

IN THE EMPLOYMENT RELATIONS COURT OF FIJI
AT SUVA

ERCA No. 16 of 2019

BETWEEN : **FIJI SPORTS COUNCIL**

APPELLANT

AND : **JEMESA TIKO NIULEVU**

RESPONDENT

BEFORE : **M. Javed Mansoor, J**

COUNSEL : **Mr. D. Nair and Mr. M. Lomaloma for the plaintiff**

: **Ms. L. Mataigusu for the defendant**

Date of Hearing : **6 October 2020**

Date of Judgment : **1 December 2022**

JUDGMENT

EMPLOYMENT LAW

Summary dismissal – Allegation of gross misconduct – Award of compensation though no finding of unfair dismissal by the tribunal – Negligence of worker – Finding of unlawful dismissal – Sections 33 (1) & 230 of the Employment Relations Act 2007

1. The respondent, who was employed as a security supervisor at the National Gymnasium, was summarily dismissed by the appellant for gross misconduct. The allegation against him was that he engaged a casual worker for security work at a national sports event contrary to instructions issued by the management. The respondent alleged unfair dismissal and filed an employment grievance. The mediator referred the unresolved grievance to the Employment Relations Tribunal. By its decision of 3 July 2019, the tribunal awarded the respondent compensation for loss of earnings and benefits, stating that the employer's decision to terminate was unlawful.
2. The appellant appealed saying that the resident magistrate was not entitled to hold that the dismissal was unlawful when the claim before the tribunal was for unfair dismissal, and that there was no basis to call the dismissal unlawful after making a finding of negligence on the respondent's part. The appellant said that the respondent's negligent performance of work entitled it to summarily dismiss the worker, and that the respondent's contributory conduct disentitled him to any remedy for loss of employment. Among other contentions, the appellant said that the respondent's conduct had damaged its reputation. The resident magistrate had declined to hold with the appellant on this assertion as well.

Grievance

3. The respondent was employed as a security supervisor on a three year contract commencing 23 January 2017. He was responsible for the allocation of duties and the supervision of security personnel during sporting events that were managed by the appellant. The respondent's employment was terminated with immediate effect by letter dated 2 November 2017, titled "Summary Dismissal", which was given to him on 6 November 2017.

4. The dismissal letter stated that the respondent engaged a casual employee to be a part of the security for a two day event on 28 and 29 October 2017 without the approval of the management. The letter stated that the appellant was summarily dismissed, pursuant to section 33 (1) (a), (b) & (d) of the Employment Relations Act 2007. He was given seven days to submit his written mitigation on the proposed penalty before the final decision could be made. The respondent did not take up the matter of mitigation with the employer.
5. On 15 November 2017, the respondent reported an employment grievance claiming that he was unfairly dismissed from employment. As the grievance could not be settled by mediation, the mediator referred the matter to the Employment Relations Tribunal to consider whether the respondent was unfairly dismissed. The tribunal concluded that termination was not unfair, but was unlawful and awarded the respondent compensation amounting to pay of 30 weeks.
6. The appellant's case is that the worker had permitted one Maikeli Tamani, a casual worker, to be engaged for security work even though the management had not given approval to place him on duty during a national tournament. The appellant submitted that the respondent failed to remove Tamani from the stadium after his presence was brought to the notice of the respondent. The allegation against the worker is that he colluded with Tamani and allowed him free access to the National Gymnasium to watch the games for two days under the pretense of performing security duties. The employer's position is that the conduct of the respondent was dishonest, and that the neglect of his duties were such as to warrant summary dismissal in terms of section 33(1) of the Act.
7. The respondent countered by saying that someone from the appellant's office had summoned Tamani to perform security work at short notice. The respondent denied having summoned the casual worker. Tamani had complied with the request to report to work. The record reveals that in cross examination, the respondent denied seeing or talking to Tamani during the event. Tamani gave evidence on behalf of the respondent, and said that he received a call from the appellant's office asking him to report to work. He could not say who called him

on that occasion. He did say, however, that in the past, the respondent had called from his mobile and asked him to report to work. The respondent submitted that the tribunal's finding was that the worker's conduct amounted to negligence, and not gross misconduct as alleged by the employer. Therefore, the respondent submitted, the decision to award 30 weeks of wages as compensation for unlawful termination should stand.

Conclusion

8. The respondent served the employer for about nine months out of a contract drawn up for three years. As a supervisor, he looked after security arrangements during games at the National Gymnasium. The evidence is that a casual worker by the name of Tamani was called upon for security work from time to time. At times, the respondent has called Tamani and asked him to report to work. On this occasion, Tamani says, he received a telephone call asking him over to work. He could not say who called him. He had reported to work. By the time he did so other workers had dispersed for duty. The respondent denied having asked Tamani to report to work. The appellant says Tamani's presence was an act of collusion between Tamani and the respondent to allow the casual worker free entry to watch the national games. The respondent has denied this claim. Although the appellant said that Tamani was present on both days, the evidence has it that he reported for work for only on the first day and not on both days. The evidence also shows that the appellant ceased to engage Tamani as a casual worker at the time the respondent's employment was terminated for the alleged misconduct.

9. A perusal of the decision shows that the resident magistrate has assessed the evidence carefully. He concluded that termination was not unfair. The appellant has alluded to this finding, and submits that dismissal of the respondent's action should have followed upon this finding as the reference by the mediator was to determine whether termination was unfair. The magistrate was of the view that the respondent's employment was terminated without good cause. He noted that the termination letter made reference to the act of engaging Tamani for work, while the employer's evidence and submissions laid emphasis upon the respondent's failure to remove Tamani. He has given consideration to whether

the respondent's omission to do so brought disrepute to the appellant. He answered that question in the negative. In reaching his conclusion, he gave thought to whether the respondent was negligent. The tribunal was concerned whether the respondent had satisfactorily discharged its functions. The decision makes reference to the respondent's failure to observe Tamani's presence, saying such an omission would be negligent. But he did not find the grievor's negligence to have contributed towards the situation which gave rise to the grievance. This inference may be the only one with which a minor interference may be possible in this proceeding. The resident magistrate was clear in his finding that the appellant had not proved the respondent's alleged misconduct.

10. The appellant disagreed with the tribunal's decision to term the dismissal as unlawful. The appellant submitted that the worker's employment was terminated for the reasons stated in the dismissal letter. He was guilty of misconduct. The respondent's claim, the appellant said, was for unfair dismissal. The tribunal's finding was that dismissal was not unfair. Having made this finding, the appellant contended, the tribunal ought to have dismissed the grievance.
11. A dismissal could be held unlawful, the appellant contended, if the appellant failed to comply with the statutory requirements. This was not so in the present case, as the worker was issued a written notice of termination and a certificate of service as required under section 33(1) (e) and 34 of the Act. The question before the tribunal, it was submitted, was whether the dismissal was unfair and, therefore, the tribunal's decision to award compensation on the basis the dismissal was unlawful was in excess of its jurisdiction.
12. The resident magistrate has held that the termination of the respondent's employment was not unfair. Nevertheless, he was entitled to consider whether termination was just in all the circumstances. This he has done, and the court will not interfere with those findings. He appears to have considered whether the appellant's act of dismissing the respondent fell within the band of responses open to the appellant. This is not to say that the tribunal is encouraged to substitute its views for that of the employer. The test is an objective one as to

whether the employer acted reasonably. The resident magistrate has evaluated the evidence in reaching his conclusion.

13. Section 230 (1) sets out the remedies that the tribunal may grant if it determines that a worker has an employment grievance. The tribunal's finding is that the respondent could have worked for another 115 weeks. The tribunal's award was for 30 weeks. In assessing compensation, the resident magistrate says that there was no evidence before court of attempts to mitigate the respondent's losses. The respondent was obliged to show he made efforts to mitigate his losses. He did not do so.
14. Section 230 (2) of the Act provides that if the tribunal or court determines that a worker has an employment grievance by reason of being unjustifiably or unfairly dismissed, the tribunal or court may (a) in deciding the nature and extent of the remedies to be provided in respect of the employment grievance, consider the extent to which the actions of the worker contributed towards the situation that gave rise to the employment grievance; and (b) if those actions so require, reduce the remedies that would otherwise have been decided accordingly.
15. The resident magistrate appears to have found a degree of negligence on the part of the respondent. In conclusion, he said that the respondent's conduct could fall within the ambit of negligence. However, he determined that the worker's conduct would not constitute habitual or substantial negligence warranting summary dismissal. The respondent concedes that the resident magistrate made a finding of negligence as opposed to a finding of gross misconduct. Looked at this way, it seems appropriate to reduce the compensation awarded by the resident magistrate to reflect the worker's contribution to the situation that gave rise to the employment grievance. An award of compensation equivalent to 20 weeks would be just in the circumstances.

ORDER

- A. The appeal is dismissed subject to the variation of the tribunal's decision as set out below.
- B. The compensation awarded to the respondent by the tribunal is varied to the equivalent of 20 weeks.
- C. The parties will bear their own costs.

Delivered at **Suva** on this 1st day of December, **2022**



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor
Judge