

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 22 of 2013

**BETWEEN:** PRAVIN CHAND

**APPELLANT**

**AND:** FIJI PUBLIC TRUSTEE CORPORATION LIMITED

**RESPONDENT**

*Appearances:* Mr. D. Nair for the Appellant.

Mr. D. Sharma and Ms.N. Choo for the Respondent.

*Date/Place of written Judgment:* Tuesday 19 January 2016 at Suva.

*Coram:* Hon. Madam Justice A. Wati.

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## **RULING**

**Catchwords:**

*Employment Law – Summary Dismissal – to assess lawful dismissal cause and correct procedure must be established- employer has to prove that the cause was justified and the procedure correctly followed- on the evidence before the Tribunal, it was open to it to make a finding that cause was justified- whether summary dismissal under ERP is available to employers covered by the ERP.*

**Legislation:**

1. The Employment Relations Promulgation 2007 (“ERP”): s.33

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### **Cause and Background**

1. The employee appeals against the decision of the Employment Relations Tribunal (“ERT”) of 27 November 2013 wherein it held that the employee was lawfully and fairly dismissed from employment and that he was not entitled to any remedies.



2. *Lack of responsibility in accounting for applications received in the system those received, processed and pending. This lack of responsibility and accounting of the same has also resulted in the incident not being identified;*
3. *Making recommendations without proper due diligence for payments were made on a number of applications without funds available. The accounts are as follows:*

<i>File No.</i>	<i>Amounts</i>	<i>Comments</i>
<i>483/06</i>	<i>\$331.54</i>	<i>Payment of \$635: Balance \$415</i>
<i>38/10</i>	<i>\$133.55</i>	<i>Payment of \$5,846.68: Balance \$5,713.13</i>
<i>478/00</i>	<i>\$63.88</i>	<i>Payment of \$209.36: Balance \$145.53</i>
<i>Total</i>	<i>\$528.92</i>	

*In light of the above resulting from your incompetency and other previous cases resulting in losses to the corporation, you are to:*

1. *Repay the Corporation the above amounts wrongly paid:*
2. *That your employment with the Corporation has been terminated.*

*You are given 14 days to respond to the letter”.*

7. The employee wrote back to the employer asking for a review of the dismissal. The employer responded in writing and stated that he was to remain terminated.

**Findings of the ERT**

8. At the trial, only two witnesses gave evidence. The employer produced one witness and the employee gave evidence himself.
9. The employer’s focus was on the employee’s act of recommending payments in respect of applications where there were no funds available for payout. At the outset I must make it clear that there was never a denial by the employee that there were payments in respect of



applications where there were no funds. At the trial, the employee had only denied that he was responsible for those pay outs.

10. The ERT found that the employee had a duty and responsibility to guard and protect the funds of the employer as a Trust Supervisor and that on the evidence produced by the employer he had failed in his duty which incurred loss to the employer. On the evidence the employee did not deny that payments were recommended by him when funds were not available but he denied that it was his responsibility to verify whether payments could be made. He blamed his juniors which was improper on his part as it was his duty to ensure that correct and proper payments were made and that he did not allow room due to his inaction and negligence that other staff members defraud the employer.
11. It was also held that the employer was entitled to terminate the employee summarily without notice but giving reasons for termination and up to date pay which procedure was complied with by the employer.
12. The ERT also found that there was no evidence that the employee was treated unfairly by the employee.

### **The Appeal**

13. Aggrieved at the decision of the ERT, the employee appealed by raising 7 grounds of appeal, one of which was withdraw being ground 7. The grounds are that the ERT erred in law and in fact:
  1. *in holding that the dismissal was lawful in the absence of any substantial evidence.*
  2. *in holding that in summary dismissal cases the employer is not required to uphold the principle of natural justice.*
  3. *in holding that the dismissal was lawful without establishing the process the employer had followed in arriving at the conclusion that the employee was guilty of habitually and continuously neglecting his duties.*

4. *in holding that the Public Service Act and Regulations 1999 was not applicable when in fact it regulated the terms and conditions of employment of all employees including the appellant when they were transferred from the Public Service to the Corporation.*
5. *when she demonstrated unreasonableness and bias in her decision making process when she disregarded the relevant considerations but took into account extraneous factors.*
6. *in exceeding her powers when she disregarded the evidence of the employee in its entirety only to arrive at the conclusion that the dismissal was lawful.*

### **Submissions**

14. In respect of ground 1. Mr. Nair argued that the ERT should have analysed the facts which constituted gross misconduct and also the process the employer followed in terminating the employee. No such facts were adduced to establish the lawfulness of the termination.
15. In respect of ground 2, it was established that summary dismissal can only be invoked if the employee was guilty of gross misconduct. The Public Service Act and Regulation prescribes that the employee be accorded procedural fairness before being terminated and that was not accorded to the employee.
16. On ground 3, it was submitted that initially the employee was dismissed. Then he was allowed to come to work for a month after which he was terminated. If the employee was guilty of gross misconduct, he should not have been allowed to return to work. He should have been terminated immediately after the completion of the investigation. His return to work shows that he was not guilty of the conduct complained off.
17. In respect of ground 4, Mr. Nair argued that the ERT should have first ascertained the terms and conditions which the employee was subject to and if it did, it would have, as admitted by the employer, found that the terms and conditions were the terms and conditions that existed under the Public Service Act and Regulations, 1999. This law speaks of procedural fairness which was not followed and which was not even given any regard to by the ERT.



18. In respect of ground 5, it was argued that there was no evidence adduced to establish that the employer suffered financial loss due to the actions of the employee. The only time the employer had made known to the employee about the financial loss was when he was served with the letter of termination. The ERT relied upon the hearsay evidence of the employer that there was financial loss.
19. In respect of ground 6, it was argued that pursuant to s. 171 of the ERP, the decision of the ERT ought to have been given within 60 days from the date of the completion of the hearing. The hearing in this case was concluded on 24 August 2012 and the decision was delivered on 27 November 2013. In this regard the ERT exceeded her jurisdiction and so the decision is null and void.
20. Mr. D. Sharma argued that his first objection was the form in which the appeal was filed. The notice of appeal had scattered grounds. The first ground is so generalized. At least the appeal should have alluded to the judgment where such a point is made which is appealed. The entire reading of the notice of appeal does not indicate what the appeal is about.
21. Ground 2 also does not allude to where the finding was made in the judgment. This all makes it very difficult for the respondent to prepare the case.
22. Mr. Sharma further argued that the employer had to establish the cause and procedure under s. 33 for terminating the employee. There were two witnesses and the ERT found that on the balance of probability, the employer had established the case. The employer does not have to establish the cause beyond reasonable doubt.
23. It was also a question of whose evidence was to be believed and the employer's evidence was accepted. The appellate court cannot lightly interfere with that finding. The employer does not have to corroborate the evidence given by one employee.
24. The ERT also did not oust the PSC Act and Regulations. It made a finding that the dismissal was carried out under s. 33 of the ERP. This is a statutory prerogative of the employer and cannot be denied by any other law.

25. The parties had filed their closing submissions in September 2012 and decision delivered in November 2013. The decision cannot be invalidated because it was delivered outside the timeframe provided for by the statute.

***Law and Analysis***

26. The First issue that I have to determine pursuant to the appeal is whether on the evidence produced before the ERT, it was open to it to make a finding that at least one of the causes based on which the employee was terminated was established by the employer and that that cause was one for which summary dismissal was available to it under s. 33 of the ERP.

27. The evidence of the employer was that the employee received certain applications for payments of monies. Without verifying with the Accounts Section as to whether there were enough funds for payment, he proceeded to recommend the payments.

28. The employee's evidence was that he was not in charge of the verification process. The verification was to be carried out by the accounts section being the Registry Clerk and that the final approval was given by the CEO. He did not make any payments.

29. The ERT found that the employee was in a position of the Trust Supervisor. It was his duty to supervise and manage the funds of the employer and that he cannot shift the blame on a junior and a senior staff and expect to be exonerated from his obligations to ensure that every application in respect of which he recommended payment was proper.

30. I do not agree with Mr. Nair that the employer produced hearsay evidence. There was direct evidence from the employer that there were certain accounts, particulars of which were contained in the termination letter that the employee recommended for payment. In these accounts funds were not available and the employee did not check for the availability of the same.

31. The employee was holding the position of the Trust Supervisor. He was to ensure that what his staff did was accurate. He had to check on their work and if they made a mistake, it was his duty to correct that. What he did in turn was to endorse the errors of the clerks. What was the point of him holding the position of the supervisor when he could not verify for himself a basic process



of only paying out when there is money available for doing so. He was responsible as a guardian to guard the funds of the employer. He failed to do so.

32. The employee was given a final warning on 30 November 2009. In the final warning it was stated that due to the employee's negligence there was a wrong payment done from the trust fund in the estate of Vula Moon. The letter also stated that the employee had admitted to this act.
33. Then there was an email to the employee on 30 March 2010. In that email it was alleged that the employee had been making recommendations for payments on the withdrawal applications before the Accounts had been verified. He was reminded to follow the withdrawal procedures to eliminate the risk of wrongful payments, fraud and other losses that may arise due to the negligence. The employee was asked to refrain from the short cut practices. On the same day, the employee replied to that email and stated "**noted**". The employer then asked one other staff to print and keep the email in his personal file.
34. All the above shows that the employee had been in the habit of recommending payments without verifying the same with accounts. In his evidence the employee did not deny that the act occurred. He however denied being responsible which on the evidence he cannot as he had been warned and told of the procedure to verify with accounts before making the payments. His excuse is lame. Even in his letter of response to the termination he wrote to the employer that:  
  
***"It was the responsibility of the Accounts to put their comments on the availability of funds and foremost before any payment is made, this verification should have been done. I do not have access to the accounts where the funds are determined"***.
35. I am alarmed that despite being warned for the same previous mistakes, the employee chooses to recommend for payments in respect of applications where there were no monies. He says someone else is responsible and that he does not have access to accounts showing the funds. If it was not his duty to make verifications, why would he been given previous warnings. He denied at the ERT of having received any warnings but I find that the ERT was correct in making a finding that the warnings were given. There was no point in putting this in the employee's file when there were not any warnings.



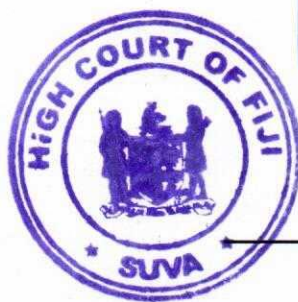
36. I find that the employee had also responded to the email warning. How would he respond if he did not receive it? All this makes the employee's evidence incredible to put any reliance on.
37. Mr. Nair also argued that the employee was initially suspended and then he returned to work. If he was guilty he would not have returned to work. The employer would have terminated his employment forthwith. I find this argument to be devoid of any merit and more lay than legal.
38. The suspension letter of the employer indicated that the employer needed one month for the investigation into the alleged activities against trust staff for fraudulent activities and unauthorized use of trust funds and that after one month the employee was to return to work.
39. As per its undertaking in the suspension letter, that the same was for investigations and that the employee was to return to work on a certain date, the employer allowed the employee to work. A decision was made on the report later and then the termination was effected. This does not mean that the employer exonerated the employee in any way.
40. Mr. Nair also argued that the only time the employee came to know about the financial loss to the employer was when he was given the termination letter. Even the suspension letter mentions the trust funds being affected by fraudulent activities and unauthorized use. The employee therefore knew that the employer had gone into financial loss for which he was being investigated.
41. Since the employee had been neglecting his duties, s. 33 remedy was available to the employer. The employee cannot say that he is entitled to be heard before the dismissal was carried out. It is the employer's prerogative to carry out summary dismissal in a matter of this kind and the ERT was correct in finding that the only procedure required was to grant reasons in writing for the dismissal and up-to date pay.
42. The summary dismissal procedure, by virtue of the ERP, is available to all the employers covered by the ERP. It is the employee who filed a case under the ERP. It is ironical for him to now argue that s. 33 provisions do not apply to him.
43. The employee also argued that the ERT did not give the required decision within 6 months of the date of hearing. All the users of the ERT are fully aware that it is inundated with work. The ERT

has to hear cases throughout Fiji. There are only two legal personnel's to hear the cases. Whilst it is appreciated that the statute mandates an early decision, there are lack of resources to comply with the requirement. Be that as it may, the issue that arises from this ground of appeal is whether the decision is valid even if it was not delivered within the 6 months timeframe. I find that it is still a valid decision and that the Court cannot overturn the same based on the delay.

**Final Orders**

44. I find that the appeal has no merits and I dismiss the same.

45. Each party to bear their own cost of the appeal proceeding.



*Anjala Wati*  
Anjala Wati

Judge

19.01.2016

To:

1. Mr. D. Nair for the Appellant.
2. Mr. D. Sharma for the Respondent.
3. File: Suva ERCA 22 of 2013.