

**IN THE EMPLOYMENT RELATIONS COURT AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 20 of 2015

**BETWEEN:** **MATRIX RISK MANAGEMENT LIMITED**  
**APPELLANT**

**AND:** **MANOA DUGULELE**  
**RESPONDENT**

*Appearances:* Ms. M. Tikoisuva for the Appellant.

Ms. A. Raitivi for the Respondent.

*Date/Place of Judgment:* Friday 04 August 2023 at Suva.

*Coram:* Hon. Madam Justice Anjala Wati.

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**JUDGMENT**

**A. Catchwords:**

*Employment Law - Appeal - whether the tribunal was correct in arriving at a finding that the employer did not have valid reasons to terminate the employment of the worker and that the procedure to terminate the worker was improper making the dismissal unlawful- whether the tribunal was correct in arriving at a finding that the employer's conduct was such that it caused the worker humiliation, loss of dignity and injury to his feelings for which he should be compensated.*

**B. Legislation:**

1. *Employment Relations Act 2007 ("ERA"): s33.*
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**Cause and Background**

1. Manoa Dugulele [*"Manoa"*] had filed as claim in the tribunal for unlawful and unfair dismissal of his employment from Matrix Risk Management.

2. After hearing the matter, the Tribunal found that Manoa was unlawfully and unfairly dismissed from his employment. The Tribunal thus ordered the employer to pay to Manoa 12 months' wages lost as a result of the grievance for unlawful dismissal and further 12 months wages for unfair dismissal. The 24 months wages was reduced by a period of 6 months' to reflect Manoa's contribution towards the situation that gave rise to the employment grievance.
3. The employer is in the business of providing security services to its clients. It therefore employs, amongst others, security guards to provide services to its clients. Manoa was employed as a security guard by the Employer from 26 November 2006 until 27 March 2011 when he was terminated for allegedly stealing fuel from the client's premises which he was guarding.
4. A day before his termination, Manoa was sent to a client's yard namely CJ Patel in Lami as a static guard. Manoa was the team leader on the site. There were 2 other guards. At the back of the client's premises, Vodafone has a generator. The same night, fuel was stolen from the Vodafone generator. None of the guards reported the theft to the employer or the police the same night even though two of them admitted that they saw that the theft had taken place.
5. Manoa was alleged by the fellow colleagues to be the person who had orchestrated the crime, taken part in it and let the criminals away from the site.
6. Vodafone saw the theft the next day and reported the matter to the employer and the police. When the employer found out about the theft the next day, Manoa was summarily terminated from work along with one another security officer.
7. The employer also reported the matter to the police. The police investigated the theft. That same year in July, the police closed its file on the basis that there was insufficient evidence against Manoa. The Tribunals' entire finding arises from the police report of insufficient evidence. Aggrieved at the Tribunal's decision, the employer appealed.

***Issues on Appeal***

8. The employer has raised several grounds of appeal all of which in its crux amounts to determining whether the tribunal had properly come to a finding that the employer did not have valid reasons to terminate the worker, that the procedures for termination was not followed and that the conduct of the employer was such that it caused the worker humiliation, loss of dignity and injury to his feelings entitling him to be compensated.

***Evidence in the Tribunal***

9. During the trial 3 witnesses gave evidence on behalf of the employer. The Grievor was the only one who gave evidence for himself. I have seen the hearing notes and I find that the Tribunal has not clearly reflected in its judgment the evidence that it recorded during the hearing. Even the hearing notes are scarce and not recorded in a prudent way.
10. The judgment of the tribunal summarises the evidence from the submissions of the employer's counsel and no regard was given to what the tribunal itself recorded. I will reflect on the tribunal's summary of the evidence in its judgment. However at the time of my determination of the issues, I will not only rely on what has been reflected in the judgment but also what appears in the hearing notes.
11. The first witness for the employer was Shalend Rohit Ram. He was employed as a Security Guard by Matrix in 2011. Around March 2011 he was stationed at CJ Patel premises at Wailekutu along with Manoa and one Saki on the night shift from 7pm to 7am.
12. Shalend testified that Saki manned the main gate taking notes of all the movements. Saki remained at the main gate throughout the night. Manoa was on one side of the complex whilst he was at the back of the premises. Shalend said that well into the night, Manoa came and asked him to switch places so that Manoa could look after the back of the premises. For a while nothing happened as the guards continued with the normal duties including the periodical punching of cards. Between 3.00 to 4.00am that

morning, Shalend said that he went to check on Manoa and saw him standing next to the generator beside the fence. There was a van parked outside the fence and there were 3 people outside the van with 10 to 15 containers of around 20 litres. Manoa was holding a pipe into the generator and the other end went through the fence into the containers outside. Shalend stated that he called out to Manoa and asked what he was doing and that he was going to call Itesh. When he tried to call Itesh, Manoa put a knife to his throat and told him that he would be killed if he reported.

13. Shalend said that he was frightened for his life and told Saki, but he did not believe him, so he went home without reporting the incident. He was frightened that if he was assigned to another base to do security work he would be killed. When he was questioned by Itesh, he did not say anything as he was really frightened. At home Shalend was encouraged by his wife and landlord and he finally reported to the police what he saw and all that happened. During that time Saki was also at the Police Station but Manoa was not there. Shalend confirmed that he was terminated the following day and the reason was his failure to report the theft of fuel.
14. The second witness for the employer was Itesh Singh. He is the General Manager of the Employer. He had been working as a General Manager for 10 years. He testified that on the morning of the day in issue, he received a telephone call from Vodafone that fuel had been drained from their generator and when he checked the office, there was no such report from the guards on duty that night. He then made his way to the scene of the crime and on arriving saw a broken cap, a hose pipe lying beside the generator and a broken fence at the spot where the exchange took place, so he was sure that fuel had been stolen. Vodafone had reported the theft to the Police.
15. Itesh testified that Manoa was not responding to his calls. He called in Shalend to question him but Shalend did not say anything. Then the police came. Shalend was taken in for questioning. Later the police came and informed him that Shalend had told them that Manoa had stolen the fuel. He called Shalend back to the office where Shalend confirm what he saw. He tried unsuccessfully to call Manoa. When Manoa came in a few days later, he saw Manoa in his office and asked him about the allegations of

stealing fuel from the Vodafone Generator. Itesh said that Manoa refused to answer him and just sat quietly on the chair. He asked Manoa several times to respond to the allegations but Manoa did not. He informed Manoa that his employment was terminated immediately. Itesh also confirmed that Saki was also on guard too but that he was way in the front. Itesh said there was no way Saki could have known about the theft.

16. During cross examination, Itesh confirmed that there were always tedious and controversial issues surrounding Manoa's performance and when he was questioned about the allegation, he was not forthcoming but basically remained quiet. When questioned as to the availability of due process, Itesh stated that there is a grievance procedure in place.
17. The third witness for the employer was Amit Kumar. Amit Kumar commenced work with this employer on 2<sup>nd</sup> February, 2011 in the position of Operations and Payroll Officer. In his examination in chief he stated that he prepared Manoa's termination letter upon instructions from Itesh Singh. He handed the letter to Manoa and asked him to read before he signed it. Manoa did not mention anything, read the termination letter, signed the same and took his money. The money included his pay and remaining benefits. Manoa returned his uniform in exchange. Amit said Manoa was not forced or coerced into signing the termination letter.
18. The worker's evidence in chief was that during the night of the alleged incident, Saki called him to go and see the break-in at the back of the building. He went there, where he saw fuel and the break in the fence whilst Shalend was sleeping in the guard room.
19. Manoa said that he did not report the matter to the main office or Police but told one Sireli Bale the day shift guard for the next day. Bale then told him to go home as he would report the theft. Manoa maintained that no one from the office called him but when he returned to work, Saki told him that the Police were looking for him. Manoa said that that is when he returned home. The following morning the police came and took him from his home.

20. Manoa said that at the Police Station, he was confronted by Itesh and one Waisake with the information given by Shalend and Saki that a 3 ton truck entered the premises with Manoa in it. Back at the office, Manoa was again confronted by Itesh but he denied taking the fuel. He was handed the termination letter by one Waisake Tabuya and he signed it after reading the contents. When asked as to why he signed termination letter admitting reasons for termination, Manoa stated that he needed the release of his wages and all outstanding entitlements.
21. Under cross examination, Manoa was told that his evidence directly contradicted those of Itesh, Shalend and Amit. He was asked why he did not confront the employer's witnesses on their versions, he answered that he did not know he could do that.

### ***Tribunal's Findings***

22. The Tribunal stated that it is for the employer to establish the guilt of the worker. It further stated that an investigation needed to be carried out and Manoa ought to have been awarded the due process of responding to the allegations of theft against him.
23. The Tribunal said that it was not convinced by the evidence that Manoa had stolen the fuel. It said that what bothered its mind was why Saki failed to take down the registration number of the truck that allegedly came in that night and why was the incident not reported by Saki and Shalend? The Tribunal said that Saki was not even called as a witness for the Employer. His evidence was crucial to the determination of the case.
24. The Tribunal said that if Saki was guarding the front gate, he should be able to see in the night the registration number of the van that came in, as there would be enough light around the front of the complex. Similarly, Shalend must have also seen the registration number but did not tell the Police and his boss in the office.
25. The Tribunal gave credit to Manoa for reporting the incident to the day security. It said that the other two guards Saki and Shalend did not even report the matter but accused Manoa.

26. The Tribunal also went onto examine how Manoa was investigated by the Police. It said that there was no evidence by the Police so it is not known whether Manoa was cautioned by the Police when interrogated. Manoa was interrogated on a number of occasions by the Police and the Employer without being awarded the right of representation and that disqualifies any admissions or lack of response made by him in regards to his participation or engineering of the alleged offence.
27. The tribunal stated that the interrogation culminated in Manoa's summary dismissal. The Police took 3 months to investigate the case and to confirm in writing on 18 July 2011 that Manoa had been cleared of being charged as there was insufficient evidence against him. The Police report, the tribunal found, nullifies the reasons given in the termination letter and thus makes the act of termination unlawful and unjustified. Since the matter was with the Police the employer should have waited for the investigation to complete, to establish the guilt of the employee.
28. The Tribunal also found that the number of interrogations by the Police and the employer caused Manoa humiliation, loss of dignity and injury to his feelings.

### ***Analysis***

29. S.33 of the Employment Relations Act provides that a worker can be dismissed without notice in cases various cases including where the worker is guilty of gross misconduct. Some common forms of misconduct are theft, fraud, dishonesty, negligence, insubordination, absence without permission from work, coming late at work, swearing at colleagues, assault, deliberately failing to follow the code of conduct of the employer and many more.
30. In this case, Matrix Risk Management had sent 3 of its Security Guards to manage its client's property at night. Theft takes place. One of the guards allege that Manoa aided and abetted the theft.

31. Irrespective of whether Manoa engineered the theft or assisted the theft, it is clear from his evidence that he saw theft of fuel taking place. That he certainly admitted in his cross-examination. The notes of the Tribunal on page 56 of the records states as follows:

*“No, did not report theft.*

*Yes, saw theft of fuel taking place.*

*Yes, still did not report to police.*

*Yes, next day went to work in the afternoon. Sakiusa told me to go to Police Station but I went home. Next morning, Police came in and picked me from home...”*

32. In his evidence in chief Manoa admits that he saw a truck come in. Given that evidence that Manoa saw a truck come in and saw the theft take place, there is no reason to disbelieve that he did not orchestrate the crime, took part in it and is guilty of stealing.

33. If he did not orchestrate the crime, he would have immediately called the employer and called for more guards to nab the criminals. He would have used the force to contain the crime but he let the thieves get away. This is only because he was part of the crime.

34. If not for theft, the employer was entitled to terminate him and the other guards for negligence in not reporting the matter to the employer and the Police immediately on the same night when they saw the break-in. I am not going on the evidence of Manoa's workmate Shalend. He appears to be a complicit in the crime and his evidence is tainted. I am relying solely on the evidence of Manoa. I am surprised that given the evidence of the worker, the tribunal is still of the view that theft was not established.

35. The tribunal is using the Police report to say that there is insufficient evidence of theft. What about Manoa's own admission that he saw theft occurring. Why did he not stop the theft, report the crime and identify the thieves? He is not capable of guarding anyone's property with the kind of conduct he displayed in the adversity.

36. Such kind of guards are a menace to the owners of the property and more a liability than protection. Manoa deserved to be summarily terminated without any process. There was no need to hear him. A serious crime occurred under the watchful guard of



the men who were entrusted to look after the property. Theft takes place and the employer's clients suffered. The non-reporting was such a serious misconduct too that the employer was entitled to terminate the worker without any hearing.

37. The Police and the employer questioning Manoa is expected as a normal process as he is the one to be questioned. I see nothing wrong about that process. Manoa cannot and should not expect mercy from the employer or the police. If that caused him embarrassment then it is his making and his negligence. He cannot be embarrassed for incurring such a menace to his employer's clients.
38. I find that the Tribunal had failed to properly analyse the evidence of the witnesses to come to a correct finding that the employee was lawfully and fairly terminated.

**Final Orders**

39. I allow the appeal and wholly set aside the orders of the Tribunal. I order costs against the worker in the sum of \$1,500.00 to be paid to the employer.



  
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**Hon. Madam Justice Anjala Wati**

**Judge**

**04.08.2023**

**To:**

1. **Mitchell Keil Lawyers, Suva for the Appellant.**
2. **Ministry of Employment, Productivity and Industrial Relations for the Respondent.**
3. **File: Suva ERCA 20 of 2015.**

