IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 23 of 2017**
BETWEEN:	**GRAND PACIFIC HOTEL LIMITED**
	APPELLANT
AND:	**INISE TOGANIYASAWA**
	RESPONDENT
Appearances:	*Ms. S. Saumatua for the Appellant.*
	Mr.J. Ulodole for the Respondent.
Date/Place of Judgment:	*Thursday 25 April 2019 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

A. *Catchwords:*

Employment Law – Award of remedies – whether justified in law and on the facts of the case – factors to be addressed during the hearing and in awarding the remedies for loss of wages: the cause of the dismissal or termination (as this will assist in determining whether the remedies ought to be reduced based on the fact that the employee's conduct gave rise to the grievance), the employer's conduct in the mediation; any delay caused by the employer or employee in bringing the proceedings and ensuring expeditious conclusion of the matter; whether the employee mitigated his loss; and whether the employer has assisted or hindered the employee in finding new work: the list of factors not being exhaustive.

B. *Legislation:*

1. *The Employment Relations Act 2007 ("ERA"): s. 30(6).*

Cause

1. The employer is aggrieved with the decision of the Employment Relations Tribunal ***("ERT")*** of 13 October 2017 wherein it found that the employee was unjustifiably and unfairly

dismissed from her employment. In arriving at that conclusion, the ERT found that the employer did not have sufficient cause to dismiss the employee. As a result, the ERT ordered that the employer pays to the employee lost wages for 17 months.

2. The employer only appeals the finding on quantum on the basis that:

"The Tribunal erred in law and in fact in assessing the compensation awarded and it failed to take into consideration that any compensation (if any) should have been mitigated by the respondent. Furthermore, the Tribunal failed to consider whether the Respondent had contributed to the termination in assessing the compensation".

3. In form of brief background, the employee had signed her employment contract with the employer on 20 February 2014 as a Public Area Attendant. The employment was to take effect from 3 March 2014. She was on probation for the first three months.

4. In her role as a Public Area Attendant, she was reporting to the Executive Housekeeper. She was later promoted to the position of a waitress when issues surrounding her termination occurred.

5. The employee's version of how and why the termination took place is different from that of the employer. According to her, the incident which led to her termination occurred on 31 December 2014. She says that on the day in question, she was assigned to be a *food runner* and her work was to deliver food from the kitchen to the restaurant.

6. She testified that she was on her way to serve a guest. She was carrying a plate of pancakes. The plate also had small bowls of condiments. The plate slipped from her grip and one of the bowls of condiments spilled in the other bowl.

7. The employee further stated that everything happened so suddenly and before Mr. Leonard, the Training Manager. According to her, the Training Manager became very angry and swore at her. He started screaming insults in front of the guests. She asked the Training Manager to stop the way he was behaving but he continued to do so in the presence of a senior waitress.

8. The employee then, as per her testimony, ran to the rest room and cried herself out. The incident was reported to the General Manager by the Training Manager and the Human Resources Manager.

9. The employee further stated that on the next day being 1 January 2015, the General Manager of the Hotel was conducting his rounds when he met her. He explained to her the importance of listening to the Manager on duty and verbally warned her not to question her superior's instructions whenever there was a difference of opinion on matters. The employee was rude in her response. She was then verbally directed by the General Manager to go home.

10. Later on the same day, she was suspended through a letter written by the Human Resources Manager informing her that she has been suspended without pay for the period of 2 weeks beginning 1 January 2015 to 14 January 2015.

11. Two termination letters were tendered in evidence. The one that the employer says is the correct one is dated 15 January 2015 which reads as follows:

"The management would like to inform you that your employment contract has been terminated according to the following reports provided by the HODs.

As per your contract, the company pays you one month in lieu of notice and pays your annual leave on pro rata basis".

12. I will not deal with the first letter of termination and the implications it has since the issues on appeal are very narrow and does not merit an investigation into the date of termination and the authenticity of the letter of termination.

13. The employer says that the reason the employee was terminated was because of her habitual insubordination of orders. She was informed and advised on various occasions not to enter the kitchen and help the chef in cooking, which instructions she disobeyed culminating to the incident regarding the pancakes.

Determination

14. Based on the grounds of appeal, I am only required to investigate the correctness of the remedy awarded to the employee. The employer has not appealed the ERT's findings that it did not have sufficient cause to terminate the employment.

15. I will thus confine the issues to the remedies awarded. The appellant argues that before the remedies were awarded, the ERT ought to have investigated why the employee did not mitigate her loss when it was her duty to do so. She remained unemployed for so long when she could have found other work.

16. It was raised during the hearing that the employee was terminated on 15 January 2015. The hearing was concluded on 15 June 2016. The ERT, it was asserted, did not justify why an award of 17 months lost wages was made in favour of the employee.

17. The counsel for the appellant also argued that the ERT had found in paragraph 38 of the judgment as follows:

"It came out in evidence and through the submissions from the various Department Heads that the grievor had a mind of her own and tends to overuse her initiatives thus upsetting established processes and procedures.

18. The counsel for the appellant argued that the ERT's findings above indicates that the employee had not been following instructions which was specifically for her not to go to the kitchen and that is when she disobeyed the lawful orders. If she was terminated, she contributed to the same and the remedies ought to have been reduced because of that.

19. I will first deal with the question of mitigation of loss. I have said in very many judgments before, that although an employee is entitled to lost wages, the award must be justified in law and on the facts of the case.

20. I repeat once again that the court has discretion to fix a proper amount as lost wages. The discretion must be exercised judicially. The court awarding the remedy has to consider

various factors such as the cause for the termination *(as this will assist in determining whether the award ought to be reduced in view of the fact that the employee's conduct gave rise to the dismissal)*; the employer's conduct in the mediation and the progress of the case, the delay caused by the employer and the employee in bringing the matter before the tribunal or the court and in ensuring an expeditious conclusion, the employee's employment status since the termination, whether the employee mitigated his loss, and the conduct of the employer which assisted or hindered the employee in finding work. The list of factors is not exhaustive.

21. Both the parties were represented by counsel and none of them attempted to extract evidence along the lines I have mentioned above to assist the ERT in arriving at a proper remedy. The only evidence that was before the ERT was that the employee had not found work till the date of the hearing which was 17 months post termination. On that basis the ERT fixed the award at the rate of 17 months.

22. To add to the uncertainty and lack of evidence by both parties which would even assist me in reassessing the remedy, I have before me no evidence that the employer had issued a certificate of service to the employee at the time of termination. This is a mandatory obligation on the employer imposed on it by s. 30(6) of the ERA. It reads:

"Upon termination of a worker's contract or dismissal of a worker, the employer must provide a certificate to the worker stating the nature of employment and the period of service".

23. This certificate of service is always important for an employee to look for a new job in a similar industry or profess experience in having worked before. A clearance is needed by all employees. That is the minimum standard that needs to be observed by the employers. If the employer fails to provide such a certificate, it then must be taken to have caused an impediment to the employee in finding the employment.

24. The employer's motives can be deduced when it does not comply with the law. It cannot behave in a vindictive way in carrying out dismissals.

25. I find that in the absence of a certificate of service and the fact that employee did not find work until the date of hearing, the award of 17 months is justified and I will not interfere with the same.

26. The appellant's counsel has also raised the issue of the employee contributing to the situation that she entered the kitchen when she was not supposed to and assisted the chef in the cooking. The ERT has not accepted the employer's version of why the termination was carried out. To use the employer's version to reduce the remedy in this situation would bring the verdict to inconsistency.

27. It may be so that the ERT found that the employee was overusing her initiative but that was not found to be for the detriment of the employer to cause summary dismissal in the way it was done. I do not find that the ERT erred in not reducing the remedies as professed by the counsel for the appellant.

Final Orders

28. In the final analysis, I find that the appeal has no merits and ought to be dismissed. I therefore dismiss the appeal and order costs in favour of the employee in the sum of $2,500.

29. The employer must pay the 17 months' wages lost and the costs of the appeal proceedings to the employee within 21 days from the date of this order.

Anjala Wati
Judge
25. 04.2019

To:

1. *Lateef & Lateef Lawyers, Suva for the Appellant.*
2. *Mr. J. Ulodole for the Respondent.*
3. *File: Suva ERCA 23 of 2017.*