

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA NO. 20 OF 2012

BETWEEN: NAUSORI TOWN COUNCIL

APPELLANT

AND: JOSEPH SUBRAMANI

RESPONDENT

Appearances: Ms. Raikaci for the Appellant.

Respondent in Person.

Date and Place of Judgment: Monday 17 February 2014 at Suva.

Coram: The Hon. Justice Anjala Wati.

JUDGMENT

Catchwords:

Employment Law- Appeal- Unlawful dismissal- Unfair dismissal- procedure and reasons looked at to ascertain the lawfulness of the termination whilst the manner of dismissal is looked at to ascertain the fairness of the dismissal- powers of employer to summarily dismiss an employee- procedure to be followed.

Legislation:

Employment Relations Promulgation 2007 ("ERP"): s. 33.

Essential National Industries (Employment) Decree 2011 (Decree No. 35 of 2011) ("ENI"); ss. 28(2); 30(2).

Essential National Industries & Designated Corporations (Amendment) (No. 2) Regulations 2013.

The Cause

- [1]. The respondent filed a case for unjustified and unfair dismissal at the Employment Relations Tribunal ("*ERT*").
- [2]. He was employed as a Traffic Officer/ Prosecutor in Nausori Town Council ("*NTC*") on or about 14 April 2009.
- [3]. He was summarily dismissed on 1 April 2011. The reason for termination in the letter was stated to be that the employee had breached Articles 12.5 (i) and 12.5 (ii) of the agreement in that the employee did not fulfil the express or the implied conditions of his contract of service and that there was wilful disobedience of lawful orders given by the employer.
- [4]. The employee in asserting that his dismissal was wrong and unfair stated that:-
 - a. *He was dismissed without any reasonable cause and justification as there was no investigation to prove the allegations and if there was one, none was served to the grievor.*
 - b. *He was not given any opportunity to state his views on the findings of the investigation team.*
 - c. *He was not accorded the right to be heard in a hearing of these allegations and their relevant charges.*
 - d. *He was denied the right to mitigate on the quantum of penalty that was manifestly harsh and that the action of the employer was in breach of natural justice.*
- [5]. The grievor sought from the ERT reinstatement without any loss of pay and/ or benefits.

The Evidence adduced at the ERT

- [6]. The hearing of the matter was held on 16th November 2012. The employer produced only one witness being the Chief Executive Officer Mr. Azam Khan who shall be referred to in this judgment as AK. The grievor gave evidence. He would be referred

to as JS. On his behalf, the Managing Director for Professional Security Services Mr. Vijay Prakash also gave evidence. He shall be referred as VP.

- [7]. The evidence of the parties was well summarized by the ERT. I shall recite the same from the judgment of the Tribunal.

“AK began his evidence with a brief history of his joining the NTC; that he commenced employment on 1st July 2010 and that when he came in JS was already an employee of NTC as a traffic and prosecution officer. On the role of JS he described his job description as the prosecutor was to handle Council cases, these cases would be for illegal operations or illegal development and other minor cases and the major cases would normally be going to the solicitors. As the traffic officer, he was in charge of the general operations in the traffic section on a day to day basis including the operations of the parking meter and looking after the town as far as the illegal operations goes and working in line with the Council's resolution set from time to time.

AK informed the Tribunal that a committee was set up by the NTC to determine the issue of taxi bases prior to his appointment as the Chief Executive Officer. The committee consisted of an advisory counselor, Mr. Vijay Prakash, the Special Administrator, the Chief Executive Officer and JS who acted as Secretary. This committee was to go through the taxi base applications, make recommendations and the Chief Executive Officer would then make submissions to the Land Transport Authority for approval.

Answering questions from NTC's counsel, AK mentioned that he did not attend any committee meeting and was not aware of the outcome of any meeting as the minutes and the list of the taxi bases approved were not made available to him. He added that he did not bother to find the minutes of the meeting as actions on the recommendations were already made prior to his appointment.

AK related to the Tribunal that he knows a Mr. Ugresh Narayan a former advisory counselor for the Rewa Advisory Council who had attended a number of community meetings and who resides in Nakasi. This Mr. Narayan had raised the issuance of extra taxi bases in the Naulu/Nakasi community meetings on behalf of a group comprising 5 taxi operators and they had written to the Special Administrator on 25th October, 2010 alleging that JS was receiving fees and rewards by members of the public. Such was the extent of Mr. Narayan's

concern that he called AK who was attending a workshop in Labasa to act on the issue and any further delay would lead him to refer the matter to the Ministry. AK told the Tribunal that he had to cut short his participation in the workshop and returned to Nausori in order to attend to this case.

AK further told the Tribunal that due to the level of complaints received from the Naulu/Nakasi community meetings the Special Administrator had informed him that he had written two letters to JS seeking his explanations to the allegations with the purpose of taking further action. As a result of Mr. Narayan's letter the NTC revisited the grievance over the issuance of the taxi permits and the Special Administrator by letter dated 16th March, 2011 wrote to JS as follows:

Dear Sir,

I am obliged to refer back to complaints that have been made against you during the last year and to seek your clarification about the granting of the 148 bases in Naulu/Nakasi in October, 2010.

The allegations were:

(i) That members of the public had bribed the Council of \$207,000.00 for issuing \$1400.00 each for 148 bases.

(ii) That wealthy people have benefitted from the bases and permits.

Please explain to me;

- 1) The specific government directive given to help regularize illegal operations.*
- 2) How you collected the \$1400.00 instead of the \$730.00 for new applications?*
- 3) What happened to the balance and where in the Council is it being kept?*
- 4) How the other department representatives have also been implicated in the saga?*
- 5) Where is the record of the meeting that finalized the 148 applications?*
- 6) I want to see the list that was approved by the Committee then and the approvals that you gave out later.*

These allegations are serious and you need to explain to me within 7 days of receiving this note.

JS did not reply to the allegations specified in the letter and according to AK he was given an opportunity to respond to the allegations but he did not and thus his contract was terminated on 1st April, 2010 on the grounds of disobedience to simple instructions and gross misconduct.

At the end of his evidence in chief, AK stated that NTC tried to keep its end of the bargain and it had given an opportunity for the workers to respond and even during the heated debate at the Naulu/Nakasi community meeting the Special Administrator in attempting to protect the prosecution and traffic department had denied that the allegations could have happened and he pointed out that if those in the meeting did have anything substantial they could write in.

*Under cross examination, AK read out clause 2A of JS employment contract which states;...**diligently and faithfully perform contract of enforcement officer in the office of Nausori Town Council as stipulated herein and any other duties which the Council thinks is desirable to employ the officer for a period of 3 years. Should the officer perform to the expectation of the Council, the contract will be extended for a further 2 years.***

*AK explained that the traffic officer is the person in charge of the sub-committee, was supposed to be the secretary and to produce the minutes and have them numbered as resolutions in its monthly reports. AK agreed that the responsibilities for the secretary to the committee and sub-committee come under the ambit of "**other duties,**" in the employment contract.*

When asked as to who in the Council has the mandate to issue taxi permits, AK answered that it is the Special Administrator and that he will give the final approval after the applications are processed by the committee. He added that this was the area where the Special Administrator wanted clarifications from the Traffic Officer on what transpired on the allocation of taxi bases. According to AK, the Special Administrator was confused as in the absence of written records like minutes of committee meetings, he had no way of proving that what were agreed to in the meetings had been properly executed.

AK further told the Tribunal under cross examination that the Special Administrator was not sure of the number of taxi bases approved in the absence of any minutes, as the process was

that the committee approves and the final say is with the Special Administrator. Since there was no minutes he would not know which applicant had the approval of the committee to have a taxi base.

AK then explained to the Tribunal that the Chief Executive Officer should be signing the letter of approval on behalf of the Council and that in that allocation of taxi bases the Traffic Officer, JS signed the letters of approval although he did not have the authority to do so. As to the number of letters issued, AK would not know and told the Tribunal that due to the lack of information within, the Council had to consult the Land Transport Authority.

As to the letter dated 25th October, 2010 by one Mr. Ugresh Narayan the District Advisory Councillor of Naulu and Nakasi, AK said that it was written on behalf of a Taxi 5 Association and the letter implicated JS. The letter was given to JS for his comments and explanation. This is the letter with the allegation that 148 bases at \$1,400 each were issued by JS and AK pointed out that he was not sure as there were no records apart from the written complaint.

As to the dismissal letter dated 1st April, 2011, AK was aware that it was signed and issued by the Special Administrator to JS and that he had preliminary discussion with the Special Administrator before the issuance of the letter. AK explained that the dismissal letter referred to misconduct in not replying to the allegations put to him and in-subordination referred to dealing with taxi proprietors without the authority of the Council. AK further added that JS was not a member of the Union but that does not mean that the collective agreement did not apply to him as the terms and conditions of employment in the Council are similar to the provisions in the collective agreement.

AK answering questions on cross examination admitted that there was no full investigation of the allegations against JS as there was only a preliminary investigation to collect papers and documents and that JS was not interviewed. There was no disciplinary tribunal either as the Council did not see the need to activate one as JS had not responded to the allegations submitted to him in the letter dated 16th March, 2011; he did not respond within 7 days and the Council went ahead and effected the dismissal. The Council according to AK had given JS all the chances and he should have asked for more time if he needed to.

As to the validity of the base letters allegedly issued by JS it was confirmed by AK that they are valid as they have been regularized by the Minister through the Council.

On re-examination, AK confirmed that the letter of 16th March 2011 from the Special Administrator to JS was to give him an opportunity to respond to the allegations that were raised particularly the issue of taxi bases and that was also one of the reasons why he was given 7 days to respond. AK also confirmed that taxi base issue was on going and the letter dated 16th March was not the first time that the matter had been raised with him but it was intended to trigger the investigation of the issue of taxi bases.

AK stressed that the Special Administrator wanted to be fair to JS and that was the reason why he asked in the 16th May letter for the records of the meeting that finalized the 148 applications and the list of approvals made by the committee. JS failed to ask for more time to provide those records and did not even offer any reply to the Special Administrator and that amounted to both insubordination and negligence of responsibilities.

AK confirmed that JS was not a member of the Fiji Local Government Workers Association when he joined NTC and that in 2010 he applied to be member of the Fiji Public Service Association.

JS in his evidence stated that he signed an employment contract when he joined NTC on 15th April, 2009 to be a prosecutor and traffic officer and that he was never asked to recruit at any time. As to the recording of minutes during meetings, JS related to the Tribunal that it was not part of his responsibilities and he was never instructed to act as secretary as there is a secretary employed full time to attend to all the subcommittee, tender meetings, the finance meetings and the staff meetings. This secretary records everything and keeps the records in the office. JS continued with his evidence that from the time of recruitment in 2009, the Chief Executive Officer did not raise any issues with him regarding the keeping of minutes in any subcommittee meetings but commended him for doing a good work overall.

JS agreed that he attended a special tender committee meeting to decide on the approval of taxi bases as advertised in the media after the illegal operators; the private vans and carriers were seized and put off the road. To increase the volume of traffic in the Nausori, Naulu, Nakasi and Wainibuku areas; the NTC applied and the Land Transport Authority and Ministry of Transport agreed for the increase and the approval was gazetted.

JS confirmed that the committee was appointed by the Special Administrator and it comprised of himself, the Chief Executive Officer, VP, one advisory councilor and the Special

Administrator. On the number of taxi bases issued, JS told the Tribunal that the figure of 148 was exaggerated and it should be around the 100 mark. The recipient came and paid their fees of \$730 to the cashier in the NTC so that they could get their receipts and these receipts together with the base letters are produced to the Land Transport Authority when applying for a permit. The records of the 100 applications that were receipted are always available with the NTC.

On the allegations vide the Special Administrator letter of 16th March, 2011 JS explained that they were not new as the allegations were discussed with him the previous year and if these people had evidence they could go to the Police or FICAC. When the allegations were first put to him, JS explained that he went around to everyone issued with the base letters and these people wrote a petition to the Special Administrator that they only paid \$730 and were prepared to give evidence. These people are retired civil servants, police and military officers.

The letter dated 25th October, 2010 written by one Mr. Yogesh Narayan was next referred to JS and he accepted that it was not only directed at him but implicated others like VP, Mr. Nilesh the former Treasurer of the Council and the LTA lawyer. There was no investigation by the Prime Minister's team or the Police although the Police collected some documents during his suspension. JS further told the tribunal that the Special Administrator did ask him about the 148 bases and the extra \$700 per application. He was not shown the letter but was told that it was on file.

JS was then shown the dismissal letter dated 1st April, 2011 that referred to Article 5 of a Collective Agreement as follows:

1st April, 2011

Mr. Joseph Subramani,

P.O.Box 360,

Nausori.

Dear Sir,

DISMISSAL FROM OFFICE

I have examined all the allegations that have recently been made against you and I am duly satisfied that you are guilty of misconduct and insubordination. Under Article 12.5 of the "Agreement" you are hereby summarily dismissed on the grounds of:

1] Article 12.5(i) misconduct inconsistent with the fulfillment of the express or implied conditions of your contract of service.

2] Article 12.5(ii) willful disobedience to lawful orders given by the employer.

Yours faithfully,

(N. Masirewa)

Special Administrator - Nausori

JS agreed that he was not a member of any union so he would rely on the contract of service entered with the NTC and not the Collective Agreement which means that the dismissal was unlawful as it was based on the 2 limbs of Article 12.5 of the Collective Agreement.

Still on his contract of service, JS related to the Tribunal that there is a disciplinary policy in place and everyone has access to it and the fact that he had been dismissed under the provisions of a Collective Agreement which does not apply to him, makes the dismissal unlawful.

Going back to the letter from the Special Administrator dated 16th March, 2011 JS explained that he could not reply within 7 days because the letter was given to him on 17th March, 2011 and on 18th March, 2011 was sent home on indefinite leave and told not to enter the office or communicate with any staff. JS reported to the Tribunal that he went around to the people who had been issued base letters and they petitioned the Special Administrator and consequently, the Police closed the case. JS said that he was in the process of gathering information and compiling a comprehensive report when he was terminated. He lamented

that the NTC could have given him additional time to enable him to reach all the people issued with the base letters.

JS further told the Tribunal that there was an investigation conducted by the CEO and a Councilor and they did not come to interview him and that he had to check with the Police and FICAC if any report had been made against him.

JS concluded his evidence in chief by confirming that there is a disciplinary procedure and that he was not accorded natural justice.

Under cross examination, JS was asked whether he remembered that one Mr. Ravi Chand had made a written complaint against him on 24th August, 2010 and he answered that he was aware but that there was no Mr. Ravi Chand as it was a fake letter on the Naulu/Nakasi base permits' allocation. JS continued that he made his own investigation and told the Police that there is no Mr. Ravi Chand. He agreed that the Special Administrator wrote him a warning letter based on the allegations from Mr. Ravi Chand and also the failure to keep minutes of the Tender Committee which decided on the allocation of taxi bases.

JS then talked about the process of application for a base through a special 3 page form designed by him and approved by the NTC. Through that form he assessed whether the applicant was telling the truth and submitted his recommendation to the Special Administrator who would sign the form if approved. The base letters would then be issued by JS through his position as temporary head of the Traffic Department.

JS was then referred to the 16th of March, 2011 letter where the Special Administrator had put the various allegations to him and asked for his response within 7 days and also for him to go on leave and not to enter the office, in order for an investigation to be carried out. JS was queried why he did not ask for more time to submit his response and he submitted that he was barred from the office and told not to communicate with the staff and that was the reason he could not write to ask for more time. Counsel for the employer apparently did not believe him and told JS that the reason why he did not respond in time was because he wanted to sabotage the investigations.

JS maintained that he was not given a proper opportunity to respond as there was not enough time to respond to all the allegations and in that regard he was denied natural justice.

JS was referred to the letter of dismissal that referred to section 12.5 of the Collective Agreement summarily dismissing him and he agreed that he was summarily dismissed by the Special Administrator”.

The Findings of the ERT

[8]. The ERT found that:

1. *There was no evidence that the employee had been assigned the duty to be the Secretary of the committee.*
2. *The letter of 16 March accorded the employee fair procedures before he was dismissed and the lack of response by the employee cannot be upheld to be lack of providing fair procedures to the employee. The employee’s termination thus was substantially and procedurally justified.*
3. *In deciding whether the employee was treated fairly at the time of the dismissal, the ERT stated that it had to look at the manner of treating the employee in carrying out the dismissal. The ERT stated that the employer’s actions and conduct must be assessed to ascertain whether the employee was treated with fairness, respect and dignity in carrying out the dismissal as there is an implied term in the modern contract of employment that requires an employer to deal fairly with an employee even in the context of dismissal. The ERT found that the dismissal was unfair in that after examining the process over the period culminating in the dismissal, it found that JS was being humiliated and it affected his dignity. He was refused entry to the NTC office and communication with staff when he was supposedly building and gathering his response to the allegations. To receive a dismissal letter before submitting a comprehensive report that had been prepared is just unfair and the point was raised in evidence that NTC should have called and asked him whether he needed more time. In that regard, the ERT found that the dismissal was unfair.*

The Remedies

[9]. The ERT awarded the following remedies:-

“The Tribunal makes the determination that JS has a grievance in that he was unfairly dismissed and in that connection orders the following remedies in settling the grievance:

- (i) Under section 230 (1) (b) – reimbursement of 12 month's wages lost by the worker as a result of the grievance;*
- (ii) Under section 230 (1) (c) – the payment of 6 month's wages as compensation for humiliation, loss of dignity and injury to feelings of JS; and*
- (iii) Under section 230 (1) (a) – reinstatement is denied”.*

The Appeal

[10]. The appellant appeals against the decision of the ERT on the following grounds:-

- 1. That the Tribunal erred in law and in fact in holding that the respondent was unfairly dismissed.*
- 2. That the Tribunal erred in law and in fact in holding that the dismissal of the respondent was humiliating, not fair and was void of any form of dignity.*
- 3. That the Tribunal erred in fact and in law in finding that it was unfair to dismiss the respondent before a comprehensive report that had been prepared could be submitted.*
- 4. That the Tribunal had erred when he made a finding that the respondent has already prepared a comprehensive report as there was no evidence to confirm that such a report had in fact been prepared.*
- 5. That the Tribunal erred in law and in fact in holding that he appellant should have called the respondent and asked him whether he needed more time to prepare his report.*
- 6. That the Tribunal erred in law and in fact in failing to find that the appellant as the employer had properly complied with the disciplinary procedures regarding termination/ dismissal in accordance with the respondent's employment contract.*
- 7. That the Tribunal had erred in law and in fact in that after a finding that the respondent's dismissal was justified substantially and procedurally he proceeded to then hold that the dismissal was unfair.*

8. *That in finding that the dismissal was justified substantially and procedurally the Tribunal was satisfied that the disciplinary procedures and processes have been fully and correctly complied by the appellant.*
9. *That the Tribunal therefore erred in law and in fact in ordering that the respondent be reimbursed 12 month's wages which was lost by the respondent as a result of the grievance.*
10. *That the Tribunal erred in law and in fact in ordering that the respondent be paid 6 months wages as compensation for humiliation, loss of dignity and injury to his feelings.*
11. *That the Tribunal erred in law and in fact in failing to disclose the method of assessment adopted and how he arrived at the total amount of the compensation to be awarded to the respondent.*
12. *That the amount ordered by the Tribunal is excessive.*

The Submissions

- [11]. I did not receive any substantive submissions from any party. Ms. Raikaci repeated and emphasised on the grounds of appeal whilst the employee submitted that the Court must look at the judgment in whole and particularly paragraph 46 where the reasons for unfair dismissal are being dismissed.

The Law and Analysis

- [12]. I must make one aspect very clear which is that unlawful dismissal and unfair dismissal as the ERT states are not the same thing. Whilst the reasons and the procedure invoked in termination are examined to determine the lawfulness of the termination, the manner of treating the employees in dismissing him is relevant to determining the fairness of the dismissal.
- [13]. Ms. Raikaci appears to have been confused. The ERT was correct in making two separate findings but what I do not agree is that there was no evidence from the

employee that he was being humiliated, embarrassed and that his feelings were hurt whilst he was being dismissed. Obviously, the employee would have gone through that feeling but there is no evidence that the employer's improper treatment caused the same. The ERT states that stopping the employee from going to the office and communicating to the staff is humiliating. I disagree as any employer will want to take safety precaution and not want the records to be tampered with. If the employee needed to obtain dates from the office to respond to the allegations, he could have written and ask for permission and time to respond. It was not for the employer to speculate that more time is needed and that it should ask the employee for further time.

- [14]. The employee had stated that it was not his duty to keep records of the meeting as a secretary. If that was the case, what then was he going to find from the office and adduce in his response? He could have just written a simple explanation to that effect.
- [15]. The award of remedy of humiliation and loss of dignity was not properly founded on the facts.
- [16]. Secondly when the ERT found that the dismissal was substantially and procedurally justified it became inconsistent when it awarded the remedy of 12 months wages lost by the worker as a result of the grievance. What was that for? There is no basis to make that award.
- [17]. What comes out from the employee's failure to respond to the letter seeking explanation from him is that the employee failed to comply with lawful orders to allow further investigations. This attracts, if not anything else, summary dismissal under s. 33 of the ERP. On summary dismissal, the employee is entitled to receive a letter setting out the reasons for the dismissal and up to date pay. There is no complaint that this procedure was not followed under the ERP.

Summary dismissal is also permissible under clause 7 of the employee's contract. It reads:-

"If after reasonable inquiry Counsel is satisfied that the Officer has been guilty of misconduct or a breach of any terms of this contract, the Officer may be summarily

dismissed by Council and upon such dismissal all rights and advantages accrued to the Officer under this contract shall cease."

- [18]. By Clause 2(i) (b) of the contract of employment, the employee had agreed to act in all respects in accordance with direction given to him by the Town Clerk or any person duly authorised. The letter of 11 March was an allegation against the employee and a direction to provide explanation to ascertain the correctness of the allegations. By the non response it is deemed that the employee had admitted the allegations and if he has he is liable to be dismissed under clause 7 for breach of clauses 2 (i) (a) and 2(i) (b) of the contract. Clause 2 (i) (a) reads:

"The Officer will diligently and faithfully perform the duties of Contract Enforcement/ Traffic Officer in the Office of Nausori Town Council as stipulated herein and any other duties on which Council may think desirable to employ the Officer for a period of three years. Should the officer perform to the expectation of the Council, the contract will be extended for further two years".

New Matter

- [19]. Another new matter has arisen since the date of the hearing. On 18 December 2013, by *Essential National Industries & Designated Corporations (Amendment) (No. 2) Regulations 2013*, NTC has been designated as an essential national industry and by virtue of s. 28(2) and s. 30(2) of the ENI, no decision of the NTC can be challenged under the ERP. This matter thus, if NTC was unsuccessful in the appeal, would have been discontinued any way.

Final Orders

- [20]. The ERT's order no. (i) is set aside for inconsistency.
- [21]. The ERT's order no. (ii) is set aside as it is not properly founded on facts.
- [22]. Finally the entire remedy of the ERT is set aside by the Court.

[23]. Each party to bear their own costs.

Anjala Wati

Judge

17.02.2014

To:

1. *Ms. Raikaci for the appellant.*
2. *The respondent.*
3. *File: ERCA No.20 of 2012.*