages for unfair termination) which is unsupported by evidence, excessive and ought to be reduced.*

[8] At the hearing the learned counsel for the appellant invited the court that he is relying on two grounds, namely, ground Nos. 'i' and 'v' only. I think ground 'iv' is coupled with ground 'v' and these two grounds can be considered together.

Submissions of the learned counsel for the appellant

[9] On the first ground the learned counsel submitted that there is no evidence of a threat. On the question of the threat the learned Judge in paragraph 59 (pg. 14 of the Record of the High Court (RHC)) of the judgment states as follows:-"*It was undisputed evidence that Mr. Rudra Prasad had called the employee into the office in the absence of anyone else and threatened the griever and made her admit that she stole the money*". The learned counsel submitted that there is no such evidence found in the proceedings.

[10] The evidence of the griever (Elizabeth Chand) regarding the threat is that, "*Prasad told me to go when I was on the phone. When Prasad told me not to go anywhere. If want to come with one member, he...left and right. They reported to police*"....(pg. 99 of the RHC) The Tribunal said in the determination in paragraph 8 referring to the evidence of the griever that, "*She also testified that Rudra Prasad interviewed her alone with no other female present and had coaxed her into agreeing to have committed the alleged offence. She stated that she was under duress and feared for her life*" (pg. 103).

[11] The learned counsel complained that what is stated in paragraph 8 of the determination of the Chief Tribunal is not found in evidence. The learned counsel submitted that what is stated in paragraph 8 appears to be an excerpt from the closing submissions filed on behalf of the respondent on 26 July 2011 (pgs. 92-96 at 94). The learned counsel also invited the attention of this court to paragraph 2 of the determination (pg.102) which reads, "*subsequent to her termination the griever lodged a complaint to the Ministry of Labour Enforcement Unit by completing Form ER 1 and where she stated that on April 2010, Rudra Prasad called her into his office and threatened and accused her of missing funds*". The learned counsel submitted that what is contained in the above complaint the learned Judge referred to as undisputed evidence.

[12] The learned counsel complained that the proceedings before the Tribunal (referring to pages 98-101) does not contain any evidence to the effect that the respondent was threatened or was under duress and feared for her life and that the Employment Relations Court (the High Court) has failed to review the evidence recorded before the Tribunal but has merely adopted it. However the learned counsel admitted that what is stated in ER 1 formed part of evidence.

ER 1 (pgs. 81-83 RHC)

[13] In ER 1, under the heading "Details of employment grievance (the problems) the Griever states that, "*On 02/06/2010 the Director of food 4 Less Mr. Rudra Prasad called me inside his office and threatened me and accused me for funds missing in my access card...*". The learned counsel complained against the use of this document without leading any oral evidence, thus making the contents of the document worthless.

Grounds 4 & 5

[14] The learned counsel submitted that the learned Judge erred in awarding 8 months' salary for the griever on the basis that she would not have found alternate employment during that period. The learned counsel submitted that no such evidence was led. The learned counsel relied on the case of **Isireli Fa v Roko Tagi Albert** ERC No. 10 of 1012 (17 February 2014). This is a case of unlawful dismissal where the court assumed that the employee was without employment for a period of six months while having no evidence as to the period during which the employee was without a job. The court ordered the employer to pay part of the wages lost under section 230 (1) (b) of the ERP which equals to 3 months' wages. The learned counsel submitted that there should be consistency with regard to orders made by court.

Unfair termination-3 months wages-section 230 (1)

[15] The Tribunal found that the demotion and reporting the matter to the police was humiliating. The Court (ERC) in appeal attributed humiliation to the threat which made the termination unfair thus awarding 3 months' wages and in all 11 months wages to be paid by the appellant (employer). The learned counsel submitted that the respondent failed to adduce evidence to support that the manner of her dismissal was humiliating or undignified or that it injured her feelings entitling her to compensation. The learned counsel submitted that an award of compensation for humiliation is not automatic. The learned counsel complained that the respondent did not make a claim for compensation under section 230 (1) (c) (i) of the Employment Relation Promulgations (ERP). The learned counsel in support of his submission mentioned the case of **Department of Survey & Land Information v NZ Public Service Assn** (1992) 1 ERNZ 851 at page 857 where Cooke P states;

> *"Mr. Metheson pointed to the danger of any automatic award of compensation for humiliation and the like whenever a personal grievance was found to be established. Plainly that would not be a proper practice. Each case has to be considered on its own facts and merits and demerits, and there would be no propriety in an inveterate or even a normal practice of awarding compensation under section 227 (1) of the 1987 Act. But the present decision of the Labour Court does not appear to proceed on the basis of any general rule or practice. The natural interpretation of it is that in the particular circumstances of this case some allowance under that sub-paragraph was considered appropriate."*

[16] I should complete what Cooke P had said thereafter in the same page:

> *"It is impossible, in my view, to hold that in law such an award was not open to the Labour Court. The amounts awarded were relatively modest. The Court spoke of the grievants as having been shabbily treated in their employment. It is not for us hearing an appeal on a point of law to express a view one way or the other as to whether on the evidence that epithet was or was not justified. That is a matter for the Labour Court, but it was a view open to them and, having taken that view, it was perfectly natural for them to reason that long-serving officers of the Department who had been treated in that way would naturally suffer injury to feelings ...*

> ***The submission was made that there was no specific evidence of distress or injury to feelings, but the actions taken by each employee by way of protest at what was done speak volumes as to its effect on them****. Moreover the Labour Courts had the advantage of seeing and hearing them giving evidence. That Court was in a better position than this Court to make an assessment of how they had reacted to their treatment. There are some general references in the evidence to the disturbance caused to the staff by what happened at this period. I have no doubt that, in all the circumstances and on a view of the facts that was open to them, the Labour court were entitled to make the award that they did under this heading. That question should be answered No and dismissed this appeal (emphasis added).*

[17] This is a classic example to show that the proceedings before Labour Tribunals should be analysed very carefully. It may be that every word is not recorded before the Tribunal. The court may arrive at findings by examining all the circumstances, the conduct of parties etc.

Submissions of the learned counsel for the Respondent

[18] The learned counsel for the respondent submitted that the evidence recorded at pages 98 to 101 does not contain the entire transcript. The learned counsel submitted that there was evidence of threat by the employer. With regard to ground 4 the learned counsel submitted that the learned Judge of the ERC had considered the fact that there was no evidence as to how long the respondent was out of a job. That is why the learned Judge had reduced the period of one year to eight months. The Tribunal had awarded one years' wages on the basis that the trial had begun one year since the termination. The learned Judge had considered that as an unsound reason. In paragraph 58 of the judgment the learned Judge had said that, "I find that the employee could have at least found some job in the first 8 months period. She is not a skilled worker that work would be readily available for her. She would need to go and find a similar job and if she tried, 8 months could have been sufficient time for her to find work for herself."

Evidence of threat

[19] The learned counsel for the appellant strenuously submitted that there was no evidence of a threat. The learned counsel for the appellant went to the extent of suggesting that the evidence of threat originated from the closing submissions dated 26 July 2011 (pgs. 92-96) made before the Tribunal by the Labour Officer. In paragraph 3.4 of the written submission (pg. 94) it states that, "*she also testified that the employer had interviewed her alone with no other female present and had coaxed her into agreeing to have committed the alleged crime under duress and fearing for her safety, she did so.*" Paragraph 8 of the determination (at pg. 103 of RHC) states thus, "*She also testified that Rudra Prasad interviewed her alone with no other female present and had coaxed her into agreeing to have committed the alleged offence. She stated that she was under duress and feared for her life.*"

[20] The learned Judge (ERC) in her judgment in paragraph 59 (pg. 14 of RHC) states as follows. *"It was undisputed evidence that Mr. Rudra Prasad had called the employee into the office in absence of anyone else and threatened the griever and made her admit that she stole the money".*

[21] I have observed that the learned counsel for the appellant never complained before that, that there was no evidence of a threat by the employer. The learned counsel mentioned this for the first time in the Court of Appeal. The evidence of threat is observed for the first time on 26 July 2010 in Form ER 1(pg. 82 of RHC). It states, "*On 02/06/2010 the Director of Food 4 Less Mr. Rudra Prasad called me inside his office and threatened me for funds missing in my access card*". Mr. Prasad who was the Managing Director of the appellant has admitted in an affidavit (pg. 85) to having interviewed the respondent. In a second affidavit filed on 20 May 2011 (pgs. 87 to 89) the Managing Director Mr. Prasad accused the respondent (pg. 89) of embezzlement of funds. In paragraph 2 he states, (a) "*The griever was well aware of the situation as all the evidence gathered was against her in the embezzlement of funds. (b) Full internal policy was exercised, as all the evidence was against her and hence the matter was reported to the police. (c)...Elizabeth Chand*

(respondent) is the prime suspect of embezzlement of funds. (e) She was the prime suspect after the internal investigation and therefore she will be proven guilty in due course".

[22] The respondent gave evidence before the Tribunal on 5 July 2011. It appears that she had stated her grievance before the Tribunal and was cross examined by the Managing Director, namely, Mr. Rudra Prasad. He was the respondent before the Tribunal. The closing submissions were filed before the Tribunal on 26 July 2011. The appellant in this case appealed against the decision of the Tribunal to the Employees Relations Court (ERC). Written submissions were filed for the respondent before ERC on 22 March 2016 (pgs. 66-68).In the written submissions at page 66 under the heading "Brief facts" it is stated that, "*In April (this may be June) 2010, the Director of Food for Less called her to his office where he threatened and accused her of funds missing in her access card*". Written submissions of the appellant too were filed on the same day (pgs. 58 -64). It is the position of the learned counsel for respondent that the respondent gave oral evidence before the Tribunal of the threat made by the General Manager, Mr. Prasad although it does not appear in the transcript. The threat is referred to in the Determination, in the closing submissions of the Labour officer and in the written submissions of the counsel for the respondent in the ERC. If there was no such evidence why could not the counsel bring it to the notice of the learned Judge of the ERC? Apart from that why should the Director aver in his affidavit dated 20 May 2011 that there was no duress and the respondent voluntarily admitted to the theft?

[23] The learned counsel for the appellant however admitted that the document ER 1 is part of evidence. The threat referred to in this document has not been challenged. Considering the above facts I am of the view that there had been evidence of threat before the Tribunal.

Award of 11 months

[24] The award of 11 months is made up of eight months for unlawful dismissal and three months for unfair dismissal. The learned counsel for the appellant does not complain of

making an award for unlawful dismissal. The respondent was summarily dismissed for embezzlement. The complaint of the learned counsel is against awarding 8 months wages for unlawful dismissal. The respondent was informed by the police that no action would be taken against the respondent due to insufficient evidence. The ER1 Form was filed on 26 July 2010. The Mediation was held on 27 and 29 September 2010. The case was referred to ERT on 12 November 2010. The hearing before the ERT was taken on 5 and 6 July 2011.

[25] The Tribunal had awarded one years' wages against unlawful dismissal on the basis that it took one year to hear the case from the date of termination. However the learned High Court Judge of the ERC reduced the amount to 8 months' wages.

3 months award for humiliation

[26] The learned counsel for the appellant complained that the learned Judge had awarded three months wages on the ground that the threat was humiliating. The Tribunal's award of 6 months was on the basis of a demotion and a complaint to the police. I am of the view that what is important is to ascertain whether there was any evidence to cause humiliation. Once it is proved that there is evidence of a threat and degrading treatment that could justify an award.

The Employment grievance remedies under the Employment Relations Act 2007

[27] Section 230 (1) states,

> "*If the tribunal or court determines that a worker has an employment grievance, it may, in settling the grievance, order one or more of the following remedies-*
> *(a) reinstatement of the worker in the worker's former position or a position no less advantageous to the worker;*
> *(b) the reimbursement to the worker of a sum equal to the whole or any part of the wages or other money lost by the worker as a result of the grievance;*

(c) the payment to the worker of compensation by the worker's employer, including compensation for- (i) humiliation, loss of dignity, and injury to the feelings of the worker; (ii) loss of any benefit, whether or not of a monetary kind, which the worker might reasonably expect to obtain if the employment grievance had not occurred' or (iii) loss of any personal property. Sub section (2) and (3) not reproduced.

[28] If the finding of unlawful termination is rightly decided, I am of the view that the court has power to make an award which the court thinks is just. In this case the Tribunal has awarded one years' wages for unlawful termination. The ERC however reduced the amount to eight months' wages on the ground that that period is sufficient for the respondent to find similar employment. I am of the view that the award made by the ERC is very modest and not excessive. Hence I am of the view that this ground has no basis and should be rejected. The other complaint is of awarding three months' wages for the humiliation caused. We have seen the facts of this case. The police had investigated and found nothing against the respondent. However we have seen how the respondent was convicted by the management. She was branded as a thief. The management was looking for a conviction. I have already considered the aspect of the threats by the management. Considering all the evidence I am of the view that the learned High Court Judge was right in concluding that the threat had caused humiliation. I am also of the view that her award of three months' wages on account of that is very modest and should be upheld.

[29] Due to the foregoing reasons I am of the view that this appeal cannot succeed. The appeal is therefore dismissed with costs in a sum of $5000.00 payable to the respondent by the appellant.

Lecamwasam JA

[30] I agree with the reasons and findings of Basnayake JA.

Guneratne JA

[31] I too agree with the reasons and findings of Basnayake JA.

Orders of the Court are:

1. *Appeal dismissed.*
2. *Costs in a sum of $5,000.00 payable to the respondent by the appellant.*

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Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL