

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 11 of 2018

BETWEEN: **CHRISTOPHER NELSON**

APPLICANT

AND: **RPA GROUP (FIJI) LIMITED**

RESPONDENT

Appearances: Ms. M. Motofaga for the Applicant.

Mr. F. Haniff for the Respondent.

Date/Place of Judgment: Tuesday 16 February 2021 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. Catchwords:

Employment Law – Order by ERT to pay to the employee the balance of the contract – dispute regarding what is the contract price arose at the time of compliance – evidence heard in appellate court to resolve the controversy between the parties: employer raised the issue that the contract price was varied and agreed to by the parties- finding made that the evidence of the employee was credible and substantiated by other evidence that the contract price was never varied - any variation to the contract price should be unambiguous, properly recorded and explicitly agreed to by the parties: it is only fair that this principle be applied to avoid the employers from taking advantage of their employees - employer also ordered to pay shortfall of wages for the period he was not paid the contract price.

Cause

1. The application before me seeks an order for compliance of the judgment of the Employment Relations Tribunal ("*ERT*") of 15 September 2017. The ERT had made a finding on the applicant's claim for unlawful and unfair dismissal in his favour and ordered that the employer pays to the employee the balance of his contract.
2. The employer is not refusing to comply with the order, however, its contention is that it will only pay the employee at the rate of \$280 per week which was the pay he had agreed to after entering into the contract for which the price was set at \$45,000 per annum. The employer's contention is that the contract price was re-negotiated and agreed to by the employee.
3. The applicant vehemently denies that there ever was a variation of the contract price and that he ought to be paid the balance of his contract at the price set by the contract.
4. Since there was a contention regarding what the ERT had ordered, I had sent the matter back to the ERT for clarification of that order but the clarification could not be given as the presiding officer in the ERT matter no longer holds the judicial office.
5. It was then agreed by the parties that I hear them on what the agreed wages of Mr. Nelson was to determine the rate at which the order for compliance shall issue. I therefore ordered the parties to give oral evidence on the aspect of "*agreed wages*" which they did. Before I determine the issue, it is important that I summarise the position of the parties.
6. It is to be noted that under the judgment, the employer has already paid a sum of \$5,600 to the Ministry of Labour. The employee does not refute this position but seeks that if the Court finds in his favour then the employer should be ordered to pay to him shortfall in wages from the day he was paid \$280 per week till the date of termination. I will deal with this later in my judgment.

Employer's Position

7. It is the employer's position that the parties entered into a contract on 28 March 2014. The essential terms of the contract was that the employee will be paid a sum of \$45,000 per year.

The term of the contract was for 1 year with effect from 1 April 2014 with a possibility of extension. The agreement was to end on 31 March 2015 unless extended.

8. From April 2014 to the last week of May 2014, Mr. Nelson was paid \$692.30 per week net. Mr. Nelson returned to New Zealand in the last week of May. When Mr. Nelson came back to Fiji, his pay was renegotiated to \$280.00 per week. Mr. Nelson re-started work from 19 June 2014.
9. From 19 June 2014 until the termination of Mr. Nelson's employment on 10 October 2014, Mr. Nelson was paid \$280.00 per week. The wages register shows that Mr. Nelson acknowledged receipt of the said sums of money.
10. The balance of his contract would be for a period of 5 months and 21 days. The employer has already paid a sum of \$5,600 in the office of the Ministry of Labour and since there is short payment of \$840.00 for 21 days, it undertakes to pay that amount to the employee immediately.

Employee's Position

11. The employee agrees that he was engaged to work at a contract price of \$45,000 and that his wages was never re-negotiated to \$280.00 per week. The employer is being dishonest on this aspect. He explains why he was being paid that sum. He said that when he came to work in Fiji, the employer asked him to go back to New Zealand to enable it to lodge his papers to obtain his work permit. The employer paid for his one way ticket back to New Zealand. He therefore left for New Zealand on 21 May 2014 and returned on 13 June 2014.
12. When he returned from New Zealand, the employer started paying him \$280.00 net per week. He therefore enquired about the reduction and the employer told him that that was merely an allowance to sustain him until his work permit issue was resolved. The pay was never re-negotiated to \$280.00 per week. There was nothing in writing to effect this nor any discussion held between the parties regarding the new wages.

13. The employee says that the wages register for the period he was paid \$280 per week does not show what annual salary he was on whilst for the other employers the annual salary is noted. That is indicative of the fact that his wages was never re-negotiated and that the sum of \$280 per week was only an allowance.
14. The employee claims that he is also entitled to be paid the shortfall for the period he was paid the sum of \$280.00 although the ERT had not ordered that to be paid.

Evidence

15. At the hearing of the issue confined to the question of agreed salary of the applicant, the employee testified that he was initially paid a sum of \$692.30 net per week. He went to New Zealand in the last week of May 2014 because of the immigration issues. After returning from New Zealand, he was only given \$280 per week as allowances until his work permit issue was sorted out. There was no negotiation regarding his pay. He had complained and questioned the employer on why he was getting \$280 per week and it was explained to him that the sum is merely an allowance for his sustenance until the work permit was resolved. He denied the employer's contention that he accepted the reduced salary as he could not perform as a special projects engineer.
16. The employer through its accountant testified that the employee initially worked for the company from April to 20 May 2014 for which he was paid a sum of \$692.30 net per week. He does not know why Mr. Nelson returned to New Zealand, it may have been for his personal matters.
17. The witness further testified that when the employee returned from New Zealand, there was a discussion between the employee, the director and him that his wages would be \$280 net per week for the services performed as road engineer and supervisor. Initially he was to do tender works for the company and also make claims but since he did not do that work, the pay was reduced.

18. According to the employer, the employee had agreed to the reduced pay. He did not complain of the reduction or the actual payment. The discussion was not recorded in writing but the employer agreed that it could have been formalized which they did not because the company was fairly new in that it was incorporated in 2012 and barely 2 years old so it did not know about a lot of paper work that needed to be done.
19. The witness of the employer agreed that the wages records of all employees show how much they were paid per week and there are 17 instances showing that Mr. Nelson was paid \$280.00 per week. However the wages record for that period does not show Mr. Nelson's annual salary when the same is noted for all other employees. This is because Mr. Nelson was not subject to any deductions. He testified that Mr. Nelson never got a work permit to work.

Determination

20. There is only one issue before me to decide and that is the contract price at which the employee agreed to work for the employer.
21. I will start off with the contract first which was executed by the parties on 28 March 2014 to take effect from 1 April 2014 for a period of 1 year which means that the contract would come to an end on 31 March 2015 unless revoked earlier or extended.
22. The position at which the employee was appointed was that of a road engineer/projects supervisor. It was agreed between the parties that the employee shall be paid an annual salary of \$45,000 payable weekly. He was also entitled to an accommodation and a fully maintained vehicle and company mobile.
23. Through the employment contract, the employee did not ever agree to a reduction of his annual wages during the term of the contract. The compensation clause however states that the annual salary maybe **increased** if it is determined by the director of the company. The relevant clause is 3(b) of the contract.
24. The employment contract gives no indication to the employee that there was a possibility of a decrease in the salary. The employee therefore had not agreed for a decrease of his salary

during the term of his contract. As a result, his salary could not have been decreased without his consent.

25. Let me determine whether he ever provided his consent to decrease his salary. He vehemently denies providing any consent to this effect either orally or in writing. It is my finding that if there was any discussion to decrease the wages, the issue should have been decided unambiguously, explicitly agreed to and recorded in writing.
26. If such a stance is not taken by the Courts, an opportunity will be created for the employers to take unfair advantage of their employees. The employer's will start reducing their employees salary arbitrarily and assert consent to justify their actions.
27. It is unfair and improper to an employee to reduce his salary to his disadvantage unless it is agreed by him. There shall be good faith on the part of the parties in performance of their obligations under the contract and if the employer attempts to unilaterally change an essential term of the contract, the act will be considered a breach.
28. In this case, there is no evidence of the employee having agreed to the new salary except for the employer's assertion to which I do not attach any weight on the basis that I do not find the evidence credible or substantiated by any other evidence.
29. I do not accept the employer's evidence that there was an oral discussion about the change in wages because the employee did not perform the task as expected and therefore the reduced wages was agreed to. If that was the case, the minutes of the meeting should be tendered in evidence. The employer could not indicate to the court even the date of the meeting, the agenda of the meeting and what was explicitly reduced as the terms to be followed by the parties except to assert that there was a change in the wages. In such a situation, the employer's evidence cannot be used to disadvantage the employee.
30. I do not disregard that the wages record of the employee in April 2014 and May 2014 shows that he was paid a sum of \$692.30 weekly whereas the records from June 2014 until the date of termination shows that he received a sum of \$280 per week. That however does not mean that I have to accept the version of the employer that there was an agreement to reduce the

salary. The explanation of the employee is more convincing and credible that he was only paid that amount since his work visa issue was not sorted out and all that he received was an allowance for his sustenance.

31. I find that the employer could not have paid to the employee any wages as such unless his work permit was sorted out otherwise the employer will be considered as illegally employing the foreigners. To avoid this problem, the employer avoided paying to the employee any wages as agreed by the contract. All it could do was to provide an allowance to the employee which it did. It is only now that the employer has changed its stance to suggest that the sum paid was agreed wages.
32. The other reason to substantiate my finding is the wages record itself. The wages record for the periods the employee was paid \$280.00 per week does not show what his annual salary was whilst it shows and notes every other employee's annual salary. If the wages were agreed to be reduced then the wages record will not show the difference in the manner in which the recording is done.
33. It is not difficult to note the annual salary if the same was agreed to be reduced. Further, if the annual salary was indeed reduced then it was done unilaterally and the omission in the records was to confuse the employee. If there was notation of the annual salary then the employee would have questioned the employer because the representation to him was that the sum paid to him was merely an allowance. By omitting to write the annual salary, the employer played "safe" hoping to underpay the employee for as long as it could and at the same time misrepresent the same as allowance.
34. The wages records for April and May 2014 were also presented. That very clearly shows and notes the employees' annual salary to be \$45,000 per annum. The approach then should be consistent in the subsequent months. I find that the reason it changes was that the employer does not wish to pay the employee the full contract price as ordered by the Tribunal and is taking advantage of paying the allowance to equate it to be a representation of his agreed salary. Such acts are and should not be condoned by the court as it affects the principle of good faith

and can give the employers an unfair ground or room to take advantage of employees to underpay them for the work.

35. The wages record of the employees shows that the position for which this employee was paid remained the same as described in the contract, that is, the position of the engineer. If that is the position which he retained throughout, I see no reason why his salary should be changed.
36. There is no evidence before me to accept the contention of the employer that the job description of the employee included to conduct tenders and make claims which was taken away from him as he did not work accordingly. I find this evidence unacceptable.
37. I am also surprised that Mr. Nelson coming from New Zealand to work in Fiji as an engineer and supervisor will work at the rate of \$280 per week. The wages records shows that the foreman and operators got almost the same rate. In that regard, as a supervisor and engineer his pay was expected to be that as agreed in the contract price.
38. I therefore reject the employer's contention that the balance of the contract price should be worked at \$280 per week. I find that the balance of the contract should be worked at \$45,000 per annum.
39. Since I have made a finding that the contract price should be \$45,000 per annum, it will be grossly unfair to ask the employee to file another action to recover the shortfall in wages for the period he was paid \$280 per week. Although this issue was not before the ERT, it will be inequitable for the Court to disregard the shortfall and endorse the same.
40. It is only just and proper than an order to the effect regarding the shortfall be made as the employer has been heard on the issue. There is no denial of natural justice to the employer on this aspect.
41. I also find that since the employer has not paid the judgment sum since the date of the order of the ERT, interest should accrue on the judgment sum.

Final Order

42. In the final analysis, I find that there was no agreement between the parties to reduce the contract price from \$45,000 per annum and that the employer should within 21 days from the date of the order pay to the employee the balance of the contract. The contract price shall be worked at \$45,000 per annum. The sum of \$5,600 paid to the Ministry of Labour shall be discounted for.
43. I also order that the employer pays post judgment interest from the date of the ERT's judgment that is 15 September 2017 until the date of payment. The statutory rate of 4% post judgment interest shall apply. The amount of \$5,600 should be discounted for when working the interest rate.
44. I further order the employer to pay to the employee the shortfall of wages for the entire period he was paid a sum of \$280 per week.
45. The employee shall also have costs of the proceedings in the sum of \$3,000 to be paid by the employer within 21 days.



Anjala

Hon. Madam Justice Anjala Wati

Judge

16. 02.2021

To:

- 1. Attorney –General's Chambers for the Applicant.*
- 2. Haniff Tuitoga Lawyers for the Respondent.*
- 3. File: ERCC 11 of 2018.*