

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 18 OF 2011

BETWEEN: J.S. HILL AND ASSOCIATES LIMITED

APPELLANT

AND: EMOSI VEREBASAGA

RESPONDENT

Appearances: Ms. B. Malimali for the Appellant.

Mr. P. Howards for the Respondent.

Date /Place of Judgment: Monday 20 May, 2013 at Suva

Coram: The Hon. Justice Anjala Wati.

JUDGMENT

CATCHWORDS:

EMPLOYMENT LAW: Summary Dismissal – Cause of Dismissal needs to be justified – Procedure prescribed by statute in summarily dismissing an employee must be followed.

LEGISLATION:

The Employment Relations Promulgation 2007 (“ERP”): s. 33(2).

The Cause

1. The employer appeals against the decision of the Employment Relations Tribunal (“ERT”) of 5 September 2011.
2. The terms of reference before the ERT pursuant to which arose the decision of 5 September 2011 was in the following form:

“The grievance is over the termination of service of watchman, Mr. Emosi Verebasaga on 20 March 2009 which he considered:

(i) Unjustified, unreasonable, and unfair;

(ii) Unlawful as it is in breach of section 33 of the ERP 2007.

The grievor views that action taken by his employer, JS Hill & Associates Limited as unjustified and unfair and demands appropriate relief in terms of Employment Relations Promulgation 2007.”

3. The employee was indisputably dismissed summarily pursuant to s. 33(a) and 33(d) of the ERP. The actual termination occurred at the end of March 2009, the precise date was not identified by any party. There are two letters of termination, one issued on 16 March 2009 and the other on 20 March 2009. The employee says that he received the letter of 16 March 2009 on 24 March 2009.
4. The employer’s complaint was that the employee was habitually late to work and that he did not follow orders of the employer when he on his own volition cut some timber into pieces which was set aside for a job to comply with the contract for a customer being FNPF. The employees’ act occasioned loss to the employer and so the terminated occurred for those reasons.
5. The ERT found that the employee ended up cutting timber which was for a contractual project for FNPF thereby occasioning loss of about \$400 to the employer but had the employer put the employee on performance management when he was issued with a first warning letter on 12 May 2008, the employee would not have ended up doing what he did.

6. The ERT found that the dismissal was procedurally unfair in that the employee was confronted with the allegations, denied the formal disciplinary procedure in his employment contract and served with the termination letter. The ERT found that the employee was denied a right to be heard and so the dismissal was unfair.
7. The ERT thus awarded the remedy of 2 years and 6 months wages lost as a result of the grievance. The 2 years 6 months award was reduced by 6 months as the ERT considered that the employee contributed to the situation that gave rise to the employment grievance. The final award was for 2 years wages which was to be paid within 28 days from the date of the decision.

The Grounds of Appeal

8. Amongst the 8 grounds that were initially raised, Ms. Malimali only relied on 2 grounds and they were:
 1. *That the Tribunal erred in finding that the employee was not given a right to be heard; and*
 2. *That the award of 2 years wages is wrong in law and on the facts of the case.*

The Submissions

9. Ms. Malimali submitted that the evidence is clear that when the termination letter was issued, the employee was given an opportunity to discuss his termination with the General Manager and the Assistant General Manager of the employer. This clearly indicates that he was given an opportunity to be heard.
10. Ms. Malimali also submitted that the award of 2 years wages is excessive and no basis for awarding such a sum was justified.
11. Mr. Howard submitted that the employer terminated the employment under s. 33(a) and (d) by a letter dated 16 March 2009 which was given to the employee on 24 March 2009. There were no reasons provided to the employee for his termination.

The Law and the Analysis

12. From the terms of reference, it was apparent that the employee was challenging:

(a) The cause for termination; and

(b) The procedure which led to his termination.

13. At no point in time does the ERT explicitly make a finding that the cause for termination was proper under s. 33(a) and (d) of the ERP. The ERT at 4 occasions impliedly holds that the cause for termination was proper.

14. Mr. Howard did not raise any appeal on the grounds that the ERT did not discharge its duties properly under the terms of reference in finding whether the cause for termination was lawful and justified. Had he done so, the aspect could have been properly vindicated. Thus for now, I will only concentrate on the procedural aspect of termination as the appeal is solely based on that.

15. The only procedure that the employer is required to follow in summarily dismissing an employee is to provide written reasons to the employee at the time of dismissal. That is the statutory requirement under s.33(2) of the ERP and not the procedure as the ERT outlines *as giving a notice of the specific allegation and its gravity and possible outcome; giving an opportunity to refute the allegations with an opportunity to have a representative, not simply a witness present and an unbiased consideration of the employee's explanation.*

16. Let me examine whether written reasons were provided to the employee.

17. The letter of termination was issued on 16 March 2009. The employee collected this letter on 24 March 2009. Indisputably when the employee collected the letter he was still employed. In his own evidence he stated that he worked until end of March. Ms. Malimali says he worked until 26 March 2009 as per the employer's evidence. Mr. Howard does not challenge that when the employee received the letter of 16 March on

24 March he was still employed. His only qualm was regarding providing of the written reasons at the time of dismissal.

18. Mr. Howard states that the employer wrote in its letter of 16 March that the reasons for dismissal are contained in the letters of 12 May 2008 and 2 March 2009. Mr. Howard says it is not sufficient to mention letters previously issued. It was proper if the two letters were attached to the termination letter.
19. The letter of 16 March 2009 reads:-

"It is with regret to inform you that your employment with the company will cease on 20 March 2009. With reference to employment relation promulgation section 33:a, d you are being terminated from work with the reason well known to you in the letter that was issued to you on 12 May 2008 and 2 March 2009..."

20. Unlike it was mentioned in the letter of 16 March, the employee continued to work after 20 March although a letter was again issued on 20 March which the employee claims not to have received it. On this letter Mr. Emosi is noted to have received this letter on 24 March 2009 at 8.30am being the same time he received the letter of 16 March. The letter of 20 March reads:

"It is with regret that we inform your employment with the company will cease on Friday 20 March 2009. Accordingly you will be paid one week pay in lieu of notice..."

21. Once again after the letter of 20 March the employee was kept at the employment. Till what date the employee was at work is exactly not known but definitely he was at work until 24 March when he went to work and collected the two letters.
22. The employee, before he left work upon termination, was definitely in possession of the letters of 12 May 2008, 2 March 2009, 16 March 2009 and 20 March 2009. He was therefore at the time of dismissal provided with written reasons of his termination. The

reasons for termination were contained in the letters of 12 May 2008 and 2 March 2009. These letters are admitted to have been received by the employee. The actual letter of termination of 16 March contains the reasons to be the same as those contained in the letters of 12 May 2008 and 2 March 2009. So effectively the reasons were provided to the employee. There was no need for the letters to have been attached to the termination letter although some may prefer to do so to avoid unnecessary issues later on.

23. I therefore find that the employer had complied with s. 33(2) of the ERP and that the employee is not entitled to any remedy for procedurally fair and justified dismissal.

Final Analysis

24. The appeal is allowed and the order of the ERT is wholly set aside.

25. There shall be no order as to costs.

Anjala Wati

Judge

20.05.2013

To:

1. *Ms. B. Malimali for the appellant.*
2. *Mr. P. Howard for the respondent.*
3. *ERCA 18 of 2011.*