

IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. ERCA 8 OF 2023
ERT APPLICATION NO-756 of 2021

BETWEEN: FLETCHER BUILDING (FIJI) PTE LIMITED T/A HIGGINS (FIJI)

APPELLANT

AND: SULTAN KHAN

RESPONDENT

BEFORE : Hon. Mr. A.M. Mohamed Mackie- J.

COUNSEL : Mr.Hussain. T. For the Appellant – Employer on 16th May 2024
 : Respondent – Griever in person
 : Ms. Kumar .P with Mr. Namata. S. for the Appellant on 5th Nov, 2024.
 : Respondent- Griever in person
 : Ms. Singh. P. for the Appellant-Employer on 26th February 2025.
 : Ms. Reddy .S. for the Respondent- Griever

HEARING : By way of written submissions.

W. SUBMISSIONS : By the Respondent- Griever filed on 06th November 2024.
 : By the Appellant -Employer filed on 11th December 2024.
 : Reply by the Respondent- Griever filed on 09th January 2025.

JUDGMENT DELIVERED: On 27th March 2025.

JUDGMENT

A. INTRODUCTION:

1. This is an Appeal arising out of the Decision dated 20th July 2023 pronounced by the learned Tribunal Magistrate (“the Magistrate”) of the Employment Relations Tribunal of Lautoka in ERT Grievance Application No-756 of 2021.

2. This grievance had been referred to the Employment Relations Tribunal by the Mediation Service in accordance with Section 194(5) of the Employment Relations Act 2007.
3. After hearing the Application, the Magistrate by his impugned Decision had made the following Orders;
 1. *That Sultan Khan was not afforded procedural fairness during the termination of employment. The reinstatement is not appropriate. The Tribunal has concluded that the Griever should be compensated. It is further ordered Employer to compensate Mr Sultan Khan 2 months' wages for unfair termination.*
 2. *Under Section 230 (1) (c) (i) the employer to compensate Mr Sultan Khan further one month compensation for humiliation , loss of dignity and injury to his feelings; and*
 3. *The Employer will compensate the Griever a total of 3 month's wages, within 21 days of this decision.*
 4. *The parties are to bear their own costs*
4. Being aggrieved by the above Decision, the Appellant –Employer (“the Appellant”) filed its timely Notice of Appeal and Grounds of Appeal on 02nd August 2023 moving that the above Decision be wholly set aside and revoked and that this Honourable Court enter Judgement in favour of the Appellant and/ or order a fresh Trial and / or make other relief it deems just and expedient and the costs of this Appeal and all costs to be paid by the Respondent upon **the following Grounds**: -
 1. *THAT the Employment Tribunal erred in law and in fact by deciding that the Employer breached section 107 of the ERA by failing to give the Griever information pertaining to redundancy not less than 30 days before carrying out termination when the Employer had given all information about the Redundancy process to the Employer on 4th May 2020.*
 2. *THAT the Employment Relations Tribunal erred in law and fact by deciding that the Employer had carried out the redundancy process, which was unlawful, unreasonable and was not justified when the Employer had employed all procedures required under Section 107 of the ERA.*
 3. *THAT the Employment Relations Tribunal erred in law and in fact by ruling that the date for termination notice was 15th May 2020 when the document titled Change Decision expressly stated that the date for termination of the employment agreement would be in effect from 5th June 2020.*
 4. *THAT the Employment Relations Tribunal erred in law and in fact by accepting that the Employer had not given the Griever an opportunity for consultation when the Griever was given ample opportunity for consultation.*
 5. *THAT the Employment Relations Tribunal erred in law and in fact by ruling that the Griever was subject to humiliation and loss of dignity when there was no evidence to prove the same.*

6. *THAT the Employment Relations Tribunal erred in law and in fact by ruling that the Grievor's termination was unlawful when there were no laws breached by the Employer in making the Grievor's position redundant.*
7. *THAT the Appellant reserves the right to file further grounds of appeal upon receipt of the record or upon discovery of facts not known to it at the time of arguing this matter in the High Court.*
5. Subsequently, the Appellant on 21st August 2023, filed its Summons for Stay pending Appeal of the decision of the Employment Tribunal delivered on 20th July 2023 and the same being supported before me inter-parte on 25th September 2023, having heard and given direction to file affidavits in opposition and reply, this Court granted an interim stay till the date of further hearing the Summons.
6. Accordingly, the Respondent-Griever ("the Respondent") filed his Affidavit in opposition on 6th October 2023, and the Appellant filed its Affidavit in Reply on 24th November 2023 which was sworn on 31st October 2023 by one Imtiaz Ali, being the Financial Controller of the Appellant Company.
7. However, when the Application for stay came up for hearing on 16th May 2024, by consent of the parties, the stay was extended till the final hearing of the Appeal, and the hearing of the Appeal was fixed for 02nd August 2024.
8. As the hearing did not eventuate on 02nd August 2024, due to my being away from Fiji, when the matter came up before me on 17th September, 2024, both parties agreed to have the hearing disposed by way of written submissions and the directions being given for the same, both parties have filed their respective written submissions as aforesaid.

B. THE LAW:

9. This matter arises out of the Redundancy process undertaken by the Appellant in relation to the Respondent and some other employees of the Appellant Company in terms of Sections 106 and 107 (1) (a) and (b) Employment Relations Promulgation 2007. The Appellant also relies on Section 211 (1) (a) and (d) and Section 230 (2) (a) and (b) of the same Act, which are reproduced bellow for the sake of easy reference.

Object of this Part

Section 106. The object of this Part is to provide workers facing redundancy with some degree of certainty about the problems faced by the employer and the assurance of compensation.

Provision of Information

Section 107 (1) (a) and (b) are on Provision of information to the worker which state as follows;

107.— (1) If an employer contemplates termination of the employment by redundancy of workers for reasons of an economic, technological, structural or similar nature, the employer must—

- (a) provide the workers, their representatives and the Permanent Secretary not less than 30 days before carrying out the terminations, with relevant information*

including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; and

(b) give the workers or their representatives, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and on measures to mitigate the adverse effects of any terminations on the workers concerned, such as action to attempt to find alternative employment or retraining.

Jurisdiction of Tribunal:

Section 211 (1) (a) and (d) of the Employment Relations Promulgation 2007 states that;

211. — (1) The Tribunal has jurisdiction—

(a) to adjudicate on employment grievances;

(d) to adjudicate on all actions under this Promulgation for the recovery of wages or other money;

Employment grievance remedies

Section 230 (2) (a)-(b) of the above-mentioned Act states;

230.—(2) if the Tribunal or Court determines that a worker has an employment grievance by reason of being unjustifiably or unfairly dismissed, the Tribunal or Court may—

(a) in deciding the nature and extent of the remedies to be provided in respect of the employment grievance, consider the extent to which the actions of the worker contributed towards the situation that gave rise to the employment grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been decided accordingly.

10. As alluded to in the impugned decision of the learned Magistrate, I find that the **Section 108** of the Act, which deals with Redundancy pay, also comes into play when considering the ground 5 of the Appeal hereof.

Redundancy Pay.

“108.— (1) Subject to subsection (2), if an employer terminates a worker's employment for reasons of an economic, technological, structural or similar nature, the employer must pay to the worker not less than one week's wages as redundancy pay for each complete year of service in addition to the worker's other entitlements.

(2) A worker is not entitled to the payment specified in subsection (1) unless the worker has completed one year of service with the employer.

(3) Nothing in this Promulgation prevents an employer giving to a worker a redundancy payment in excess of that required to be given by this Promulgation”.

C. ANALYSIS:

11. I have carefully considered the contents of the impugned decision by the Magistrate, those of the written submissions filed by both the parties and the Law that governs the subject.
12. The pivotal issue that was before the Magistrate and now before this Court is, whether the Appellant – Employer had duly complied with the Section 107 (1) (a) and (b) of the Act when it exercised the Redundancy process in respect of the Respondent grievor. I find that grounds of Appeal 1 to 4 and 6 are in relation to the alleged breach of the said section 107 (1) (a) and (b) of the Act.
13. Careful perusal of Section 107(1) (a) of the Employment Relations Act shows that if an employer contemplates termination of the employment by redundancy of workers for reason of an economic, technological, structural, or similar nature, **the employer must;**
 - a. **Provide the worker not less than 30 days before carrying out the terminations with relevant information including the reasons for termination contemplated,** the number of and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; “and
 - b. Give the workers or their representatives, as early as possible, an opportunity for consultation on measures to be taken to avert or minimize the terminations and on, measures to mitigate any adverse effects of the any terminations on the workers concerned, such as action to attempt to find alternative employment or retraining “
14. It is obvious as per the above provision (a) there **has to be 30 days gap between the date of giving information and carrying out the termination.** Sub-section (b) requires that the workers or their representative should be given an **earliest possible opportunity** for consultation on measures to be taken to avert or to minimize the terminations and on measures to mitigate any adverse effects of any terminations on the workers concerned.
15. It is abundantly clear that the rationale behind keeping 30 days gap in between giving information and the termination is, not for anything but to afford the employee sufficient time period to engage in consultation with his/her employer before facing the actual termination.
16. It is not in dispute that the Appellant by its letter dated 4th May 2020 informed the Ministry of Employment that they are to make number of employees , including the Respondent hereof, redundant effective from between 3rd-5th June 2020. It is also not disputed that the Respondent also was on 4th May 2020 informed about this proposed termination, by giving him a copy of the letter (consultation document) by calling upon him to the office at 7.00.am in the morning on the said date (4th May 2020).
17. With the above information, the Respondent grievor became aware that his proposed termination on redundancy will be effective on a date between 3rd to 5th June 2020 (**Vide paragraph -1 of the letter dated 4th May 2020 marked as 2'E**”).

18. However, what the Appellant employer did, wittingly or unwittingly, to its detriment, well before the intended termination coming into effect on 3rd or 4th or 5th June 2020 (i.e. at the expiry of 30 days), was the sending of the letter dated 11th May 2020 marked as "3-E" to the Respondent – Grievor informing that his last day of working will be **Friday 15th of May 2020** and he has to return any "**Higgings**" property, vehicle, security cards and PPE by the end of his shift on **15th May 2020**.
19. By the said act, the Appellant had deprived the Respondent's entitlement to be present and be available in the Company and /or at his place of work for 30 days as contemplated by the Section 107 (a) of the Act, in order to engage in consultation with the employer as required by sub section (b) thereof.
20. Though, the Appellant had indicated by its letters dated 4th May 2020 and 11th May 2020 that the Respondent's termination will be effective from 5th June 2020, his employment was factually terminated by the very letter dated 11th May 2020, with effective from 15th May 2020 as a result which the Respondent's termination became premature and kept him away from his place of work/ Company premises, thus disabling him from meeting the employer, its officials for the consultation contemplated in the section.
21. As indicated in paragraph 2 of page 2 of the Appellant's letter dated 11th May 2020, payment of salary/ wages, till 5th June 2020 without having to work till that date will not cure the violation of section 107 (a) and (b) by the Appellant. The Respondent's right to remain at the workplace for 30 days for the purpose of consultations, has been taken away from him or bought-over by the Appellant by paying him for around 21 days, with no requirement to work.
22. The above act on the part of the Appellant, in my view, is violation of Section 107 (a) and (b) of the Act, as a result of which the Respondent was deprived of having consultations with the Appellant by making use of full 30 days until his intended termination on 5th June 2020. The termination before the expiry of 30 days from the date of giving information on 4th May 2020 is unlawful. Accordingly, I find that the grounds of Appeal Nos-1, 2, 3, 4 and 6 are without merits and the Appeal on these grounds should necessarily fail.
23. The Respondent has served at the Appellant Company for a period more or less than 2 years and the Tribunal Magistrate has awarded two months' salary on account of the unlawful termination. As per section 108 of the Act, the Respondent is entitled to receive an amount not less than one week's pay for each year the employee has served. The Appellant has not raised any specific ground in relation this decision. Thus, I shall not interfere with this decision and the amount awarded in this regard.
24. However, in respect of the ground No-5, I find that there is merit. There was no even an iota of evidence before the Tribunal Magistrate to the effect that the Respondent was subjected to humiliation, loss of dignity and injury to his feelings to warrant compensation under Section 230 (1) (c) (i) of the Act. Therefore, I decide to allow the Appeal on ground of appeal No-05.
25. The Respondent in his submissions has moved for his other entitlements. There has not been any adjudication on such entitlements before the Magistrate. In any event, in the absence of an Appeal or counter / cross Appeal by the Respondent, this Court cannot go into such claims.

D. ORDERS:

1. The Appeal succeeds partially.
2. The ground of Appeal Nos. 1,2,3,4, and 6 fail and the ground of Appeal No-5 succeeds.
3. The Tribunal Magistrate's decision to award 2 months' wages as compensation is hereby affirmed.
4. The Tribunal Magistrate's decision to award further 1-month wages under Section 230 (1) (c) (i) of the Act is hereby set aside.
5. Subject to above variation, the Tribunal Magistrate's decision dated 20th July 2023 is hereby affirmed.
6. No costs ordered and the parties shall bear their own costs.

On this 27th day of March 2025 at the High Court (ERC) of Lautoka.




A.M. Mohamed Mackie.
JUDGE.

SOLICITORS:

MESSRS. LAL PATEL BALE LAWYERS- Barristers & Solicitors- For the Employer – Appellant.

MESSRS. JYOTI LEGAL- Barristers & Solicitors- For the Respondent-Worker (Grievor).