

IN THE EMPLOYMENT RELATIONS COURT
AT SUVA
APPELLATE JURISDICTION

CASE NUMBER: ERCA 8 of 2015

BETWEEN: FIJI NATIONAL UNIVERSITY
APPELLANT

AND: JUBBAR ALI
RESPONDENT

Appearances: Mr. V. Kapadia for the Appellant.

Mr. D. Nair for the Respondent.

Date/Place of Judgment: Tuesday 3 November 2015 at Suva.

Coram: Hon. Madam Justice A. Wati.

RULING

Catchwords:

Employment Law – Leave to Appeal Interlocutory decision refusing to set aside the orders of the court after judgment was pronounced on an undefended hearing – Prudent that leave and main appeal be heard together as the arguments will be replicated- Interlocutory decision affects substantive rights of parties and since the final judgment is substantially wrong, leave is necessary and the order for setting aside ought to be granted to remedy the substantial wrong.

Legislation:

1. The Employment Relations Promulgation 2007 (“ERP”): ss. 33 (1) (a); 33 (2); 34; 242(2) (5) (e); 243.
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The Cause and Background

1. The appellant seeks leave to appeal the interlocutory decision of the Employment Relations Tribunal ("**ERT**") of 13 March 2015. The interlocutory decision was refusing the appellant's application to set aside the judgment which was delivered after an undefended hearing.
2. I had directed the parties that the leave and the proposed appeal be heard together as the submissions on the facts of the case and the law would be replicated if the appeal were to be argued separately. It was agreed by the parties that if leave were to be granted, the effect of it would be that the judgment of the ERT would be set aside and the matter be sent for re-hearing on a defended basis.
3. The cause before the ERT was a claim for unlawful and unfair dismissal. The employee had sought compensation for being unlawfully and unfairly dismissed.
4. The employee was summarily dismissed on 13 March 2013 for gross misconduct. The termination was done pursuant to s. 33 (1) (a) of the ERP and clauses 8.1.7 and 27.0 of The Human Resources Policy of the University.
5. The specific misconduct alleged was that the employee, on 20 February 2013, at about 1.30pm, whilst in the employ of the appellant, urinated in room A112 at Derrick Campus, Samabula, which act was classed as deliberate, intentional and not as a result of circumstances beyond the control of the employee.
6. Before being dismissed, the employee was being asked for his response and he denied the allegations and stated that he was resting in the room during lunch and he had accidentally hit the bottle of water beside him which spilled.
7. On 10 April 2015, by consent I had granted an interim stay of the substantive orders of the ERT which were as follows:
 - (i) ***That the employee be reinstated to his former position or a position no less advantageous to him.***

- (ii) That the employee be paid 18 months' salary lost as a result of the grievance being the period from the date of termination to the date of the orders of the ERT.
- (iii) A further payment of 3 months' wages for humiliation, loss of dignity and injury to feelings of the worker.
- (iv) \$500 costs to the employee for wastage of hearing time.

8. The decision of the Tribunal on the employee's case for unlawful and unfair dismissal was given on 28 November 2014. The application for setting aside was made after 19 days, that is, on 18 December 2014. The decision refusing the application to set aside was granted on 13 March 2015.

Circumstances Relating to Undefended Hearing

9. The employee's cause for unlawful and unfair dismissal was listed before the ERT for hearing on 22 September 2014. In the morning of 22 September 2014, the legal counsel of the Fiji National University emailed to the Registrar of the ERT expressing the difficulty that they faced and indicated that he was unable to attend the hearing. The email read:

" Please note that I will not be able to attend today's hearing of Jubbar Ali's case as I have been asked to attend to some urgent matters relating to an important meeting of the University Council today. Manager HR is also involved in a matter which deals with an important item on the Agenda of the University HRC meeting.

These meetings have been called at a very short notice, and there is little we can do about it. Please accept my apology and convey this message to the Chief Tribunal. I have tried to call him but his line had been engaged.

Kind Regards."

10. The representative of the employee objected to any adjournment on the basis that the parties had agreed to the date and time of the hearing and if it was not possible for counsel for the

employer to attend, then the employer ought to have found an alternate counsel to conduct the hearing.

11. The ERT agreed that the matter should not be adjourned and it was therefore heard on an undefended basis.
12. The only witness who gave evidence was the employee.

ERT's Findings on Dismissal

13. I have carefully perused the judgment of the ERT and I did not find that the ERT made any finding on unlawful or unfair dismissal. The only finding is in paragraph 10 of the judgment which states that the ERT agrees that the employer should have been reasonable and allowed the four eyewitnesses to the incident to "face up to the alleged wrong doer". I must cite in full paragraph 10:

" The Tribunal agreed with that aspect of the evidence, as a reasonable employer would do that in all the circumstances of the case, as these four female staff had made an allegations and it is only justified and fair that they face up to the alleged wrong doer. Soon after the statements were taken from the four female staff members, the grievor was terminated on 13 March, 2013".

14. From the above finding I come to the conclusion that the ERT had found that the dismissal was unlawful in that the procedure to dismiss the employee was not followed. The ERT's findings indicate that the proper procedure to terminate the employee would have been after he was given an opportunity to see the statements of the eyewitnesses and an opportunity to cross-examine the makers of the statement. That is what the employee said in evidence that he ought to have been given an opportunity in regard to.

ERT's Findings on Setting Aside Application

15. The application for setting aside was refused on four grounds:

- (i) *That there was no affidavit showing merits of the defence.*
- (ii) *There was delay in making the application for default judgment.*
- (iii) *There was no explanation how the judgment was allowed to go by default; and*
- (iv) *The employee would be prejudiced as he was victimized by the employer and denied natural justice when the dismissal was carried out and that there would be irreparable harm to him as the employer did not have a meritorious case.*

Submissions/Law/Analysis

16. The need for leave arises out of s. 242(5) (e) of the ERP which states that ***“no appeal shall lie except with the leave of the Tribunal or the Court from any interlocutory decision”***.
17. S. 243 of the ERP outlines the timeframe for bringing an application for leave. The time frame is within 14 days of the date of the decision. There is no dispute that this application for leave was brought within the requisite timeframe.
18. In deciding the application for leave I have considered the affidavits filed by the parties and their submissions.
19. The interlocutory order of the ERT was not on a point of practice or procedure. It was an order which had the effect of determining substantive rights of the parties.
20. The reason I make a distinction between an interlocutory order on practice and procedure and an interlocutory order which is determinative of the legal rights of the parties is that in the former case the exercise of discretion is more stringent because if a tight control were not kept upon interference with orders of the court of first instance, the result would be disastrous to proper administration of justice.
21. Every interlocutory order could then be appealed and the finality of the cases would be delayed. An impecunious litigant may lose hope and faith in the system as he may not see the disposition

of the main cause or a much delayed disposition as the Courts will almost always be hearing appeals from interlocutory orders. The matter would be lingering between the original court and the appellant court only on interlocutory matters.

22. For me to exercise my discretion to grant leave to appeal, I have to analyse whether substantial injustice would be done by the judgment or order of the ERT. I am therefore bound to consider not only the judgment of the court refusing the application for setting aside but also the final judgment which was the subject of the setting aside application.
23. I will deal with the final judgment first. In its final judgment, the only reason for ERT to hold that the dismissal was unlawful was that the employer did not allow the employee to cross-examine the four eye-witnesses.
24. This finding on procedure to summarily dismiss an employee under s. 33 (1) (a) of the ERP is plainly wrong. There is no requirement in law that the employer gives the employee any opportunity to respond to the allegations or that a hearing be allowed on the allegations. What is required on procedure is that the employee be given written reasons for dismissal and that he be paid all wages up till the time of dismissal. That is the procedure that is prescribed under s. 33(2) and s. 34 of the ERP.
25. There was no finding in regards whether s. 33(2) and s. 34 procedures were complied.
26. I do accept that the onus to establish the cause and the procedure was on the employer and that it did not turn up to establish the cause and the procedure which makes the dismissal unlawful but that was not the basis on which the findings were made. The finding on unlawful dismissal was based on the wrong principle of law.
27. Even if I were to find that the employer did not establish the cause and procedure, there was absolutely no evidence that the dismissal was unfair. To decide the fairness of the dismissal, it was for the employee to establish that the employer acted in bad faith in dealing with the employee whilst carrying out the dismissal or that the manner of treating the employee was not fair or done in good faith.

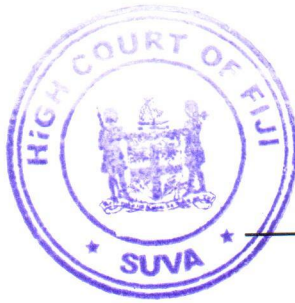
28. There was no evidence in that regard and even no factual finding on the fairness of the dismissal and that makes the final findings wrong in law.
29. I then refer to the remedy of reinstatement which normally is not granted when the parties' relationship breaks down. The employee had not actually asked for reinstatement and it maybe because he did not wish to go back to work for the employer which made allegations affecting his morale. For the employer, if such misconduct is established, it may not want to get an employee on the premises who is not concerned about the health and comfort of the students and the workers. It is incumbent that a remedy of reinstatement be granted after careful consideration of whether the relationship is repairable and could be continued without any hindrance. In its judgment, no such consideration was given by the ERT.
30. Further, a sum of \$500 was ordered against the employer for wastage hearing. The hearing date in fact was not wasted. If the matter was vacated, the cost would be justified but the matter proceeded to hearing and I do not find any basis why the order for cost was necessary under that head of "*wastage of hearing time*".
31. The employee would have been entitled to costs of the proceedings but no such order for costs in his favour for a successful case was given to him.
32. I now turn to the reasons why the employer did not attend the hearing. The email states that the legal counsel was caught up in a Council meeting. This Council meeting is an internal meeting which could not have been fixed in the eleventh hour and if it was then the Court hearing ought to be given priority and if the attendance of the legal counsel was necessary then alternative arrangement ought to have been made for the hearing.
33. The email states that the counsel tried to contact the Tribunal directly. This bothered me to a very large extent. It is not ethical for counsel to speak to the presiding officer directly in regards the case before it even if it is to relay a message of the kind above. The proper practice is to make a formal application, which could be oral in a matter like this.
34. I do not find that there was satisfactory explanation why the counsel for the employer did not attend the hearing on the day.

35. On the findings of the ERT, that there was no defence on merits, I find that the letter of dismissal of 13 March 2013 speaks for itself. The letter indicates that the employee was found urinating in a classroom and that there were four eyewitnesses to the incident. This fact is even mentioned in the initial judgment. With the given facts, there was no need to reiterate in the affidavit that the employer had lawful cause which would have been established by the eyewitnesses to justify the termination. By dismissing the setting aside application for want of an affidavit containing the merits of the defence, a substantial wrong was done to the employer in that it was precluded from putting forth a case on erroneous findings of facts.
36. On the question of delay to make an application for setting aside, I find that although the application could have been made earlier than 19 days, I do not find that the application was brought unreasonably late in the day.
37. I do not lose sight of the fact that employment cases should be heard expeditiously so that the employee is not left out of work and is able to determine his future after his issues regarding his dismissal is determined. However this is a case where balancing of right is required and although the delay is prejudicial to the employee, an order for expeditious inter-partes hearing and an order for costs could have minimized the prejudice.
38. I find that since the final orders are based on erroneous findings of fact or findings of facts on wrong principles of law, the judgment ought to be set aside and the matter heard afresh before a different Tribunal.
39. The employer will need to pay the cost for the delay which occurred through its neglect.

Final Orders

40. In the final analysis, I set aside the judgment and order of the ERT of 28 November 2014 and order that this matter be heard before a different Tribunal. The matter is to be heard expeditiously.
41. The employer is to pay the employee the cost of the setting aside application which I summarily assess as \$1500 to be paid within 21 days.

42. For reasons of clarity I order that all costs ordered by the ERT be set aside.




Anjala Wati

Judge

03.11.2015

To:

1. Mr. Viren Kapadia for the Appellant.
2. Respondent.
3. File: Suva ERCA 8 of 2015.