

IN THE EMPLOYMENT RELATIONS COURT
AT SUVA
APPELLATE JURISDICTION

ERCA No. 03 of 2019

On appeal from the decision of the Employment
Relations Tribunal handed down on 24 January
2019 in Grievance No. 100 of 2017

BETWEEN: **SAVNEEL SINGH**

APPELLANT

AND: **G.M.R MOHAMMED & SONS (PTY) LIMITED**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Appellant represented himself
 : Ms. M. Rakai for the respondent

Date of Hearing : 19 September 2019

Date of Judgment : 13 April 2023

JUDGMENT

EMPLOYMENT LAW

*Dismissal during probation – Assessment of employee’s competence
– Whether dismissal unfair – Whether evidence properly assessed*

1. The appellant was employed as the respondent’s procurement manager from 1 January 2017 on a contract for 12 months. His contract provided for a probationary period of three months, which the employer could extend by a similar period after assessing the worker’s performance. On 8 March 2017, during probation, the appellant’s employment was terminated. Thereafter, he filed an employment grievance on 21 March 2017, claiming compensation for unfair dismissal. The grievance was referred to the Employment Relations Tribunal, which, by its judgment of 24 January 2019, held in favour of the respondent. This appeal is against the judgment of the tribunal.
2. The crux of the appellant’s grounds of appeal is that the tribunal failed to consider what the appellant described as unfair circumstances in which he was dismissed from employment. The appellant said he was troubled by the placement of an advertisement for his position as procurement manager in the Fiji Times on 4 March 2017. The advertisement appeared just over two months after he was recruited. He complained that the employer did not consult him prior to advertising his position. His immediate supervisor, from whom he made inquiries about the matter, was unaware of the advertisement. Thereafter, he had made queries about the advertisement from the respondent’s management.
3. A few days later, on 8 March 2017, the appellant was directed by the respondent’s managing director to take an ability test. The appellant says he was asked to take the test at around 4.30pm. Thereupon, he requested that he be allowed to take the test on the following morning. This, he said, was because he had to leave office by 5pm to take charge of his infant son, as the baby sitter was leaving early on day. He said his request was denied and his employment was terminated at 4.45pm on the same day. He said he was not given any reasons for dismissal. He asked for his dismissal letter, which he received the next day. The appellant contends that he was asked to take the ability test because he questioned the advertisement of his position. He told the

tribunal that he came to know about the advertisement a day before it was placed. He said he was never given reasons for advertising his position.

4. The respondent submitted that the appellant was in employment for approximately three months before his employment was terminated. It was submitted that the appellant was frequently absent from work. The appellant was asked to take the ability test around 3.30pm and again at 4.45pm. On both occasions, the respondent submitted, the appellant had refused to do so. He was also asked previously to take the test. The respondent submitted that the appellant demanded a dismissal letter but refused to accept it on the same day. Therefore, the letter of dismissal was delivered to him the following day. At the time of his dismissal, he was given a week's pay in lieu of notice in addition to his last salary.
5. It is not clear whether evidence was given before the tribunal on behalf of the respondent as the available transcript of the court record does not contain the respondent's evidence. In cross examining the appellant, the respondent's view was put forth by its representative. Neither party raised issue at any stage over the completeness of the transcript. The evidence on record, however, suffices to let the court reach a conclusion.

The evidence

6. The dismissal letter dated 9 March 2017 was signed by the respondent's chief operating officer, Iftar Ali. The letter states that the appellant did not improve despite being counselled on high absenteeism at the start of the year. He had refused to follow lawful instructions from his immediate manager, and his action in refusing to take the ability test resulted in gross misconduct. The failure to take the ability test, the letter said, showed that he was incompetent to continue with his current work. Another allegation was that he incited a subordinate employee to look for a job outside the company. On these grounds, which are briefly considered below, the appellant was summarily dismissed.
7. The appellant is said to have been absent for seven days out of the short period in which he was employed. This includes the two days on which he did not report to work immediately prior to the date of his dismissal. In cross examination, the appellant admitted that he took sick leave on 6 & 7 March, and reported to work the

next day. It was put to the appellant that his absence on 6 & 7 March was discussed when he returned to work on 8 March. Mr. Ali, who cross examined the appellant, suggested that he was told at that discussion that his probation may be affected as a result of absenteeism. The appellant, while admitting that he was absent on three other days, denied that he was regularly absent from work. He tendered sick sheets to cover the two days of his absence in March. He was not, he said, warned in regard to his performance or attendance.

8. The employment contract does not expressly refer to the requirement of an ability test. Mr. Ali suggested to the appellant in cross examination that the test was discussed on the morning of 8 March 2017, the day on which he was dismissed. The appellant was asked to take the test at 3.30 pm and 4.30 on the same day, Mr. Ali said. The appellant says he was asked to take the test at 4.30 pm. He was unable to comply as he had to leave office by 5 pm. None of these assertions are in writing. This raises the question whether the worker was given reasonable notice to take the test. The further question is whether, in the circumstances, the appellant's request to take the test on the following morning was reasonable. The tribunal does not say which testimony on the matter it accepts, but says that the appellant had to leave office to attend to a family matter.
9. The tribunal's finding was that the appellant was not assessed prior to dismissal. This means that the appellant was also not assessed when his position was advertised. He was asked to take the ability test four days after the advertisement. This was on the day of his dismissal. The respondent's claim that he was asked on previous occasions to take the ability test has not been substantiated by specific evidence. At the time of advertising his position, the appellant was not aware of the reasons for which his position was advertised.
10. The employer also alleged that the appellant incited a subordinate worker to leave employment and find another job. The appellant denied the claim. The respondent produced a letter written by the subordinate worker confirming that the appellant asked him to leave the company. The worker concerned did not give evidence. The tribunal made no finding with reference to this complaint.

Tribunal's determination

11. The tribunal concluded that the appellant's dismissal during probation was not unfair and dismissed his grievance.
12. The tribunal did not make a finding of misconduct against the appellant.
13. The purpose of the ability test, the tribunal explained, was to assess the appellant's performance when probation ends. The tribunal's finding was that the employer did not review the worker's performance. This, the tribunal said, was because the appellant refused to take the ability test.
14. The tribunal does not say whether it accepts or rejects the appellant's evidence that he asked for a postponement of the test to be taken the next day. The tribunal was satisfied the appellant had to leave his work place to attend to family matters.
15. The tribunal made no findings concerning the Fiji Times advertisement of the appellant's position four days prior to his dismissal.

Conclusion

16. The court is mindful that it must be cautious in interfering with the findings of the tribunal. The tribunal was in the best position to have evaluated the evidence and reach findings that would have led to the right conclusion. It did not do so. Therefore, it is necessary for the court to make findings upon the evidence on record.
17. The respondent has not established the grounds of misconduct on which the appellant's employment was terminated. In these circumstances, there was no justification to dismiss the appellant for misconduct.
18. The appellant has asked for at least six months compensation for unfair termination. The respondent engaged the appellant for a period of 12 months. He had completed a little more than two months in employment. He was within the period of probation. The employer was entitled to assess him at the end of his probation in a meaningful and fair manner. The appellant did not receive such an assessment at the end of his probation. The placement of an advertisement for the procurement manager's position is indicative that the employer was not satisfied with the

appellant's performance and could have taken steps to terminate his employment with due notice. Nevertheless, the manner in which the dismissal was effected was not fair. Considering these circumstances, a sum equivalent to six weeks wages would be fair compensation to be paid by the respondent to the appellant. In assessing costs, I have considered that the appellant, though represented before the tribunal, was not represented in this court.

ORDER

- A. The appeal is allowed.
- B. The respondent is to pay the appellant compensation equivalent to six weeks wages within 21 days of this judgment.
- C. The respondent is to pay the appellant costs summarily assessed in a sum of \$500 within 21 days of this judgment.

Delivered at **Suva** on this 13th day of **April, 2023**.



M. Javed Mansoor
Judge