

IN THE EMPLOYMENT RELATIONS TRIBUNAL

AT SUVA

ERT Grievance Case No. 32 of 2022

BETWEEN : **RAKESH**

AND : **MINISTRY OF RURAL AND MARITIME DEVELOPMENT**

Appearances:

Mr F Ali for the Grievor

No Appearance on behalf of the Employer

Date of Decision: 6th February 2025

**DETERMINATION BY THE EMPLOYMENT RELATIONS TRIBUNAL
(ON FORMAL PROOF HEARING)**

CATCHWORDS:

EMPLOYMENT LAW – UNFAIR DISMISSAL - COMPENSATION

LEGISLATION:

THE EMPLOYMENT RELATIONS ACT 2007 (“ERA”).

Employment Relations Grievance

- [1] This grievance was registered with the Ministry of Employment on 20 January 2022. Mediation was attempted on 10 February, 16 February and 17 March 2022 but was unsuccessful.
- [2] The mediator referred the grievance to the Employment Relations Tribunal (or “ERT”) on 21 March 2022 in accordance with *s194 (5) of the Employment Relations Act 2007* (or “ERA”) outlining the nature of unsettled employment grievance with the following terms of reference: -

“Unfair Dismissal – (Remedy – Compensation)”.

Cause before the ERT

- [3] At first call in the Employment Relations Tribunal (or “the ERT”) on 2 May 2022, the grievor requested for time to seek Legal Aid assistance which was granted. The matter was again called on 30 September and 1 December 2022 respectively, however Legal Aid requested for more time as they were still assessing the grievor’s application. On 10 February 2023, Legal Aid confirmed representation for the grievor and time was given for both parties to file preliminary submissions. This was finally complied with by the employer who filed on 1 January 2024 after several reminders were given. The grievor’s submission was filed on 12 March 2024. The matter was fixed for hearing on 4 July 2024. However on the day of hearing, the new counsel for the grievor who has now taken over the matter requested to vacate the hearing and if a fresh submission could be filed since the previous submission needed to be withdrawn due to certain issues that were highlighted in the previous submission. This was granted since the employer also had no issues with this request. The grievor’s new submission was filed on 4 July 2024. The matter was called on 7 and 23 August as well as 4 September 2024 to fix hearing however the employer was no longer appearing despite NOAHs being served on all occasions which compelled the Tribunal to fix hearing on 25 September 2024.
- [4] On the hearing date 25 September 2024, only the grievor appeared. The employer still made no appearance which compelled the grievor to seek for formal proof. This was granted.

Formal Proof Hearing

- [5] The action taken by the Employment Relations Tribunal in this case is also consistent with the powers of the Tribunal to proceed if parties fail to attend as elucidated in Section 233 of the Employment Relations Act 2007 as follows:
- “If, without good cause shown, a party to proceedings before the tribunal or the court fails to attend in person or by representation, the tribunal or court may act as fully in the matter before it as if that party had duly attended or been represented”*

Witness – Rakesh (Grievor)

- [6] Under oath, the grievor stated that he is currently employed as a Driver for the Ministry of Infrastructure for the last two and a half years and was previously a Truck Driver for the Ministry of Rural and Maritime Development from 2019 to 2022. He said that he had signed the contract with Ministry of Rural and Maritime Development on 4 January 2019 and it was for a term of three years and therefore expected to expire on 3 January 2022.
- [7] The grievor further stated that at the expiry of this contract he was notified of an extension of his services by another three months. He also said that the extension of contract letter

was dated 30 November 2021 and which was for the period of 4 January 2022 to 3 April 2022 and was signed by the Permanent Secretary Mr David Kolutagane.

- [8] The grievor explained that the reason why he left the Ministry of Rural and Maritime Development was due to what he believes is his unfair termination as a result of allegations against him. He also read his termination letter dated 5 January 2022 in which it stated that the effective date of termination was 11 January 2022
- [9] The grievor further elaborated on the allegations the Ministry brought against him saying that there were three allegations as follows:
- i) Damage to a fibre boat during off load – He was informed to offload a fibre boat which had two big engines. Since he was unable to ensure the safe off-loading of the boat whilst handling the machine, he explained that he had asked two military officers to hold on to the rope tied to the boat whilst he offloads the boat. He said that the two military officers left the rope and the boat hit a post;
 - ii) Neighbour alleges that he had damaged the neighbour's pipe – the grievor claims that he did not damage the neighbour's pipe and that the neighbour was also unable to provide evidence that he had indeed damaged the pipe; and
 - iii) Negligence leading to damage of warehouse – the grievor stated that during distribution of rations during a disaster, he was driving the forklift and in the course of performing his duties that he had damaged the warehouse
- [10] The witness said that he was informed of his investigation through a letter from his Permanent Secretary dated 27 September 2021 mentioning that there were allegations against him however the letter did not specify what those allegations were. He said that he was finally told of those specific allegations from the investigation panel's interview in which they had asked him whether he had damaged the boat and the warehouse to which he agreed to but that he did not agree to damaging the neighbour's pipe.
- [11] Furthermore, the witness said that he was told by the panel to await the conclusion of the investigation which they did not inform him of but that he had instead received the termination notice which he did not agree to. He said that he then wrote a letter to his Permanent Secretary disputing his termination however he did not receive a response and so he took up his grievance with the Ministry of Employment.
- [12] The witness stated that he was not provided an opportunity to respond to the allegations and neither was he given an opportunity to provide evidence against the allegations and so he believes that he was unlawfully and unfairly terminated. He also insists that because he has now found employment elsewhere, he therefore does not wish to be re-instated but that he wants to be compensated for the period that he was home when he was terminated which was for five months at the rate of \$6.50 an hour totalling \$3,550.00.

The Grievor concluded his case marking the following documents:

- G1:** Contract of Service dated 04/01/2019;
- G2:** Extension of Contract dated 30/11/2021;
- G3:** Internal Investigation dated 27/09/2021;
- G4:** Termination Letter dated 05/06/2021; and
- G5:** Grievor's Response to Unfair Termination dated 10/01/2022.

Analysis and Law

[19] This grievance was referred to the Tribunal outlining the terms of reference as unfair dismissal and the remedy sought is compensation. The submission by the grievor supported the same.

[20] The Termination Letter dated 5th January 2022 states as follows:

*Mr. Rakesh (Driver)
ufs Director Disaster Management*

RE: TERMINATION

*Pursuant to the powers vested in me under Section 127 Subsections 7 and 8 of the Constitution of the Republic of Fiji and the concurrence of the Minister, I hereby terminate your contract of service with effect from **11/01/2022**.*

This decision has been made taking into consideration the allegations made against you and the investigation process confirmed as well-founded.

*As per "**Clause 10**" of your employment contract, your current contract is hereby terminated and subsequently all rights and privileges accrued to you under this contract shall be forfeited with the exception of the rights and privileges established under the Terms and Conditions of Employment.*

*You will officially proceed on annual leave of **two and a half** [2 ½] days with effect from **07/01/2022 – 11/01/2022**.*

*You are required to ensure that there is a comprehensive handover of all official documents, government assets and pending work under your charge to the **Director Disaster Management Mrs. Vasiti Soko** prior to your departure.*

Thank you for your service rendered to Government.

David Kolutagane

Permanent Secretary for Rural & Maritime Development and Disaster Management

[22] Sections 33 (2) and 114 of the Employment Relations Act 2007 states as follows:

*33 (2) The employer **must**, provide the worker **with reasons in writing, for the summary dismissal at the time he or she is dismissed**. (my emphasis).*

*Section 114. **The employer must, when dismissing the worker provide to the worker with a written statement setting out the reasons for the dismissal**. (my emphasis)*

[23] Sections 33(2) and 114 of the Employment Relations Act 2007 entitles any employee to be able to comprehend the actual facts and evidence that leads to his/her dismissal, more so applies mandatorily at the critical time when a summary dismissal is exercised. The grievor must also be made to understand clearly the reasons why he/she is being terminated. Although the employer had written to the grievor informing him of his termination, the letter was vague mentioning only that there were allegations against the grievor and did not give the actual reasons for the termination. The action of the employer in this case is therefore undoubtedly unlawful as required in Sections 33(2) and 114 of the Act.

[24] The grievor had also argued that the employer in line with Regulation 16 of the Civil Service (Discipline) Regulations 2009 did not follow procedure by not referring the disciplinary action to the Public Service Disciplinary Tribunal but instead had unilaterally decided to terminate the grievor's employment. The grievor therefore argues that the employer's non-adherence of the provisions of the Civil Service (Discipline) Regulations 2009 is unlawful.

[25] Nevertheless Section 127 (7) of the Constitution clearly articulates that the Permanent Secretary has the authority to remove and institute disciplinary action on an employee with the agreement of the Minister as follows:

*"The permanent secretary of each ministry **shall have the authority to appoint, remove and institute disciplinary action against all staff of the ministry, with the agreement of the Minister responsible for the ministry.**" (my emphasis)*

[26] The employer according to the grievor had terminated him alleging that there were allegations against him. Mr Justice Gates (as he then was) in the case of ***Philips Thomas***

v Fiji Electricity Authority HBC243 of 1996L had stated the following in regards to the employer's requirements in dealing with such cases:

"the employer must show that he believed that there had been misconduct by the employee; that there were reasonable grounds for that belief; that he had carried out as much investigation into the matter as reasonable in all the circumstances; and that the decision to dismiss him for that conduct was within the range of reasonable responses of a reasonable employer."

- [27] The grievor had informed the investigation committee that he did not fully admit to the allegations since there was another party involved (in the case of the damaged boat) and that he did not agree to the allegations of his neighbor that he had damaged the neighbor's pipe. The panel according to the grievor neither considered his plea nor conducted further investigations to his claims. Further, since the reasonable process of investigation was not followed, the employer was unable to give an unbiased consideration of the employee's explanation.
- [28] In any case, the employer, despite knowing the case was before the Employment Relations Tribunal showed no real interest to defend the claim when they were also put on notice regarding the formal proof hearing. The employer therefore did not come to the aid of the Tribunal through their side of the story despite being given several opportunities.
- [29] Although an opportunity was given for the grievor to explain or respond to the allegations, the panel did not get back to the grievor on the grievor's arguments or whether there was genuine attempts to provide reasonable grounds for termination of the grievor. What the Tribunal is looking at is whether the employer had reasonable grounds for alleging that the grievor was deserving of the termination and whether the employer had acted reasonably in terminating the grievor. From evidence the Tribunal is not satisfied that the employer had made genuine attempts to accord the grievor all the fair procedures as stipulated in the leading case of **NZ Food Processing, IUOW v Unilever 1NZILR 35;[1990]**, it says that the employee must be given:
- notice of specific allegation and its likely consequences
 - a real opportunity for explanation and
 - an unbiased consideration of such explanation.
- [30] All in all, the tribunal is not convinced that there was lawful cause to terminate the grievor as there were no actual facts and evidence provided to justify his termination.

- [31] That being the case, because the employer has failed to establish that there was lawful cause(s) to warrant the termination, the grievor's termination then in essence, become wrong, harsh and unfair.
- [32] The onus in an employment grievance matter lies on the employer to disprove any claim of termination as alleged by the grievor in this instance. Here, the employer had waived that right by not appearing on the day of hearing to defend the claim.
- [33] The Tribunal is not satisfied with the employer's decision to terminate the grievor as the employer was not able to prove the allegations against him. The decision of the employer to terminate the service of the grievor is unlawful, harsh and unfair. As a result, the grievor should be compensated.

Decision and Orders

[33] It is the decision of this Tribunal that:

- [i] The employer's decision to terminate the grievor is declared unlawful and unfair. Accordingly, the grievor's claim for unlawful and unfair dismissal is allowed forthwith;
- [ii] I will allow compensation of \$3,550.00 given the severity of the actions of the employer;
- [iii] The employer to also pay the grievor \$200 summarily assessed as loss of benefit which the worker might reasonably expect to obtain if the employment grievance had not occurred; and
- [vi] Each party will bear their own costs.

Dated at Suva this 6th day of February, 2025.




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Ms. SHANNON C TOUTOU
ER TRIBUNAL MEMBER (NON-LEGAL)