

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 26 and 28 of 2017

BETWEEN: **FIJI NATIONAL UNIVERSITY**
APPELLANT

AND: **PURAN PRASAD**
RESPONDENT

Appearances: Mr. B. Singh for the Appellant.
Mr. F. Vosarogo for the Respondent.

Date/Place of Judgment: Tuesday 15 November 2022 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. *Catchwords:*

Employment Law – worker claims unlawful and unfair termination – whether proper principles were considered and evidence properly analysed by the tribunal to determine the claim – the tribunal ought to have examined the reasons for the termination and the procedure invoked by the employer to determine whether the summary dismissal was lawful – in determining whether the termination was fair, the manner in which the termination was carried out needed examination: an employer must not conduct itself in a manner that causes the employee humiliation, loss of dignity and injury to his feelings – the tribunal considered the principles of natural justice to determine the lawfulness and fairness of the termination which in this case of summary dismissal was not the proper consideration to have been made for a determination of the lawfulness and fairness of the termination.

B. *Legislation:*

1. *The Employment Relations Act 2007 (“ERA”): ss. 30, 33, 34.*

Cause and Background

1. The employer and the employee both have filed their respective appeals from the decision of the Employment Relations Tribunal ("***Tribunal***") of 06 November 2017. Succinctly, the tribunal had found that the employee was unlawfully and unfairly terminated and ordered that the employer pays to the employee six months' salary for unlawful termination and \$3,000 for unfair dismissal.
2. In form of background facts, Mr. Puran Prasad was employed by Fiji School of Medicine from 2006 as an ICT User Support Technician. The Fiji School of Medicine was later merged with the Fiji National University. After the merger, the employee was transferred to Fiji National University.
3. The employee was summarily dismissed on 25 July 2013. The letter of termination was issued on the same day. It reads as follows:

" It is alleged that you had failed to use the biometric attendance system, failed to give roll call on a daily basis, failed to carry out duty as per job description and have been reporting late to work.

You were given the chance to explain the allegations against you and you agreed to the allegations.

It is noted that you had willfully disobeyed lawful orders given by your employer.

It is also noted that there had been a substantial neglect of duty on your part and due to your negligence server housing shared drive for Research Team went down.

According to FNU HR Policy No 29 on Code of Conduct for Employees which inter alia stated in clauses:

27. 2 The University retains the right of summary dismissal under the following circumstances:

27.2.2 for willful disobedience to lawful orders given by the employer

27.2.4 for habitual or substantial neglect of the worker's duties.

After receiving the allegation and response from you we are of the opinion that you had committed a wrongful act of not using the bio metric attendance system, not giving roll call on a daily basis, not carrying out duty as per job description and reporting late to work.

Given the above and in our considered view we are inclined to believe that your failure to adhere to the rules and policies of FNU was deliberate, intentional and not as a result of circumstances beyond your control.

Your failure to comply with the FNU HR Policy and your deliberate act of not using the bio metric attendance system, not giving roll call on a daily basis, not carrying our duty as per job description and reporting late to work has the potential to give negative signal to other staff and we cannot condone such laxity.

Therefore, and pursuant to section 33 (1) (b) and (d) of ERP 2007 and section 27.2, 27.2.2 and 27.2.4 of FNU HR Policy No 29 your employment is being summarily terminated with immediate effect.

You are required to duly complete the Exit Form and Exit questionnaire and hand over to Human Resources Office together with all FNU property in your possession”.

4. After the termination, the worker filed an action against the employer. The matter was heard by the tribunal. The evidence in this case was tendered viva voce by the employer and the worker after which the tribunal made a finding of unlawful and unfair dismissal.

Tribunal's Findings

5. The tribunal referred to the agreed facts between the parties that on 17 June 2013, the employer's representatives namely, the Director ICT, the Manager ICT Infrastructure and the Manager ICT Operations met with the worker at Samabula Campus.
6. The tribunal found that the employer's position was that in the meeting of 17 June 2013, it discussed all the issues with the worker and that the worker had fully participated in the

meeting held on this day. The employee however contended that this meeting was to discuss operational matters and that he was not informed that it was an investigation against him. The worker's position therefore was that he was not given a fair chance to respond to the allegations put to him and therefore there was a breach of natural justice.

7. From the evidence, the tribunal found that the meeting of 17 June 2013 was for general discussion and not for investigation of the issues surrounding the worker which formed the basis of the termination.
8. The tribunal therefore found that the worker was not provided with adequate and fair opportunity to respond to the allegations put forward by the employer during the meeting. The worker did not receive anything in writing and he was not informed about the nature of the meeting nor the allegations. The tribunal found that this was a classic case of trial by ambush. It concluded that the manner in which the employer convened and conducted the meeting, violated the sacred and revered rules of natural justice. It was for this reason that the tribunal found that there was no cause to terminate the worker.
9. In analyzing whether the termination was fair or not, the tribunal found that there was no evidence to suggest that the employer acted in an inappropriate manner in dismissing the worker. However, the Tribunal went onto to rely on its findings on breach of natural justice to conclude that the employer acted in bad faith making the dismissal unfair for which it awarded the worker \$3,000.

The Appeal

10. The employer contends that the tribunal erred:

- a. in law and in fact in finding that the worker's dismissal was "unlawful" –*

- (i) by applying the wrong test for "unfair dismissal" and by not considering and applying the statutory law test submitted by the employer;*

- (ii) *by in any event acting contrary to the legal principles and the evidence in so concluding;*
 - (iii) *by not finding that the worker's actions amounts to:*
 - 1. *Willful disobedience to lawful orders given by the employer;*
 - 2. *Habitual or substantial neglect of the worker's duties.*
 - b. *in law in its decision in awarding the worker 6 month's salary as compensation for unlawful dismissal and further \$3,000 for unfair termination. The damages awarded are manifestly excessive and do not take into account the huge loss of revenue and suffering caused to the employer because of the negligence on the part of the worker.*
 - c. *in determining a case of summary dismissal on principles applicable for termination of employment for cause as provided for under section 33 of the ERA.*
 - d. *in law and in fact in that the employer has made out a case of gross misconduct without exhausting its own procedures in its human resources policies. The tribunal failed to take into account that the gross misconduct by the employee was determined by the Vice Chancellor in accordance with FNU HR Policy. No. 29 sub section (26.1).*
 - e. *in law and in fact in failing to find that the employer exercised its decision based on its HR policies and relevant provisions of the ERA.*
 - f. *in law and in fact that the worker grievor was unfairly terminated when in actual fact the grievor was terminated fairly and in accordance with the law.*
11. The worker is also aggrieved with the decision of the Tribunal. His grounds of appeal are that the tribunal erred in law and in fact in failing to:
- a. *consider reinstatement under s. 230 (1) (a) of the ERA.*
 - b. *compensate \$29,794.25 being loss of salary from the date of termination to the date of hearing under s. 230 (1) (b) of the ERA.*

- c. compensate under s. 230(1) (b) the sum of \$2,283,65 being loss of benefit being the employer's contribution from the date of termination to the date of hearing.*
- d. compensate under s. 230 (1) (b) in the sum of \$1,193.75 for loss of annual leave entitlements from the date of termination to the date of hearing.*
- e. analyze the evidence for proper quantum of damages and to award interest on the same.*

12. The grounds of appeal by the worker is mainly on the award of the remedies. I will consider that after I have dealt with the employer's appeal which focuses not only on the award of the remedies but also on the findings of unlawful and unfair dismissal.

Law and Analysis

13. On the employer's appeal, the issue before me is whether the tribunal has correctly identified the principles that it needed to, to consider the claim for unlawful and unfair dismissal and if it has then whether the evidence of the parties was given careful consideration and proper weight to arrive at the findings that it did.
14. This was a case for summary dismissal for various reasons. When an employee raises that he is being unlawfully dismissed, what then needs examination is whether the summary dismissal is substantially and procedurally justified. This means that the tribunal ought to have considered whether the reasons for the termination was justified and whether the procedure invoked in summarily dismissing the employee was followed.
15. The tribunal stated that since natural justice was denied and defied, there was no just cause to terminate the worker. The letter of termination outlines various reasons for the termination. The parties had given evidence on what happened in respect of each issue. The tribunal ought to have analysed the evidence and determine whether the employer could establish the allegations it made against the employee. If the tribunal accepted that the allegations were established then there were lawful causes to terminate the worker. There was no analysis of any evidence to arrive at a finding whether the reasons were valid or not.

16. The tribunal then had to examine the procedure outlined by the law to carry out summary dismissal and determine whether the said procedures were followed. The ERA requires that when summary dismissal is carried out, the following procedures must be followed:

1. *The employer must, provide the worker with reasons, in writing for the summary dismissal at the time her o she is dismissed: s. 33 (2) of the ERA.*
2. *The worker must be paid on dismissal the wages due up to the time of the worker's dismissal: s. 34 of the ERA.*
3. *The employer must provide a certificate to the worker stating the nature of employment and the period of service: s. 30 (5) of the ERA.*

17. There is no requirement in law for the employer to put the allegations to the worker, seek his response and give him a chance to refute the allegations. Generally speaking, there may be some allegations or matters against the worker that may not require any further or more findings to be made by the employer. In that case the employer can proceed to terminate the worker without any investigation, for example, where there is stealing caught on camera, where there is failure to obey lawful orders, where there is violence and likewise.

18. In other matters, the employer may wish to make its own finding of facts to be able to determine whether the worker should be summarily dismissed. In that case, it may carry out the investigation and in the process, the employer may, if it is felt necessary and proper, make enquiries from the worker. The process of putting the allegations to the worker and making enquiries and providing natural justice is not mandatory. The purpose of summary dismissal maybe lost if the worker is to be kept at work and a procedure akin to disciplinary hearing is provided to the worker. This will then require the employer to keep the worker employed and the employer can suffer irreparable damages. That is why the process of enquiry from the worker, waiting for his response and hearing from him is not mandated by the law.

19. I find that the tribunal applied the incorrect principles to determine whether the termination was lawful when it examined the purpose of the meeting of 17 June and considered whether the worker was provided natural justice or not. It completely overlooked examining the reasons for the termination. It did not analyse the evidence of the parties to determine whether there were valid reasons for the employee to be terminated. It further did not examine whether the procedure set out by the law in carrying out the summary dismissal was followed.
20. Even after the delivery of the judgment, neither party knows whether the employer had based the termination for the correct reasons and whether the procedure under the law was followed. Both parties are therefore deprived of a proper finding in law. That I find is unfair to both the parties.
21. After having used the factor of breach of natural justice to make a finding of unlawful dismissal, the tribunal then uses the same factor to make a finding of unfair dismissal. In that way, one factor was used to grant remedy against the employer twice. Not only that, breach of natural justice is an issue that concerns procedural fairness and therefore, in applicable cases, will be used to determine whether the termination was lawful. In determining whether the termination was fair or not, the conduct of the employer in dismissing the worker is examined. If the conduct of the employer is such that which causes the employee humiliation, loss of dignity and injury to his feelings, then the termination is unfair. If the employer acts in bad faith and its conduct is improper when terminating the worker, that is, unfair dismissal. I find that the tribunal erred in applying the wrong considerations in determining that the termination was unfair.
22. The remedies granted by the tribunal are not justified as the tribunal has not made a finding of unlawful and unfair termination on the correct applicable principles. I do not think that I can go any further in determining the worker's appeal given that his claim is not being properly determined by the tribunal.
23. The matter has to be heard and determined again for fairness to both the parties. The parties are entitled to have the claim properly determined. A snapshot way of dealing with the claim is not justified to any litigant.

24. I do not find that I should make a finding on the worker's claim from the records. I do not have the same advantage as a trial court. When it comes to the question of the necessary weight to be given to any evidence, the trial court is in a better position to do that since it has heard the evidence, seen the manner in which the questions were asked and answered, analysed the impact that is made by the witnesses and assessed the credibility of witnesses. The trial court is also in a position to clarify the matters for better understanding of the claim. I am not saying that the appellate courts cannot analyse evidence from the records. In most cases, that is what is done. However, in this case, I find that the interest of the parties will be best served if the matter is re-heard and determined by the tribunal.

Final Orders

25. I allow the employer's appeal and set aside the findings and the orders of the tribunal in whole. I order that the matter be re-heard in terms of the principles I have identified. Since the worker has been terminated for over 9 years now, this case must be heard as a matter of priority before another tribunal.
26. I direct the Senior Court Officer of the Employment Court and the Registrar of the Tribunal to list this matter before the tribunal within a week or two and inform the parties of the fixture. The tribunal is directed to hear this matter on an expeditious basis.

27. Each party shall bear their own costs of the appeal proceedings,




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Hon. Madam Justice Anjala Wati
Judge
15. 11. 2022

To:

1. *FNU Legal in – House for the Appellant.*
2. *Vosarogo Lawyers for the Respondent.*
3. *File: ERCA 26 and 28 of 2017.*