

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER:

ERCC 06 of 2016

BETWEEN:

DR. RAVINDRA KUMAR PRAJAPTI

PLAINTIFF

AND:

FII NATIONAL UNIVERSITY

DEFENDANT

Appearances:

Mr. Naco and Mr. D Nair for the Plaintiff.

Mr. B. Singh and Mr. R. Chand for the Defendant.

Date/Place of Judgment:

Monday 22 November 2021 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

JUDGMENT

A. Catchwords:

Employment Law – Whether the termination of the employment was lawful and fair – proper compensation in the circumstances.

Cause and Background

1. The plaintiff claims compensation for unlawful and unfair dismissal. In form of brief background, he is from India. He says that the defendant (“FNU”) had advertised in the Indian papers a vacancy for the position of an Assistant Professor in Psychology, Guidance & Counselling. He applied for the position.

2. On 5 March 2013, the plaintiff entered into an employment contract with FNU for a term of 3 years with effect from 10 April 2013 to 9 April 2016. He was based at Lautoka campus.
3. The plaintiff says that when the contract expired, there was uncertainty in regards the renewal of the same. He alleges that there was no constructive decision forthcoming from the University. The defendant then refused to renew the contract and the plaintiff says that he exhausted all his avenues after which he approached the Minister of Education, Attorney General and the Prime Minister.
4. The defendant then renewed the contract for a period of 1 year beginning 22 May 2016 to 21 May 2017 for Assistant Professor, Guidance & Counselling at Nasinu Campus. The plaintiff says that apart from the transfer, there was fundamental variation to his new contract that reduced his teaching responsibilities. He then admittedly wrote an email to the Attorney-General of Fiji on 21 May 2016. His email which was tendered in evidence as *P Ex- 3* reads:

"Hon. Sir

Thank you very much for renewing my contract.

The DEAN – College of Humanities and Education, Fiji National University, Fiji, Dr. Eci Nabalarua, is not allowing me teach any specialized subject. She is aware that in school of education, no one is qualified to teach EDU 701, Counselling Theory and Practice, which is offered for Year – 3 Primary and Year – 2 Secondary students. I had written several mail to her but she is not allowing. This is doing injustice not only with me but also all students, parents, community, society, university and nation. All my communication with madam DEAN is attached.

Now she transferred me from Lautoka to Suva without any teaching load.

Requesting you, she can withdraw my transfer and allow me to teach my specialized subject for benefits of students, parents, community. Society, university and nation.

Thank you.

Kind Regards.

Dr. R.K.Prajapati”.

5. It is this email to the Attorney – General that aggrieved the employer and Dr. Prajapati was therefore summarily terminated on 26 May 2016. He was issued with a letter of termination dated 26 May 2016 through which his action of writing that email to the Attorney – General was classed as gross misconduct under clauses 8.5 (f) and (g) of HR Policy Number 29. The letter of termination was issued by Mr. Arvind Maharaj, Acting Chancellor/Acting Director of Human Resources.
6. The policy which was said to have been breached was not tendered in evidence except that *DEx- 4*, which is a letter by the Manager Employees Relations Mr. Sahadeo Singh to the FNU Chancellor, highlights what s. 8.5 (f) of HR Policy Number 29 says:

“ Attempt(s) to, directly or indirectly, take any matter concerning the University to an individual or organization or officeholder outside the University, including trade unions, prior to exhausting the procedures laid down in the University regulations and policies”.
7. The plaintiff says that there was no justifiable reason to terminate him for communicating with the Attorney – General, he was not accorded the due process of natural justice at the time of his termination and that Mr. Arvind Maharaj did not have any powers to terminate him as only the Vice Chancellor has powers to dismiss him.
8. He says that the dismissal has caused him depression, mental anguish, trauma, feeling of despair, feeling of lack of self-worth and loss of dignity. He says that he must be compensated for the unlawful and unfair dismissal.

Issues

9. From the pleadings and the evidence, it is clear that the issue that is before the Court is whether the termination of the plaintiff’s employment was unlawful and unfair.

10. When the question of lawfulness kicks in, what needs examination and determination is whether the reasons provided to terminate the employment was justified and whether the procedure undertaken by the University to effect the termination was proper.
11. To examine whether the employment was fairly terminated, the examination of the manner in which the employment was terminated is required. If the employers conduct in terminating the employment caused the employee humiliation, loss of dignity and injury to his feelings than he is entitled to compensation. This does not mean that the employee will be considered to be unfairly terminated if he suffers humiliation, loss off dignity and injury to his feelings arising out of the fact of dismissal. The conduct of the employer in terminating the relationship will come into scrutiny. The employer is not expected to behave or conduct itself in a way that humiliates the employee and causes him mental disturbance.
12. Let me first examine whether the employer had a valid reason to terminate the employment of Dr. Prajapati. Let me look at the reason for the termination outlined in the letter of termination. I will recite the full contents of the termination letter:

“On Thursday 12 May 2016 you were advised by email by Manager Human resources that you are assigned new duties as follows:

1. Prepare:

- i) A Course reader for EDU 701 (Counselling Theory and Guidance).*
- ii) An Introduction and Assignment Booklet.*
- iii) A tutorials booklet.*

- 2. Compile a book list on Counselling, Theory and Guidance which covers experiences in both theory and applications from around the world, the region and developing countries and from Fiji and the Pacific. This would be published as a reference guide for trainee teachers and it should include books, journals, online sources and any other learning tools.*

3. *Prepare a Certificate of Competency in Guidance and Counselling for staff.*
4. *Prepare a Counselling framework for HIV patients in collaboration with CMNHS.*

On Friday, 13 May 2016 you discussed the tasks with the Manager HR by telephone. At that time it was explained why you were the most suitable person to carry out those tasks.

You sent an email on Monday, 16 May thanking the Manager HR for the discussions and explanations. Later that same day you sent another email listing the requirements for you to complete the new tasks assigned to you.

On Friday, 20 May 2016 you were sent your renewed employment contract and a letter transferring you to Nasinu. The transfer stated that you were required to report to Nasinu Campus on Monday, 23 May 2016. This was followed the same day by a telephone conversation between you and the Manager Human Resources. In that conversation you requested for additional time to move to Nasinu which was granted. The same day at around 5pm you confirmed by email that you would move to Nasinu on Monday, 30 May 2016.

At no point in the verbal or written discussions did you express your dissatisfaction or objection to your new role or transfer to the Management of the University.

It has now been brought to our attention that on 21 May 2016 you sent an email to the Honourable Attorney –General and Minister for Finance, Public Enterprises, Public Service and Communications, Mr. Aiyaz Sayed Khaiyum. In that email you thanked him for renewing your contract of employment, which is not correct. In the same email you expressed your dissatisfaction with your new role and the transfer. You also alleged that there is no qualified person to teach EDU 701, Counselling, Theory and Practice which information is not correct.

In doing so you took matters related to the University to an individual outside the University in exhausting the procedures laid down in the University regulations and policies. Your actions also caused embarrassment and brought disrepute to the University and your supervisors.

We note that your action in writing to Mr. Aiyaz Sayed Khaiyum was deliberate, intentional and not as a result of circumstances beyond your control.

Your actions also constitute gross misconduct as defined by sections 8.5 (f) and (g) of HR Policy # 29, the penalty for which is summary termination of employment.

Therefore, and pursuant to sections 8.7 of HR Policy # 29 and section 6.1 (a) of HR Policy # 31 and section 33 (1) (a) of the Employment Relations Promulgation 2007 your employment is summarily terminated with effect from 27 May 2016.

You are required to duly complete the enclosed Exit Form and hand over to the Chief Administrative Officer, Ms. Ruiti Tawanang together with all FNU property in your possession.

As required by the Terms and Conditions of your Work Permit we shall advise the Permanent Secretary of Fiji Immigration Department of the termination of your employment.

We thank you for your over three years' service to the University and wish you all the best in your future endeavours".

13. I wish to repeat what I stated in the background facts that I was not made available the policy of the university which is alleged to have be breached and as such the employer has not been able to establish that the term "*any matter concerning the University*" excludes the Attorney-General who is part of the Government. It was admitted in the evidence that the University was fully owned by the Government.

14. The Policy which is said to be breached is expected to state which person (s) or body (s) constitutes the University. The employer must not forget that it is for the employer to establish that the employee's actions constitute gross misconduct and not the employee. In that case, there was lack of evidence in convincing me that the Attorney- General who holds an important portfolio as the legal adviser of the Government can be considered a person who is not a person who should be told about matters concerning the University.

15. Ms. Ram gave evidence on behalf of the employer that FNU is a government institution but that the government is not responsible for the affairs of the University. She admitted that it was the Attorney – General who had announced recently that 400 lecturers from the technical College of the University would be laid off but that he is not directly responsible for the affairs of the University. She agreed that the Government is represented in the University Council.
16. I turn to *D Ex – 1* which has the plaintiff’s contract and also the organization structure of the University. The Chart shows that Council is the head of the academic governance structure. The evidence of Ms. Ram can now be linked to this chart and I find that the government was part of the Council.
17. Ms. Ram’s evidence is clear that the Hon. Attorney – General did deal with the matters concerning the University because the Government owns the University. If the Hon. Attorney – General cannot deal with matters concerning the University than he would not be even announcing the mass redundancies of 400 staff. In absence of any clear indication in the University policy, I cannot find that the plaintiff informing the Hon. Attorney – General about his concerns relating to the transfer and not been given his previous role to teach is misconduct at all.
18. When the plaintiff’s first first contract had expired and he was told by the University on 23 September, 2015 that his contract will not be renewed. The reason the University provided was that his work permit was not renewed (*P Ex – 2*). The plaintiff initially wrote to the office of the Vice Chancellor and enquired about non- renewal of his contract. In the initial emails, he also copied the Hon. Attorney – General.
19. Subsequently, he wrote to the Minister of Education Dr. Mahendra Reddy for a response on why his contract was not renewed. Even that email, he had copied to the Hon. Attorney General. When Dr. Mahendra Reddy responded on 1 April 2016 that he has advised the Chancellor to offer the plaintiff with a contract for one year, he also copied the email to the Hon. Attorney – General.

20. I find that it was accepted by the University that there is nothing wrong in informing the Hon-Attorney General about the issue concerning Dr. Prajapati. If that was misconduct, then the plaintiff should have been informed then and there to stop copying the emails to the Hon. Attorney – General and that his conduct breached the FNU policy.
21. No one informed him that the Hon. Attorney – General was considered a person who is not to know or deal with the University matters. If the plaintiff was told that and if he repeated the actions, his conduct could then have been scrutinized.
22. It is very normal for the plaintiff to have been convinced that the FNU was not going to do anything constructive regarding his issues unless he takes the matters to people who have authority to deal with his complain. This is very evident from the actions of the FNU in not renewing the contract of the plaintiff citing the reason that the work permit was not renewed but then it managed to renew the contract upon the intervention of the Minister of Education, and after the issue was being made known to the Hon. Attorney – General.
23. In light of what unfolded with the plaintiff, his actions cannot be classed as gross misconduct. If the FNU had any concerns about the plaintiff writing to the Hon. Attorney – General, he should have been warned by someone, either the FNU or the Minister of Education like what the latter did when he was of the view that the plaintiff should refrain from certain acts in absence of which he will be disciplined. I refer specifically to *P Ex – 6*. This is an email by Dr. Mahendra Reddy to Dr. Prajapati on 17 March 2016. The email is copies to the Hon. Attorney – General.
24. He wrote:

“Dear Dr. Prajapati:

You came to see me a number of times, including three weeks ago. I told your rep that I will now investigate the matter. I have asked the Chair of Human Resource Committee, a Council Sub Committee to provide to me an independent report. You should wait for this and this will be our final verdict on this case. I also note that you are sending all kinds of

persons to interfere with the due process. The Chancellor mentioned to me on Monday that you had sent some military officers to talk to him. This is not acceptable. If you continue to do this, we will have no option but to discipline your good self.

With kind regards.

Dr. Mahendra Reddy”.

25. I would have expected the Chancellor to make a similar complaint to Dr. Reddy if he was not happy with the plaintiff informing the Hon. Attorney – General about the issues facing him. I also think that if Dr. Reddy thought that this is a matter that the Attorney – General should not be made aware of than he would not be copying all the responses to the Hon. Attorney – General.
26. The plaintiff did not know and he did not find the Hon. Attorney General to be a person outside the University and he therefore did what he did. He cannot be blamed for his actions and his contract determined for that.
27. I also find that this matter concerned the plaintiff and not strictly the University. The University was not the affected party or that this was an issue concerning the University solely. It was not made clear to the plaintiff at any point that he cannot raise issues concerning him to anyone outside the University. Of course, it is natural for the plaintiff to discuss the issue with someone if he finds that the University is not acting or is not honest in responding to his concerns.
28. It unfolded in the evidence that Dr. Prajapati started enquiring from the Head of School about his work when some of the teaching units were taken away from him. This is after renewal of his contract. He wrote an email to the Head of School and copied the email amongst others to the Vice Chancellor and the Dean of the College of Humanities and Education. The University failed to respond and he followed up with an email on 15 April 2016. On this day the Acting Head of School responded by saying that the official notification on the status of Dr. Prajapati’s contract was awaited and that assigning staff workload was a matter for the Head of the Department. In response Dr. Prajapati then sent a copy of the official confirmation on the

renewal of the contract. The Dean then responded on 20 April that since his contract states that he will be reporting to the office of the Vice Chancellor, a response from the Office was awaited. The emails were tendered in as *P Ex – 7*.

29. It is not correct on the part of the University to say that the plaintiff did not deal with the issue internally. He tried his best for a response on his queries and it is evident that the Vice Chancellors Office was comfortably ignoring his concerns. When no one seemed to care about his matter, it then when Dr. Prajapati wrote to the Hon. Attorney – General on 25 May 2016.
30. The University is now comfortably blaming the plaintiff for not exhausting the internal procedures. First, it has failed to show me what the procedure was under the Human Resources Policy to report a grievance. Secondly, his contract which was tendered in as exhibit *D Ex -1* shows that he was to report to Dean, College of Humanities & Education. The plaintiff did write to the Dean asking about his workload. Why was no response forthcoming and if he was not following the proper channel of communication, why was he not told that? Why was he not advised and directed to lodge his grievance in a proper way for consideration?
31. Going back to the reasons for termination, the letter dismissing the plaintiff also says that the plaintiff's actions of writing to the Hon. AG has caused the University embarrassment and brought disrepute to the University and his Supervisors. There was no evidence led on how the University and its supervisors faced disrepute. The Hon. AG had not acted on the email. What the evidence showed was that he did not respond to the email but had forwarded the email to the University. In my finding, there is no evidence linking the email sent to the Hon. AG to have caused the disrepute to the University and the Supervisors and that the allegation in the termination letter has not been met by the evidence of the employer.
32. In alleging that the proper procedure was not followed in terminating him, Dr. Prajapati contends that the Acting Vice Chancellor did not have the authority to terminate his employment as clause 8.8 of HR Policy number 29 states that "*where the evidence of the alleged gross misconduct needs to be assessed independently, the Vice Chancellor may refer the matter to the Staff Disciplinary Committee. The Staff Disciplinary Committee shall deal with the matter as per the procedures of the Staff Disciplinary Committee*".

33. I must say that none of the parties saw it fit to provide a very copy of the policy that they contend has been breached. How then do they expect me to find what is provided for in the Policy. Do they expect the Court to go and hunt for the documentary evidence? There is a gross shortfall on the part of the employer to provide me that policy but since this issue is specifically raised in the PTC, even the defendant could have provided me with a copy of the said policy.
34. In absence of my first hand reading of clause 8.8, I have obtained from the submission of the plaintiff on what is stated in the said clause. I have identified above the full text of the clause as it appears from the submission.
35. There is no contention that the authority to dismiss the plaintiff vested in the Vice Chancellor. Was Arvind Maharaj the Vice Chancellor? The letter of termination indicates that he was the Acting Chancellor and not the Vice Chancellor or Acting Vice Chancellor. Ms. Ram also said in her evidence that Mr. Iqbal Janiff was the Chancellor.
36. Since this issue was crucial to both parties, I expected the employer to show me a proper appointment of Mr. Arvind Maharaj to the position of the Vice Chancellor or the Acting Vice Chancellor. If Iqbal Janiff was the Chancellor and Mr. Arvind Maharaj was the Chancellor too, then who was the Vice Chancellor to have the authority to hire and fire? Certainly, I have not seen any appointment letters to be sure that the authority to dismiss the plaintiff vested in Mr. Maharaj.
37. Further, if the Vice Chancellor had the powers to hire and fire the plaintiff and Mr. Arvind Maharaj was bestowed with that authority by any law and the appointment letter, then why did Mr. Iqbal Janiff who was the Chancellor on 20 May 2016 sign the employment contract? Why was it not signed by Mr. Arvind Maharaj?
38. I also refer to Mr. Arvind Maharaj's email of 1 April 2016 to the plaintiff where he writes and informs the plaintiff about the renewal of his contract. Two matters are worth noting. First he says in that email that he is writing on behalf of the Chancellor and second he notes his designation as the Deputy Chancellor. If he was writing on behalf of the Chancellor that shows that it was the decision of the Chancellor on the renewal that he was conveying to the plaintiff

and secondly he was the Deputy Chancellor. The employer needed to establish that the office of the Deputy Chancellor is the same as the office of the Vice Chancellor. That was not established.

39. I therefore find that I have not been satisfied that Mr. Arvind Maharaj has the authority to appoint and dismiss the plaintiff. The letter of termination thus is not valid.
40. The second limb on the plaintiff's claim on procedural unfairness was that he was not provided an opportunity to establish the truth of the allegation. The plaintiff did not deny emailing the Attorney – General. The Office of the Hon. Attorney General had forwarded that email to the office of the Vice Chancellor on the same day. The email was exhibited as *P Ex – 3*. On this aspect there is nothing to meet for the plaintiff and there was little point in asking him whether he did that or not as he did not deny or does not deny his actions.
41. What however is the crucial issue is what is reflected in the PTC which is whether the employer was required to refer the cause for the summary dismissal to the Staff Disciplinary Committee under the HR Policy.
42. I refer to clause 8.8 of HR Policy Number 29 again. Dr. Prajapati started having difficulty from the Vice Chancellors office when his contract was not renewed. I say from that office because it is the Vice Chancellor who had the powers to renew his contract. The office of the Vice Chancellor had also written to Dr. Prajapati on 4 January 2016 and said that his application for review of the decision to not renew the contract was declined. Dr. Prajapati then raised matters to the Hon. AG and the Minister of Education Dr. Mahendra Reddy. It was then that the University was advised to renew his contract. 6 days after the renewal, his contract was terminated. Clearly, the office of the Vice Chancellor cannot then be said to be independent on the issue of dismissing the plaintiff. I can see the link and the conflict and it is not difficult for anyone not to suspect vindictiveness on the part of the office of the Vice Chancellor. The problem started with the non- renewal of the contract and the FNU had to do what it decided not to do in the first place. That I find clouded the independence of the office of the Vice Chancellor. Given that clear link and conflict, I find that it was prudent that the matter be

referred to the Staff Disciplinary Committee to handle it. That fairness was not accorded to the plaintiff.

43. I now turn to the issue of unfair termination. There is no evidence that the conduct of the employer in terminating Dr. Prajapati was such that caused him humiliation, loss of dignity and injury to his feelings. Of course, he suffered all that but that was due to the fact of the dismissal and that is not compensable.

44. I now turn to the question of the relief that ought to be granted to the plaintiff. In the claim the plaintiff seeks wages for the balance term of the contract, that is, 11 months and 5 days and 10% FNPF on base salary.

45. It was clear from the evidence that the plaintiff found employment in Fiji after 4 months. There was no further evidence than this. No one established whether the plaintiff was paid better or not to argue their respective positions clearly on damages. Since the plaintiff found work, the only appropriate damages is that he be paid his full salary for 4 months. The salary will be worked from the basic salary of \$55,080.00 as provided for in the contract. He is also entitled to 10% contribution from the employer to his superannuation fund as provided for by clause 3.22 of the contract of employment.

46. The plaintiff also claims annual leave pay. The provision on annual leave is clause 20.1.1 of the contract of employment. It reads as follows:

“The Worker is entitled to 20 working days annual leave per annum, which is calculated from the start date of the worker’s employment each year. If, however, this contract is terminated under any provision of this contract after one month of service but less than one year of service from the date of commencement of employment, the Worker shall be paid a sum equal to five sixths of a day’s wages for each completed month of the period of employment”.

47. That provision is for the employer to pay to the employee annual leave upon termination of the contract. That clause does not preclude the court from ordering the employer to pay to the

employee annual leave pay if the contract is improperly terminated. This is the benefit that the employee ought to have received if he was allowed to perform his contract. As a result I find that the full 20 days annual leave needs to be paid.

48. I calculate his entitlement as follows:

4 months of wages – 4 x \$4,590 (1 months wages) = 18,360.

Leave pay – 20 days (20 x \$151 (1 days wages) = \$3,020.

10 % Superannuation on 4 month's salary – 10/100 x 18,360 = \$1,836.

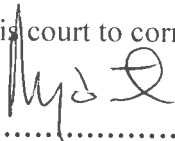
Total to be paid by the Employer = \$23,216.

Final Orders

49. I find that the plaintiff was unlawfully terminated from his employment and that he ought to be paid compensation for 4 months lost wages, 20 days annual leave, and 10% superannuation on 4 month's salary, all of which calculates to \$23,216. I order the employer to pay this amount to the plaintiff within 21 days of the date of the judgment.

50. I also order costs against the employer in favour of the employee in the sum of \$5,000 to be paid within 21 days.

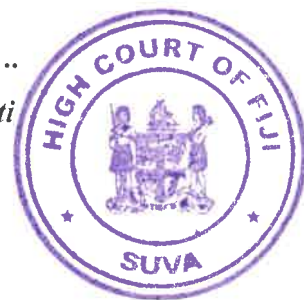
51. I grant the parties liberty to apply to this court to correct any error in calculations.



.....
Hon. Madam Justice Anjala Wati

Judge

22. 11. 2021



To:

- 1. Naco Chambers for the Plaintiff.*
- 2. FNU In – House Legal Team for the Defendant.*
- 3. File: ERCC 06 of 2016.*