

IN THE EMPLOYMENT RELATIONS COURT
AT SUVA
APPELLATE JURISDICTION

ERC APPEAL NO. 07 OF 2018

IN THE MATTER of an appeal of
the decision of the Chief Tribunal in
Lautoka dated 15 January 2018 in
ERT Grievance No.59 of 2013

BETWEEN : **PADDYS MARKET (LAUTOKA) LTD**

APPELLANT

AND : **NUNIA TINAI**

RESPONDENT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. S. Ravai for the appellant**

: **Ms. L. Vosawale for the respondent**

Date of Hearing : **13 August 2019**

Date of Judgment : **12 April 2023**

JUDGMENT

EMPLOYMENT LAW Whether suspension of employment resulted in dismissal – Whether employee abandoned employment – Findings to be based on evidence.

1. This is an appeal against the judgment of the Employment Relations Tribunal given on 15 January 2018 ordering the appellant to pay the respondent 18 months of lost wages together with compensation equivalent to 6 months wages for humiliation, loss of dignity and injury to the worker's feelings resulting from the dismissal of employment.
2. The appellant denied dismissal and contended that the respondent was suspended for a month from 12 April, 2010 and was expected to commence work after the period of suspension. The appellant's position is that the respondent never returned to work.
3. At the hearing before this court, both parties were represented and made submissions. The appellant submitted that the respondent was aware that work was to be resumed after the suspension period was over, and that the respondent was also not contactable by telephone when the appellant tried to get her to resume work. The appellant submitted that the tribunal erred in placing the onus on the employer to inform the worker to resume work. The appellant's contention is that the respondent abandoned employment, having failed to report to work after the suspension lapsed and, therefore, was not entitled to the remedies granted by the tribunal.
4. The respondent submitted that the suspension was without cause, and that the employer did not inform her the date on which to resume work. The respondent submitted that a letter dated 11 May 2010 was sent to the appellant asking when to resume work, but this was not replied. The letter is said to have been drafted by one Joan, and hand delivered by the respondent's uncle to the appellant.
5. The appellant denied receiving a letter from the respondent and pointed out that the respondent's uncle who delivered the letter as well as Joan, the alleged letter writer, were not summoned to give evidence on behalf of the respondent.

Proceedings before the chief tribunal

6. Each party presented a witness before the chief tribunal. Ms. M. Naicker, manager, gave evidence on behalf of the employer. She described the respondent as a sales assistant. The worker, the witness said, was suspended due to verbal complaints against her. She said that after the respondent's suspension was over, she did not turn up for work. The witness denied terminating the respondent's employment, and said that there was no response when the employer called the worker's mobile phone on two occasions. The respondent, the witness declared, had abandoned employment.

7. Ms. Nunia Tinai gave evidence on her behalf. She said she commenced employment on 2 June 2008. She was suspended on 10 April 2010, with effect from 12 April 2010. The respondent said she dictated to Joan, who wrote a letter on her behalf on 11 May 2010. She went to see a labour officer called Pio on the afternoon of 18 May. The worker said that she did not receive a letter of dismissal though her suspension came to an end. She said there was no reason to suspend her and that she was not cautioned previously. In cross examination, the worker agreed that the employer attempted to call her on a couple of occasions on Joan's number. The respondent's position is that the appellant did not ask her to resume work.

The chief tribunal's order

8. The chief tribunal reasoned that it was imperative for the employer to have ensured that Ms. Tinai resumed work after her suspension. Since the employer did nothing substantial to get Ms. Tinai to resume work, the employer's inaction, the tribunal declared, amounted to unjust and unfair termination of employment.

9. I am unable to agree with the chief tribunal's conclusion that it was the employer's obligation to ensure that the employee returned to work after her suspension ended. The circumstances do not justify such a conclusion. The employer's disciplinary letter clearly states that suspension is for a month. At the end of the suspension, there being no termination of employment, the worker was obliged to resume duties. If, at that point, the employer did anything to impede the resumption of work, the worker was entitled to complain. There is no evidence that the respondent attempted to get back to work or that the appellant prevented the resumption of work. The evidence, in fact, shows that

the worker could not be reached by the employer. The respondent confirmed that calls were made to Joan's phone, corroborating the employer's evidence. Presumably, Joan's phone number was provided to the employer by the worker. She did not explain why those calls were not returned.

10. The respondent says she sent the employer a letter on 11 May 2010. The appellant denies receiving such a letter. The chief tribunal was of the view that there was clear evidence that the letter was received by Madhvi Naicker, the appellant's Namaka branch manager. The finding is based on the evidence of the respondent that her uncle handed over the letter to the appellant. Neither Joan, who is said to have drafted the letter, nor her uncle, who, the respondent says, handed over the letter to the employer, gave evidence. A copy of the letter tendered to the tribunal by the respondent shows that it is copied to the Ministry of Labour and FICAC, Lautoka. There is no acknowledgment of the letter by the appellant. The court notes that the form referring the employment grievance to mediation makes no reference to this letter though other matters are set out in some chronological order. The determination does not show that these matters were given consideration in assessing the weight of the respondent's evidence on this point. Although the tribunal was confident in finding the letter to have been delivered to the employer, its reasoning in accepting the evidence of the respondent as opposed to the appellant's testimony on the matter is not clearly stated. Nevertheless, the critical question before the tribunal was whether the worker reported to work when her period of suspension ended, and if she did not, the reason for not doing so.
11. The appellant submitted that the chief tribunal's orders to pay compensation and reimburse lost wages was excessive, especially as the respondent's contract was due to expire by 18 August 2010. Although this question is academic in view of what has been stated in the foregoing paragraphs, the matter is dealt with below. The chief tribunal made orders under section 230 (1) (b) of the Employment Relations Act ordering the reimbursement of 18 months wages lost as a result of the grievance, and a further 6 months wages under section 230 (1) (c) as compensation for humiliation, loss of dignity and injury to the worker's feelings. The orders were on the basis the respondent's employment was unjustly and unfairly terminated. The respondent's employment contract was entered into on 18 August 2009, and was valid for a period of 12 months. If the respondent was deemed to have been dismissed on 12 May 2010, she had a little more than 3

months left in her contract. Upon this consideration, the tribunal's award of 18 months lost wages is not justifiable. On this point, counsel for the respondent agreed that the award of 18 months wages to compensate for losses arising from the employment grievance was excessive.

12. A further consideration is the absence of evidence that the respondent took steps to mitigate her losses. During suspension of her employment for a month, the respondent's testimony is that she helped out her mother in the market. Whether the respondent worked elsewhere after 12 May 2010 is not in evidence. It is relevant to note that the grievance was filed about two years after the respondent ceased to work for the appellant.

Conclusion

13. The respondent did not return to work after she was suspended from work for a month, but lodged an employment grievance to the labour department about two years later, on 25 June 2012. In my view the respondent ought to have reported to work immediately after the lapse of her suspension. There is no evidence to suggest that the appellant terminated the respondent's employment. The appeal is allowed, and the order of the tribunal is set aside.

ORDER

- A. The appeal is allowed, and the determination of the Employment Relations Tribunal dated 15 January 2018 is set aside.
- B. The parties will bear their own costs.

Delivered at **Suva** on this 12th day of **April, 2023**.



M. Javed Mansoor
Judge