

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**ORIGINAL JURISDICTION**

**CASE NUMBER:** ERCC 23 of 2018

**BETWEEN:** **SHANDIL MUKESH PRASAD**  
**PLAINTIFF**

**AND:** **MINISTRY OF EDUCATION, HERITAGE AND ARTS**  
**DEFENDANT**

**Appearances:** *Mr. D. Nair for the Plaintiff.*  
*Ms. P. Singh and Ms. G. Naigulevu for the Defendant.*

**Date/Place of Judgment:** *Monday 01 March 2021 at Suva.*

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

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**JUDGMENT**

**A. Catchwords:**

**EMPLOYMENT LAW** – *Summary Dismissal of Principal of School on the grounds that he had inflicted corporal punishment on a student: the act complained of in the termination letter was slapping a student when he was being reported and investigated for slapping 6 students- Principal denies inflicting corporal punishment on any student but admits touching the students faces in a friendly and non-hostile way to see whether they had glitter on their face – finding made on whether the Ministry could establish that there was corporal punishment and whether it complied with the procedure to carry out the summary dismissal – termination found to be unlawful and unjustified – employee reinstated with no loss of benefits – all wages lost as a result of the dismissal ordered to be paid within 6 months from the date of the order.*

**B. Legislation:**

1. *The Employment Relations Act 2007 ("ERA"): ss. 30(6), 33(2), 110(3), 188(4), 194(5), and 200(1)*
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*Cause/Background*

1. The plaintiff whom I shall refer to as *Shandil* was the Principal of Duavata Secondary School. He was terminated from employment on 6 September 2018 on the grounds that he had inflicted corporal punishment on a student of the same school, this being the only allegation referred to in the termination letter. It was reported against *Shandil* that he had slapped 6 students during lunch time for having glitters on their face. He was being investigated for slapping 6 students
2. The termination letter reads:

*“Re: Termination of employment effective 6 September 2018*

*By virtue of the power vested in me under Section 127(7) of the 2013 Constitution of the Republic of Fiji, and in agreement with the Honourable Minister for Education, Heritage & Arts. I wish to advise that your contract has been terminated with effect from 6 September 2018 as a result of you inflicting corporal punishment on a student.*

*The Government has a zero tolerance approach to corporal punishment and your actions are a breach of the Code of Conduct and the terms of your employment contract.*

*You have forfeited all rights and privileges accrued to you as a Civil Servant effective from 6<sup>th</sup> September 2018. You are hereby given notice to vacate the school accommodation quarters with immediate effect.*

*Should you have any further queries please contact the undersigned.*

*Yours sincerely,*

*Sgd*

*ALISON BURCHELL [MS]*

*Permanent Secretary”*

*Underlining is Mine*

3. *Shandil* has vehemently denied any act of corporal punishment on any child or the children. His position is that it was during lunch time when the teacher on duty informed him about

the students flying rubber bands. He went out to investigate the issue. He saw glitters on the face of 6 students. He touched their face in a very fatherly, friendly and non-hostile way to see whether and where the glitters were. He described his friendly touching as "tapping". When he saw the glitters, he told them to wash the same off after which he used his handkerchief to wipe off the remaining glitters.

4. Before being terminated, Shandil was informed through a letter of 16 July 2018 by the Ministry of Education, Heritage & Arts ("**MoE**") that he would be investigated for inflicting corporal punishment, abuse of office and unprofessional behavior. The letter reads:

*"Re: Investigation IRO and Allegation of Inflicting Corporal Punishment, Abuse of Office and Unprofessional Behaviour.*

*This is to inform you that we have received complaints against you in relation to the above allegations.*

*An investigation will now be carried out against you in relation to the allegations, thus you are therefore required to make yourself available upon the arrival of the investigation team. Other required documents, requested by the investigation panel will need to be presented as your source of evidence.*

*Please note that the investigation is in line with the Public Service Disciplinary Guideline, 2017..."*

5. Subsequent to the investigation letter, a face to face interview was carried out with Shandil and he denied the act of corporal punishment. The MoE carried out an investigation and upon its finding that there was corporal punishment, terminated Shandil.
6. Post his termination, Shandil filed an originating summons seeking the following reliefs:

- a. *A declaration that the decision to terminate the employment of the plaintiff was unfair, unlawful, unjustified and manifestly harsh;*
  - b. *A declaration that the decision to terminate the employment of the plaintiff was procedurally unfair, lacked impartiality and manifestly harsh;*
  - c. *An order that the plaintiff be reinstated without any loss of benefits and entitlements.*
7. It is not disputed that the Fijian Government has a zero tolerance policy on corporal punishment and that a circular to this effect had been sent to all schools. The teachers are well aware of the policy.

*Agreed Issues to be tried/Mode of Proceedings*

8. During the proceedings, it was agreed by the parties that the principal issue that needed to be tried was whether or not Shandil has inflicted corporal punishment on any child as alleged by the MoE and if so whether the termination was justified substantially and procedurally.
9. The Ministry had also raised a preliminary issue on procedure and that is whether Shandil ought to have first invoked the services of the Mediation Services Unit before filing the same in the Employment Relations Court. I will deal with this issue first before delving into the substantive issues.
10. It is important to highlight that since the act complained of by the MoE, that is, corporal punishment was denied by the Plaintiff, I indicated to the parties that there is a controversy that needs to be resolved and that the evidence of the act complained of needs to be tested.
11. For that, I allowed the parties an opportunity to present witnesses to establish their claim and defence. The plaintiff preferred to give oral evidence whilst the defendant chose not to.

12. The MoE initially relied on the ground that it may be prejudicial to the children to come to court and give evidence. It later informed the court that the children cannot be found to give evidence. I was therefore informed that the defendant will only cross-examine the plaintiff and rely on the affidavit filed by it.
13. Without going into any other aspect of the evidence at this stage I show my concern on the defendant's position that it cannot bring the students to give evidence as it will be prejudicial to them. There is no prejudice in fact that was established when the submission was made. In any event, Shandil is no longer teaching in that school or for now in any school to allow him to victimize the students. There have been some allegations on him that he had consulted the students and/or the parents to influence them but that is a live issue that I will determine.
14. In any event, if that is the case that Shandil will influence the students and their parents then that is something that the MoE needs to again establish through the students or the parents. If undue influence has already taken place, then the question of the children being prejudiced does not arise as Shandil cannot be expected to victimize the children who have now been influenced by him.
15. I do not endorse the MoE's submission on why the students and/or their parents or anyone else could not be brought to test the veracity of the allegation of corporal punishment.
16. Be that as it may, I will now analyse the evidence before me to find whether the allegations against Shandil can be met but before that I will specify the issues before the Court:
  - (i) *Whether the employee should have first referred the grievance to the mediation services since the defendant is an essential service and industry.*
  - (ii) *Whether Shandil had effected corporal punishment on a child or any children.*
  - (iii) *Whether Shandil had used his position to influence any student or anyone else for a favourable response to assist him.*

***Determination***

17. The first issue that I need to focus on is the preliminary issue raised by the MoF. It says that the employee should have first filed his cause in the mediation unit before filing the same in the Employment Relations Court. The basis of the employer's argument is that it is regarded as an essential service and industry and guided by Part 19 of the ERA.
  
18. It argued that s. 188(4) of the ERA says that any employment grievance between a worker and an employer in an essential service and industry shall be dealt with in accordance with Parts 13 and 20 of the ERA. Part 13 contains s. 110 (3) which states that all employment grievances must be first referred for mediation services set out in Division 1 Part 20 of the ERA.
  
19. I find that the employer is only applying s. 188(4) without looking at and analyzing the scheme of how grievances can be lodged in different forums, the Tribunal and the Court. As a result of not appreciating the scheme for lodgment of grievances, it fails to read s.188(4) in a meaningful and workable way. For clarity, I must say that a worker can choose to file his grievance either in the Tribunal or the Court. The Tribunal's jurisdiction on claims has a monetary ceiling of \$40,000.
  
20. S. 188(4) says that the employment grievance must be dealt in accordance with Parts 13 and 20. The provisions on employment grievances to be first referred to the mediation unit, though, exists under both parts 13 and 20, the directions in both the provisions does not carry the same mandatory force.
  
21. Whilst s. 110(3) falls under Part 13 of the ERA, s. 200(1) falls under Part 20 of the ERA. Part 20 establishes both the Employment Relations Tribunal and the Employment Relations Court.
  
22. S. 110(3) makes it mandatory that the grievances be first referred to the mediation unit whilst s. 200(1) (a) grants the person filing the grievance an option to choose whether he or she will first go for mediation.

23. Upon reading both the sections on mediation, it can be safely concluded that if a person wishes to access the Employment Court, s. 200(1) (a) can apply and there will not be a need to go through the mediation services first. However, if a person wishes to access the Employment Relations Tribunal, he or she has to first go through the mediation services unit as provided for under s. 110 (3) of the ERA.
24. I say this with conviction because s.194 (5) of the ERA states that *"if a Mediator fails to resolve an employment grievance or an employment dispute, the Mediator shall refer the grievance or dispute to the Employment Relations Tribunal"*. The legislation provides no scheme to refer the matter to the Employment Relations Court which means that those who wish to file their proceedings in the Employment Relations Court and do not wish to end up in the Employment Relations Tribunal by virtue of the mandatory requirement in s. 194(5), do not have to utilize s. 110(3) of the ERA.
25. I therefore do not feel that mediation is a prerequisite for adjudication of matters in the Employment Court. There is no provision close to requiring this although it is desirable that parties consider settling employment grievances before coming to court.
26. The next issue that needs determination is whether the dismissal of Shandil is lawful and justified. To determine whether it is, I need to examine whether the MoE has established through the evidence tendered in Court that Shandil had effected corporal punishment on a child. I need to also examine whether proper procedures were followed in dismissing Shandil from his employment.
27. I will first of all examine the procedure that the legislation requires to be effected before carrying out the termination. The procedural examination is necessary first because it is under this head that I will have to discuss the specific reason for Shandil's termination and whether he knows specifically the reason for his termination. In reference to the legislation, I will have to decide whether it was sufficient in this case to provide a letter of dismissal lacking specificity.

28. I should elaborate that the defendant is not clear in what position it has taken to terminate Shandil. If one looks at the termination letter, it indicates that only a student (*which means 1 student*) was affected in that he was the victim of corporal punishment. However, the affidavit of the MoE is very clear. It states that Shandil had inflicted corporal punishment on 6 students. The affidavit further says that the MoE was satisfied that "*the plaintiff inflicted corporal punishment to school students*": para 6 of the affidavit.
29. The letter of termination and the affidavit does not clearly show the correct position taken by the MoE. What is it that the MoE is saying? Is it 1 or 6 students affected by corporal punishment? The investigation against Shandil was for inflicting corporal punishment on 6 students but he was terminated for inflicting corporal punishment on only 1 student.
30. Shandil was and is therefore entitled to know the precise reason for which he was terminated. Shandil was entitled to know from the termination letter as to which student out of the 6 he was found to have inflicted corporal punishment on.
31. In my finding, given the allegation against Shandil, it was not fair to omit the name of the student against whom the MoE found the allegation to be established. Who is that student that the MoE is referring to? Why could the letter of termination not be transparent and specific in that regard? Why should Shandil be kept in the dark?
32. Shandil has had his livelihood affected. He ought to know exactly what the MoE has relied on to dismiss him from his decade's long service to the country. The least the legislature requires is to inform the affected party of the reason for his dismissal. It is not enough to state that corporal punishment was effected on a student.
33. S. 33 (2) of the ERA states that if a worker is summarily dismissed, the employer must, provide the worker with reasons, in writing, for summary dismissal at the time he or she is dismissed. The term "*reasons*" to my mind means clear specific reasons. In that regard, I do not find that the spirit and intent of s. 33(2) had been completely met by the employer. In this way the procedure in issuing the termination letter with reasons required was not followed.



34. I am also concerned that when Shandil was terminated, the MoE did not comply with s. 30 (6) of the ERA which states that *"upon termination of a worker's contract or dismissal of a worker, the employer must provide a certificate to the worker stating the nature of employment and the period of service"*. This means that the employer is to provide the worker with a certificate of service upon his dismissal. Being an essential service and industry does not mean that the employer can fail to comply with the rules set out by the legislature. It is important that the employer follows the procedure outlined so that the decision to terminate does not become unjustified for want of compliance with proper procedure.
35. I find that the employer had not complied with proper procedure in carrying out the termination in that the written reasons was not sufficient to meet the requirements of s.33(2) in the circumstances of this case and that the certificate of service was not given to Shandil when he was terminated.
36. I must now go into the reason for the termination and see if the same is justified. The issue is whether Shandil had assaulted a child. I do not know which child is considered the victim in this case. Since there are 6 children involved at the complaint and investigation stage. I can only do justice to the matter by finding whether the evidence establishes that any one child out of the 6 was assaulted.
37. I will start with the evidence of Shandil. His statement to the investigation panel was attached to the investigation report which was disclosed to the court through the employer's affidavit.
38. Shandil said in the statement that it was during lunch time when the teacher on duty brought some students to him complaining that they were shooting rubber bands. Shandil said that he went out to investigate. He saw that the students had glitters on their face. He checked their faces. They had glitters. He tapped them on their cheek and asked them to wash their faces. He used his handkerchief to wipe off their faces. One student Rupeni started laughing

and when he questioned Rupeni why he was laughing, Rupeni responded saying that it was the first time for him to see a principal wiping the students face.

39. It is this word "*tapping*" used by Shandil that caused alarm and a lot of concern to the MoE. The MoE says that tapping means hitting or slapping and that constitutes corporal punishment. However Shandil explains the context in which he used the word tapping. He said in cross- examination that he could describe how he tapped. He said that he turned the student's faces by touching the same to see whether there were glitters. The tapping was in a very fatherly, friendly and non- hostile way. There was no element of force.
40. Shandil demonstrated how he tapped the students and from his demonstration I find that he only touched the student's faces to see the glitters. The touch was very fatherly. Shandil said that although the touching was physical contact, it was not an assault but a fatherly touch. There was no element of force used and it was not his intention to use force either. Since they were boarding students, he needed to show that he cared about them and not that he wanted to discipline them. The red marks, according to Shandil was due to the wiping of the glitters from the face.
41. I must analyse Shandil's evidence. If I find from his evidence that his "*tapping*" the students faces amounted to slapping or hitting the students then I would find in favour of the MoE that there was corporal punishment. However, if I find that although Shandil had used the word "*tapping*" but he had just touched the student's faces to turn around to see the glitters and that his touch was very fatherly, friendly and not hostile, I will not find that there was corporal punishment on the students.
42. I find Shandil to be a credible witness and I accept that when he saw glitters on the face of the students, he wanted to check their faces. He touched their faces to turn it around and when he saw the glitters he asked them to wipe it off. He then used his handkerchief to clean their faces which had resulted in leaving their faces red. Glitters are normally not easy to remove and wiping the faces to take it off can easily leave marks on the face.

43. In the circumstances, it would be very wrong and unfair to suggest and accept that Shandil's touching the student's amounts to corporal punishment for which he can be deemed to have breached the MoE's policy on child protection and corporal punishment. Shandil's care and concern cannot be equated to corporal punishment although there was physical act of touching the student's faces.
44. The investigation report also contains statement of other people who were interviewed. The Vice Principal, Mr. Apete Tabaka ("**Tabaka**") also gave a statement. Tabaka stated that he did not witness any incident but only heard that the Principal slapped 6 students.
45. He also stated and I quote from the investigation report "*some people do not accept criticism. This person was criticized and he was looking for something to report. Before that incident happened. He was quite slack. Recently he has improved with after the incident. Class control. Supervision to duties. In the class... last year – assume there was a personal difference when – when vehicle was bought the difference*".
46. Tabaka's evidence does not help the MoE's case on the issue of corporal punishment as he was not there to witness the incident. He also does not clarify from whom he heard about the incident. The best I can make from the statement is that there was a personal difference between Shandil and one Navneet Prasad ("**Navneet**"), a school teacher from the same school who had instigated the complaint of corporal punishment to be filed to the police and the Ministry of Education. I can also say that the difference between the two was either because of Navneet's incompetency or that it was merely personal between him and Shandil. Tabaka was aware of their difference.
47. Navneet also gave his statement. He was the form teacher of the students who were allegedly the victims of corporal punishment. He is the person who got a student to write a letter of complaint regarding the alleged assault. He had also taken photos of the students without their consent. He also reported the incident to the Police and the Ministry of Education.

48. In his statement, Navneet said that it was lunch hour and he had gone home for lunch. It was a Wednesday. He came to the class and saw the students touching their faces. He asked them what happened and they said that the Principal had lined them up and slapped their faces because they had applied glitters on their faces.
49. On Friday of the same week, the Crime Prevention Unit visited the school. After the awareness, the students realized their rights. Maikeli Sauwaqa ("*Maikeli*"), a student, then wrote the letter and lodged it with the higher authority.
50. Navneet also stated that since he had learnt from the police officers that anyone can make a complaint, he called the Permanent Secretary on Monday and informed about the incident. He also called one of the students' parents.
51. He further stated that the following week Monday, the students came back and wrote a letter to him indicating about being slapped on the previous week Wednesday. The letter was written by one Maikeli who was not in the group of students being slapped. The letter was signed by all the students. He said that on Monday he had asked the students whether anything had happened on Friday and the students told him that they wrote a letter to the police regarding the incident. He said that he did not initiate the process of writing the letter.
52. Navneet further said in the statement that he knew that the students had lodged a complaint to the police but he still went ahead and made a complaint on the child helpline and also called the Permanent Secretary. He was asked by the Permanent Secretary to email her which he did. He did not speak to the Principal before lodging the complaint.
53. In his statement, Navneet also talks about how the Principal used to shout at him on various issues: for not submitting work on time when he did, for not releasing students out of class on time, for not controlling students in the class, for not being in the class on time and so forth. He said that after the incident, the Principal has stopped shouting at him and is no longer rude.
54. After reading all the statements attached to the investigation report, it is very clear that Navneet had personal issues with Shandil. He did not like being pulled up by the Principal.

Whether he was rightly pulled up or not is not a matter before me to decide. All that is established is that Navneet used his personal animosity to excite the students to exaggerate the incident of Shandil touching the children's face and removing the glitters. He equated that to slapping and required the students that it be reported.

55. I do not find that the students wanted to report the matter. If they did, they would have taken action without Navneet instigating a student Maikeli to write the letter. The students had to indicate that they were slapped because without that, there was no complaint to be raised against Shandil.
56. Navneet is also dishonest in his statement by saying that Maikeli wrote the letter on his own and that he had not asked Maikeli to write that letter. Maikeli had very clearly denied this and said that he wrote the letter on instructions of Navneet who had edited the same after which Maikeli re-wrote the letter. There is no reason for Maikeli to be dishonest. He was not even a victim. Why would he feature in the incident when he could have steered clear of it? I find that had it not been for the influence of Navneet, Maikeli would not have written the letter.
57. Navneet also said that the incident happened on Wednesday and the Child Protection Unit from the Fiji Police Force came to the school on that week Friday after which the students realized their rights and decided to report the matter. This statement is contrary to Maikeli's statement that Navneet had asked him to write the letter on Wednesday.
58. If Navneet can be dishonest about how the students had decided to complain, his evidence that the students told him that they were slapped cannot be relied on. It is very clear that he wanted to have Shandil investigated and removed. All the school teachers who gave the statement are of the same view that Navneet was looking for something against the Principal and in my finding he has confused the students to take the touching as slapping and had Shandil reported. His email to the Permanent Secretary of 21 June 2018 is very clear that he had reported the matter and that he is the one who used the word slapping. He also talks about his difference with Shandil in another email of the same date.

59. If it was not for Navneet and his personal animosity, Shandil's regard and care expressed to the students would not have been made an issue. I should further remark that Navneet's evidence has not been tested and cannot be relied upon to impeach Shandil. If he gave evidence, a lot of the inconsistencies in his statement would have been brought up. His credibility is also very questionable and the cross-examination would have highlighted that.
60. There is another statement attached to the investigation report. It contains the names of 6 students Samuela, Kavaia, Rupeni, Kalivereti, Apenisa and Ledua. The statement indicates that one Samuela said that the Principal slapped their cheek. After that the Principal took out his handkerchief, wet it and rubbed the glitter off. They were embarrassed when they were slapped. When Navneet came to the class, he asked them what had happened. He then took the photo of their faces on the same day. He did not explain to them why he was taking the picture and for what purpose. Navneet is the one who told them to sign a letter written by Maikeli. Navneet is late to Maths class.
61. The statements of the witnesses are very unreliable. It shows that only Samuela said that the students were slapped. Why have other students not complained of slapping? I understand that all the students have signed the statement but it is very dangerous to rely on evidence which has not been tested. If oral evidence was given, Shandil would have had a fair chance of putting his case to the students and asking them whether they were influenced by Navneet to change the friendly tap into a slap.
62. A person's livelihood has been affected and it is for this court to find on a balance of probability that the incident of slapping occurred. Given the history of the personal difference between Shandil and Navneet, it is very probable that Navneet has fed the students to use the word slapping to make a case against Shandil. It is very clear that he is the one who took photos without their consent and without telling them what the photo was going to be used for. Navneet's intention was malicious. His actions were not designed to protect and safeguard the students.
63. The student Maikeli also gave a statement to the investigation team. He stated that Navneet had told him to write a letter. He did that and Navneet edited it. Maikeli said that he re-

wrote the letter. Navneet then asked him to take it to the students and get the victims to sign the same. All this happened on Wednesday.

64. Maikeli further stated that Navneet had told him that the police will come on Friday and investigate the case. On Friday, he asked Maikeli about the letter. Maikeli said he told Navneet that he had the letter. Navneet then asked him to hand it to the police which he did.

65. Maikeli features in as one of the persons being interviewed because he had written the letter. He has not witnessed the slapping nor has he said that the students have told him that they were slapped. The letter that was written by Maikeli has not been adduced in evidence for me to comment upon. I do not find that Maikeli's evidence in any way establishes that there was slapping incident by the Principal.

66. I am also concerned about the missing letter signed by the students. Why has the investigation team not included that in the report? What did the letter say? Would it be prejudicial to the employer's case if it was disclosed? Was the investigation fair in that regard? These are the issues bothering my mind and concerns me. Can the investigation said to be fairly conducted? How reliable is the report in absence of it being tested in Court? I do not find that the investigation report can be taken as unquestionable evidence. It is subject to as much scrutiny as any other evidence and if the makers of the report took stand to give evidence, their credibility would be questionable.

67. Mr. Nemani Moi ("*Nemani*"), the Head of Department - Mathematics also gave a statement to the investigation team. He said that before the incident of slapping happened, the principal used to address Navneet's weakness in a professional way. The Principal only became harsh after the incident. According to Nemani, Navneet had discussed the slapping incident with him. He told Navneet that it was up to him to report.

68. Nemani said that Navneet had told him that he has sent the mark sheet to the Principal but in the briefing it was highlighted that the Principal had not received the same. According to Nemani, Navneet personalized the Principal's actions and when he slapped the students,

it gave Navneet an opportunity to report the matter. Nemani said that Navneet had said “*no more and he will report*”.

69. Nemani’s statement does not assist when it comes to finding whether there was corporal punishment. At best it indicates that there was difference between Shandil and Navneet because of Shandil addressing Navneet on his shortfall. This strengthens my finding that it is Navneet who had used the students to get back at the Principal.

70. Mr. Sevanaia Matevakaloloma (“*Sevanaia*”) the assistant form teacher of the said students stated that when the Principal had a briefing with the teachers, he addressed the issue of submitting the mark sheets. The Principal indicated who had submitted the mark sheets and who had not. Sevanaia said that he noticed that the relationship between the Principal and Navneet was not good. The Principal is harsh on Navneet and always picks on him. All the reports by the Principal has Navneet’s attitude towards work mentioned. Sevanaia said that the two are competing with each other and it could be because of wealth.

71. Mr. Sailosi Koroibola (“*Sailosi*”) also gave his statement to the interview panel. He stated that he had personally not witnessed the incident. He came to know about the incident after the police officer being the child protection officer had left the school premises.

72. Sailosi stated that he had accompanied the Principal to see the parents. He did that as a protocol officer. The Principal told the parents that the students had put glitters on their faces and that he had not slapped the children. It was just a tap.

73. According to Sailosi, only one parent had retaliated. The parent said that he has forgiven the Principal but will let the law take its toll.

74. The statements of Sevanaia and Sailosi also do not assist in the finding of whether there was corporal punishment effected on the students. They had not witnessed the incident. However they were very much aware about the difference between Shandil and Navneet. I cannot help reiterating that Navneet’s actions in instigating a report was not done with



good intent to protect the students. The evidence shows a higher probability of Navneet influencing the students to lodge a complaint against the Principal.

75. I find that Navneet has created an atmosphere to make the incident look very serious when Shandil had not caused any harm or assault on the children. The investigators could have easily picked this up if they looked at the issue with an independent mind and had analysed everyone's statement. The Ministry relied on this statement to dismiss Shandil which I find lacks justification. If the investigators were independent, they would have also interviewed the teacher on duty who Shandil says had reported to him about the students shooting the rubber band. The teacher on duty was the eye witness to what happened. Why was that teacher not interviewed?
76. I find that the investigation lacked transparency and that the material witness who could have given an independent account of what had happened had been deliberately left out from giving a statement. This actio does not help the MoE in establishing fairness in the investigation.
77. The third issue that I need to address is whether Shandil had interfered with the investigation at any point in time. It is agreed by Shandil that he had, as part of the tradition, gone to see the parents to explain his side of the story and to seek forgiveness on what had happened.
78. Shandil's act cannot be classed as something unheard of or not commonly practiced in an i-taukei community. It is common knowledge that in an i-taukei community, if a person feels that the community or a group of people are being offended, it becomes his or her duty to approach the group in a friendly manner and explain his or her side of the story. This is what Shandil exactly did.
79. The MoE is using the letter written by the parents on 21 June 2018 to indicate that Shandil had interfered with the parents. The letter indicates that Shandil had visited the parents even before he was told about the investigation against him. That clearly shows that Shandil

considered it tradition to visit the parents and explain his side of the story. He did not visit the parents to interfere with them.

80. It is also very clear from the letter that Shandil had not met the parents or students individually to influence them. He had met all of them together in presence of the Turaga ni Tui Cawaro. He had also taken a school teacher named Sailosi with him. If he wanted to influence the parents and interfere with them, he would not make the process a formal one but would sneak to get audience with the parents individually.
81. The MoE is using the mere meeting as interference. They have not shown any evidence of interference in fact. They are using the letter from the parents to justify their unpreparedness to get the students evidence taken orally in court to test the same.
82. Interestingly, the letter by the parents does not mention any influence by Shandil. It says that after listening to Shandil they have forgiven him and have withdrawn their complaint against him. It also states that there was a misunderstanding that they had and it arose when the police and the social welfare officials made their visit. The parents also express concern on how their children were being photographed without their consent. They acknowledge that the alleged "slap" was actually an advice as expressed by Shandil.
83. The parents allege in their letter that Navneet should have consulted them about the incident as the students had not mentioned this to them. They say that the incident was exaggerated by Navneet.
84. I have also not seen any statement from the Turaga ni Tui Cawaro or Sailosi to the effect that what Shandil did on the day was interference with the parents and the students. The MoE, I find is acting on its presumptions.
85. I am not surprised that the parents had easily deduced that Navneet had actually instigated and exaggerated the incident for his own personal gain and not for the benefit of the students.

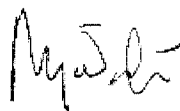
86. I find that there was no corporal punishment and no interference by Shandil with the parents or the students who had allegedly complained about corporal punishment. In my finding, The Ministry has not been able to establish that there was corporal punishment as a result of which it has failed to meet the reasons for terminating Shandil.

***Final Orders***

87. In the final analysis I find that Shandil's dismissal from employment was unlawful and unjustified.

88. I therefore make the following orders:

- (a) *That Shandil be reinstated to his former position or a position which is no less advantageous to him within 21 days from the date of the order.*
- (b) *That Shandil should be paid all lost wages from the date of dismissal to the date of reinstatement within 6 months from the date of the order.*
- (c) *That the employer shall pay costs of the proceedings in the sum of S3,500 to be paid within 21 days.*



*Hon. Madam Justice Anjala Wati*

Judge

01. 03. 2021



To:

1. *Mr. D. Nair for the Plaintiff.*
2. *AG's Chambers for the Defendant.*
3. *File: ERCC 23 of 2018.*

