

**IN THE EMPLOYMENT RELATIONS COURT**  
**AT SUVA**

ERCC No. 20 of 2017

**BETWEEN** : PUSHP CHAND DASS

**PLAINTIFF**

**AND** : SUGARCANE GROWERS COUNCIL

**DEFENDANT**

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

**COUNSEL** : Mr. D. Nair for the plaintiff

: Mr. S. Krishna with Ms. S. Chetty for the defendant

**Date of Hearing** : 3 July 2019

**Date of Judgment** : 3 April 2023

# JUDGMENT

*EMPLOYMENT LAW Dismissal – Whether Employment Relations Act contravened – Whether employer was in breach of employment contract – Employment grievance withdrawn from Employment Relations Tribunal and action filed in the Employment Relations Court – Jurisdiction of the Employment Relations Court concerning an employment grievance.*

The following case is referred to in this judgment:

*a. Salim Buksh v Bred Bank (Fiji) Ltd [2021] FJHC 259; ERCC02.2019 (27 August 2021)*

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## **Background**

1. The plaintiff filed action alleging that the defendant terminated his employment in contravention of the Employment Relations Act 2007 and in breach of his contract of employment.
2. The plaintiff stated in his statement of claim that he commenced employment with the defendant in April 2004 and rose to the position of senior executive officer of the defendant's sugar mill in the Rarawai/ Penang area by 2009. The parties entered into the subject employment contract on 13 March 2013. The defendant suspended the plaintiff's employment from 14 November 2013 after criminal charges were filed against him in the Magistrate Court of Rakiraki. He was dismissed from employment on 23 January 2014 for gross misconduct, willful disobedience to a lawful order given by the employer and for habitual and substantial neglect of his duties.
3. The plaintiff pleaded that his contract was arbitrarily terminated without exhausting the disciplinary procedures which the parties had agreed to follow. He alleged that the employer acted in bad faith, by contravening the termination clause of the contract, and by failing to consider that he was discharged by court from the criminal charges upon which he was suspended.
4. In addition to seeking a declaration that his dismissal was unjust and unlawful, the plaintiff claimed \$324,049.30 which was made up of a sum of \$301,117.80 exclusive of the FNPF contribution for the period 23 January 2014 to 1 October

2030 and a sum of \$22,931.30 being 255 days outstanding annual leave and 210 days of outstanding long service leave pay. The amounts claimed are on the basis that the plaintiff could have continued in employment until retirement.

5. In its statement of defence, the defendant admitted having terminated the plaintiff's employment by letter dated 23 January 2014. The defendant said that it did so after receiving several complaints from sugar cane growers and its own employees regarding the plaintiff's conduct. The complaints against him included the indecent annoying of a female employee, the misuse of the company vehicle, driving the company vehicle under the influence of liquor and his general conduct towards sugar cane growers. The defendant pleaded that the allegations were put to the plaintiff at a meeting on 17 December 2013, and that he did not deny the allegations. Prior to dismissal, the defendant stated, the plaintiff's employment was suspended after criminal charges were filed against him for causing indecent annoyance to a female.
6. Replying to the defence, the plaintiff reiterated that his dismissal was unjustified, unfair and unlawful in all the circumstances, and stated that the defendant did not reinstate him to his position after he was discharged by court from the criminal proceeding in April 2014.
7. Prior to filing this action, the plaintiff filed an employment grievance, which was referred to the Employment Relations Tribunal (ERT No. 145 of 2014). The plaintiff withdrew the matter on 18 September 2017. Six weeks after the withdrawal of the matter before the tribunal, the plaintiff filed the present action on 30 October 2013. The tribunal records are not before this court. However, the parties are not in dispute about the filing of the grievance or the withdrawal of the proceeding from the tribunal.

#### **The issue before court**

8. The parties raised 26 issues. The main issues for determination are whether the dismissal was unfair and unjust and in contravention of the Employment Relations Act, and whether the dismissal resulted in a breach of the plaintiff's contract of employment. Mr. Nair said the main issue in this case was whether the plaintiff's employment contract was terminated fairly, justly and lawfully.

9. The court will not decide the question whether the worker's dismissal was unfair or unjustified. That question is a matter to be dealt with by the tribunal in the first instance. The reasons for this decision are stated in the later paragraphs. In the present proceeding, the court will consider the evidence to determine whether there was a breach of the employment contract.

### **Evidence**

10. The plaintiff gave evidence on his behalf. On behalf of the defendant, Sundresh Chetty, Shailendra Prakash, Pranita Joyti Kumar and Rajendra Ragulu gave evidence. Their testimonies will be considered to the extent necessary to answer the main issues.
11. The plaintiff said he looked after three districts, including Tavua, where he was based for two days. Prior to his suspension on 14 November 2013, the plaintiff was summoned by his chief executive officer (CEO) on 8 October 2013 concerning criminal charges that were filed against him. He responded in writing on the same day, explained the circumstances and said that the complainant has written to the DPP regarding the withdrawal of the charges. He admitted receiving a letter containing allegations that he attempted to acquire information without authorisation from another organisation. He was aware that an internal investigation was carried out on the matter, and admitted to having been warned by letter dated 27 August 2013. The plaintiff admitted receiving a memo from the CEO on 28 October 2013 concerning complaints from sugar cane growers. He did not consider it necessary to respond to the memo. He was aware of the complaint made on 28 October 2013 by sugarcane growers concerning the misuse of the defendant's vehicle. Another complaint was from an employee subordinate to him at the Tavua office. He was aware of her claim of sexual harassment made on 26 November 2013.
12. The plaintiff was cross examined on an email that he sent the CEO following a meeting in his office on 17 September 2013. The plaintiff's email to Mr. Chetty is reproduced below:

*"Subject: Re meeting*

*Nmskarama! Thanx for giving ur precious time 2 day. I rily appreciated however some issues which has been crossing my mind and I cant get it out of my mind. Some mitigation factors that you cud use to convince the Ministry.*

*I do not deny wt I have done and I have made it clear to you today but just requesting for some remorse on the following lines. The legal opinion to be dragged for a fortnight or 2 maybe till the case date if possible. For the Tavua case if I cud be given a final warning and me sent to Labasa till April at least. I no it may be hard but pliz consider this as your recommendation would be endorsed by the Ministry.*

*I olwz acknowledge wt u have been telling me but I cme out to be a pure MC. I dnt want to let you down bu m sure you cud try this for me for the last time if I come thru this case. U know presently m alone, Sangi n Prerna in Auzy and Prashmil in Ltk. I am nt gonna do anything to myself bt I feel I am not wanted b4 by the fnly and now my employer, dnt take me rong, U cud advise the Ministry of my caliber and job knowledge, we cant pliz everyone as u no bt pliz giv it a go,,,,,If u think it is OK I cud get some signatures from growers .....Pliz let me know, m just fucked and dnt no wt to say or do,,,,,,, This is just 2mch for me .....*

*Regards*

*Dass"*

13. Referring to the email sent by him, the plaintiff said it was a personal note to Mr. Chetty, whom he called his brother in law (which claim Mr. Chetty denied). He denied that his email contained references to the allegations against him. He said the matters mentioned in the email were of a personal nature and his request to Mr. Chetty was to obtain the ministry's assistance to resolve those family issues. The plaintiff's explanation is weak and lacks credibility. There is nothing to suggest that the email is of a personal nature. The subject is "Re: Meeting". This probably refers to his meeting with the CEO earlier in the day. The plaintiff could not explain what he meant by mitigating factors, nor the phrase, "I do not deny what I have done, and made it clear to you today but just requesting for some remorse....". He asked that he be given a final warning and sent to Labasa.
14. The defendant's chief executive officer, Mr. Sundresh Chetty, said that the plaintiff was initially suspended with pay after being charged for indecently insulting or annoying a female. The person subject to the offensive conduct was not an employee of the defendant. He said that prior to issuing the suspension letter, the plaintiff was issued a warning letter on 27 October 2013 following a complaint by the president of the Rarawai Penang Cane Producers Association.

The warning letter was copied to the Ministry of Sugar. The complaint was that the plaintiff had attempted to wrongly obtain information from the association's office. Sugar cane growers' complaints regarding the plaintiff's work ethic and abuse of the defendant's vehicle resulted in another warning letter being issued to him on 28 October 2013.

15. The witness said the plaintiff's employment was terminated because of his admission of the complaints made against him. An executive officer of the Tavua office, Shailendra Prakash, sent a letter dated 31 October 2013 alleging that the company vehicle was used on a day the plaintiff had reported sick. The second complaint was from an employee in the defendant's Tavua office alleging that the plaintiff sexually harassed her. The third complaint of 31 October 2013 was by Rajendra Ragulu, said to be a prominent cane grower in Tavua. He had aired the concern of cane growers in the area that the plaintiff was using the council's vehicle after office hours. The witness said that cane growers were concerned about the misuse of the vehicle as they were funding the defendant at the time.
16. Mr. Chetty said that the letters were put to the plaintiff on 17 December 2013. At that meeting, the plaintiff showed remorse and asked for forgiveness. This was followed up by an email from the plaintiff on the same day. In his email, the plaintiff did not deny what he had done, and asked the witness to protect him. The plaintiff's employment was summarily terminated a few days later, on 23 December 2013. He said that disciplinary action against the plaintiff was taken in terms of his employment contract.
17. In cross examination, it was put to Mr. Chetty that charges were not formulated and communicated to the plaintiff in accordance with the employment contract. The witness admitted that though the complaint letters were shown to the plaintiff, charges were not framed and sent to him. Clause 31.1 of the employment contract requires written charges to be served on an employee for breach of discipline. Mr. Chetty said he did not consider it necessary to frame charges as the employee had admitted his guilt by email.

18. The dismissal letter is germane to the present issue as it sets out the grounds on which the plaintiff's employment was terminated. The letter is reproduced below:

*"Dear Mr. Dass*

*Re: Disciplinary Action – Summary Dismissal*

*This is to advise you that pursuant to section 33 of the Employment Relations Pronulgation Act, 2007 you are being summarily dismissed from the Council with effect from Friday 24<sup>th</sup> Janaury 2014 for the following reasons;*

- Gross misconduct*
- Wilful disobedience to lawful orders given by the employer*
- Habitual and substantial neglect of the workers duties*

*That below are some of the incidents we refer to and point out to, please note that this list is not exhaustive.*

- 1. That on 4<sup>th</sup> October 2013 you drove the Council vehicle registration number FG777 under the influence of liquor and got involved in a case where you got charged by Police for "Indecently Annoying" a person.*
- 2. That you were seen by growers consuming liquor at one particular place in Yaladro Sector between 4<sup>th</sup> and 22<sup>nd</sup> October 2013 and driving the vehicle under the influence of liquor.*
- 3. That entertaining a female visitor from Australia in Tavua district office during office hours and allowing her to travel in the Council vehicle on Monday 21st October 2013.*
- 4. That on Wednesday 23<sup>rd</sup> October, after taking sick leave you drove the Council vehicle reg.no. FG777 to Tavua from Rakiraki, parked the vehicle at the Tavua district office, hired a rental car from Goundar's Rental Hire service and drove to Nadi to drop the female visitor from Australia at Nadi Airport.*
- 5. That being rude and aggressive to growers while serving them.*

*Your salary due up to 24<sup>th</sup> January 2014 will be paid and the same shall be deposited in your bank account as per section 34 of the Employment Relations Pronulgation Act, 2007."*

The dismissal letter was copied to the permanent secretary of the Ministry of Sugar.

19. The next witness, Mr. Shailendra Prakash, was based at the Tavua office and looked after sugar cane growers in the Tavua, Ba and Rakiraki districts. He gave evidence concerning the use of the office vehicle on 18 October 2013, when the plaintiff was on leave. He said that growers complained regarding the use of the defendant's vehicle on holidays. On another day as well, the plaintiff had taken sick leave but used the official vehicle to drop a female acquaintance at the Nadi airport. He said the vehicle was for official use, and the CEO's permission was needed to use it after office hours. He said that a clerk at the Tavua office, one Pranita Kumar, was sexually harassed on several occasions and that he had asked her to report the matter to the chief executive officer. When cane growers complained of rude behaviour and poor service, he asked them to report the matter to the CEO.
20. Ms. Pranita Kumar worked as the clerk/ typist at the defendant's Tavua office from 2003 to December 2013. She was a single mother. The plaintiff was her senior executive officer. She said that the plaintiff touched her inappropriately on several occasions, and that she warned him to desist from doing so. When she complained to Mr. Chetty, he had asked her to write a memo. She was reluctant to send in a written complaint as Mr. Dass had told her that Mr. Chetty was a close and personal friend of his, and she feared that a complaint would affect her job. She decided to formally complain when the plaintiff began to touch her at regular intervals, mostly in 2013. The plaintiff's employment was in suspension at the time she made the written complaint. The witness resigned a few weeks after she wrote to Mr. Chetty.
21. Mr. Rajendra Ragulu was the last witness to give evidence on behalf of the defendant. He was the president of the Yaladro Farmers Co-operative and held several other positions of responsibility. By letter dated 31 October 2013, he wrote to the defendant's CEO concerning the plaintiff's misuse of the official vehicle after being asked to do so by Mr. Chetty. He said the vehicle was seen at a particular residence after office hours. Some of the growers complained to him that Mr. Dass did not assist them properly and was sometimes rude to them.
22. The evidence shows that the defendant had good cause to invoke the disciplinary procedure in the contract of employment.



**Did the employer act in breach of the employment contract?**

23. Clause 31.0 of the contract of employment is titled, "Disciplinary Procedures". The relevant parts of the clause are set out below:

Clause 31.1:

"An employee who commits a breach of discipline shall be served with a written copy of the charge laid against him".

Clause 31.5

"If the charge is admitted by the employee concerned, and after considering the report relating to the charge and any reply together with the report of the inquiry, the council is satisfied as to the truth of the charge it may after taking into account the service record of the employee, impose one of the following penalties:

- i) Caution and reprimand the officer in writing;
- ii) Transfer the officer to other duties;
- iii) Reduce the employee's salary with or without a consequent reduction in his grading; and
- iv) Dismiss the employee"

Clause 31.6

"Whilst any breach of discipline notification of which has been given to the employee is being investigated and where it becomes necessary for the protection of the Council's interest, the Council may either suspend the employee at once from the exercise and functions of his office or place him on other duties".

Clause 31.7

"An employee may be suspended from duty if criminal charges are laid against him provided that the charges are of a nature which is likely to adversely affect his employment with the council".

24. In terms of clause 31.1, an employee said to have committed a breach of discipline must be served with a written copy of the charge laid against him. The defendant conceded that this was not done. Mr. Chetty's explanation is that charges were not communicated in writing as the plaintiff admitted the complaints against him. Clause 31.7 permits the suspension of an employee where criminal charges are laid against him and if the charges are of a nature

likely to affect his employment with the council. Clause 31.5 permits the imposition of penalties including dismissal. The plaintiff was summarily dismissed from employment by letter dated 23 January 2014 for gross misconduct, wilful disobedience of lawful orders and habitual and substantial neglect of duties. The allegations against the plaintiff are serious in nature. The plaintiff's email sent on 17 December 2013 makes it clear that he did not contest the allegations against him. Taken as a whole, the content of the email is an admission of wrong doing. The email shows some remorse and calls out for one more chance. Clearly, the defendant did not wish to give another opportunity. In Mr. Chetty's words, the disciplinary procedure was initiated to protect the council's interests. In my view, although the defendant did not fully comply with 31.1 by sending the charges in writing, there is substantial compliance with clause 31 of the contract of employment. The defendant was entitled to terminate the plaintiff's employment in terms of the employment contract and the Employment Relations Act. The dismissal does not constitute a breach of the plaintiff's contract of employment.

### **The jurisdiction of this court to hear an employment grievance**

25. The plaintiff submitted that the main issue in this case is whether the plaintiff's employment contract was terminated fairly, justly and lawfully. That question and whether the manner in which the disciplinary procedure was carried out are questions for the tribunal to determine. For such an adjudication to be made, the tribunal's jurisdiction must be invoked in the manner provided by the Employment Relations Act. The legislature has laid down a statutory scheme by which a worker can refer an employment grievance for mediation, and where the grievance is not resolved through mediation, to have it referred to the tribunal for its determination in terms of sections 194 (5) and 211 (1) (a) of the Act. The process of mediation is made mandatory before an employment grievance can be referred to the tribunal. The tribunal is expressly conferred with the jurisdiction to adjudicate on employment grievance. The tribunal has power to adjudicate on matters within its jurisdiction relating to claims up to \$40,000.00<sup>1</sup>. The tribunal also has the jurisdiction to adjudicate on all actions for the recovery of wages or other monies and on actions involving entitlements<sup>2</sup>.

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<sup>1</sup> Section 211 (2), Employment Relations Act 2007

<sup>2</sup> Section 211 (1) (d) & (e) *ibid*

26. I have held previously that the tribunal must determine an employment grievance in the first instance<sup>3</sup>. Indeed, the tribunal is well equipped to do so. A transfer of proceedings from the tribunal to the court is possible in terms of section 218 (1) and (2) of the Act. The first sub section permits a party to make an application to have the proceeding transferred to the court, and sub section (2) allows the tribunal to transfer proceedings if it is of the opinion that an important question of law is likely to arise or that the case is of such a nature and urgency that it is in the public interest to have it transferred to the court. If the tribunal declines to transfer proceedings, there is provision for the court to do so by applying the criteria applicable to the tribunal, on application for special leave by a party. Once the court is possessed of an employment grievance in this way, it may grant the remedies provided by section 230 of the Act. The present action was not transferred by the tribunal in terms of section 218 of the Act.
27. The plaintiff invoked the tribunal's jurisdiction before withdrawing the matter on 18 September 2017. No reasons were given for the withdrawal. On 18 September 2017, the tribunal made the following orders:
- a) "That this matter is withdrawn and dismissed.
  - b) That there is no order as to costs".
28. The plaintiff states it was entitled to have withdrawn the grievance and filed action in this court as the Act enabled the plaintiff to bring an action in the Employment Relations Court when the claim exceeds the jurisdiction of the Employment Relations Tribunal. He does not specify the provision under which he is able to do so. A court cannot assume jurisdiction unless it is conferred by law. Section 220 of the Act does not confer the Employment Relations Court with the jurisdiction to hear and determine an employment grievance. Therefore, this court will not go into the question whether the plaintiff's employment contract was terminated fairly, justly and lawfully.

### **Conclusion**

29. The evidence does not disclose that the defendant dismissed the plaintiff in breach of his employment contract. The court will not consider whether the dismissal was fair or just as this is a question to be determined by the tribunal in

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<sup>3</sup> Salim Buksh v Bred Bank (Fiji) Ltd [2021] FJHC 259; ERCC02.2019 (27 August 2021)

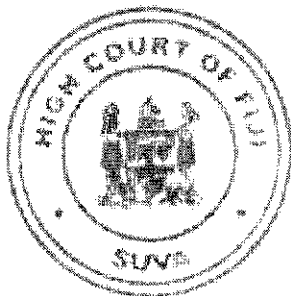
the first instance except where there is a transfer of proceeding in terms of section 218 of the Act.

30. The plaintiff also complained that he was not issued with a service certificate. This is not in dispute. The defendant said that the service certificate was available for collection. As such a direction will be made for its collection by the plaintiff.
31. The defendant sought indemnity costs. Mr. Chetty suggested a sum of \$25,000.00 as costs saying that the defendant incurred expenses on airline tickets, accommodation and other expenses on his behalf to attend court. While I hesitate to order indemnity costs, the circumstances of the case are such that the plaintiff must pay some costs in the matter. A sum of \$1,000.00 is summarily assessed as costs payable to the defendant.

### ORDER

- A. The plaintiff's writ and statement of claim is dismissed.
- B. The defendant is to make available the service certificate to be collected by the plaintiff within seven days of this judgment.
- C. The plaintiff is to pay the defendant costs summarily assessed in a sum of \$1,000.00 within 21 days of this judgment.

Delivered at **Suva** on this 3<sup>rd</sup> day of **April, 2023**.



*M. Javed Mansoor*  
M. Javed Mansoor  
Judge

IN THE EMPLOYMENT RELATIONS COURT  
AT SUVA

ERCC No. 20 of 2017

BETWEEN : PUSHP CHAND DASS

PLAINTIFF

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## **Background**

1. The plaintiff filed action alleging that the defendant terminated his employment in contravention of the Employment Relations Act 2007 and in breach of his contract of employment.
2. The plaintiff stated in his statement of claim that he commenced employment with the defendant in April 2004 and rose to the position of senior executive officer of the defendant's sugar mill in the Rarawai/ Penang area by 2009. The parties entered into the subject employment contract on 13 March 2013. The defendant suspended the plaintiff's employment from 14 November 2013 after criminal charges were filed against him in the Magistrate Court of Rakiraki. He was dismissed from employment on 23 January 2014 for gross misconduct, willful disobedience to a lawful order given by the employer and for habitual and substantial neglect of his duties.
3. The plaintiff pleaded that his contract was arbitrarily terminated without exhausting the disciplinary procedures which the parties had agreed to follow. He alleged that the employer acted in bad faith, by contravening the termination clause of the contract, and by failing to consider that he was discharged by court from the criminal charges upon which he was suspended.
4. In addition to seeking a declaration that his dismissal was unjust and unlawful, the plaintiff claimed \$324,049.30 which was made up of a sum of \$301,117.80 exclusive of the FNPF contribution for the period 23 January 2014 to 1 October

2030 and a sum of \$22,931.30 being 255 days outstanding annual leave and 210 days of outstanding long service leave pay. The amounts claimed are on the basis that the plaintiff could have continued in employment until retirement.

5. In its statement of defence, the defendant admitted having terminated the plaintiff's employment by letter dated 23 January 2014. The defendant said that it did so after receiving several complaints from sugar cane growers and its own employees regarding the plaintiff's conduct. The complaints against him included the indecent annoying of a female employee, the misuse of the company vehicle, driving the company vehicle under the influence of liquor and his general conduct towards sugar cane growers. The defendant pleaded that the allegations were put to the plaintiff at a meeting on 17 December 2013, and that he did not deny the allegations. Prior to dismissal, the defendant stated, the plaintiff's employment was suspended after criminal charges were filed against him for causing indecent annoyance to a female.
6. Replying to the defence, the plaintiff reiterated that his dismissal was unjustified, unfair and unlawful in all the circumstances, and stated that the defendant did not reinstate him to his position after he was discharged by court from the criminal proceeding in April 2014.
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8. The parties raised 26 issues. The main issues for determination are whether the dismissal was unfair and unjust and in contravention of the Employment Relations Act, and whether the dismissal resulted in a breach of the plaintiff's contract of employment. Mr. Nair said the main issue in this case was whether the plaintiff's employment contract was terminated fairly, justly and lawfully.

9. The court will not decide the question whether the worker's dismissal was unfair or unjustified. That question is a matter to be dealt with by the tribunal in the first instance. The reasons for this decision are stated in the later paragraphs. In the present proceeding, the court will consider the evidence to determine whether there was a breach of the employment contract.

### **Evidence**

10. The plaintiff gave evidence on his behalf. On behalf of the defendant, Sundresh Chetty, Shailendra Prakash, Pranita Joyti Kumar and Rajendra Ragulu gave evidence. Their testimonies will be considered to the extent necessary to answer the main issues.
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13. Referring to the email sent by him, the plaintiff said it was a personal note to Mr. Chetty, whom he called his brother in law (which claim Mr. Chetty denied). He denied that his email contained references to the allegations against him. He said the matters mentioned in the email were of a personal nature and his request to Mr. Chetty was to obtain the ministry's assistance to resolve those family issues. The plaintiff's explanation is weak and lacks credibility. There is nothing to suggest that the email is of a personal nature. The subject is "Re: Meeting". This probably refers to his meeting with the CEO earlier in the day. The plaintiff could not explain what he meant by mitigating factors, nor the phrase, "I do not deny what I have done, and made it clear to you today but just requesting for some remorse....". He asked that he be given a final warning and sent to Labasa.
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18. The dismissal letter is germane to the present issue as it sets out the grounds on which the plaintiff's employment was terminated. The letter is reproduced below:

*"Dear Mr. Dass*

*Re: Disciplinary Action – Summary Dismissal*

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- 2. That you were seen by growers consuming liquor at one particular place in Yaladro Sector between 4<sup>th</sup> and 22<sup>nd</sup> October 2013 and driving the vehicle under the influence of liquor.*
- 3. That entertaining a female visitor from Australia in Tavua district office during office hours and allowing her to travel in the Council vehicle on Monday 21st October 2013.*
- 4. That on Wednesday 23<sup>rd</sup> October, after taking sick leave you drove the Council vehicle reg.no. FG777 to Tavua from Rakiraki, parked the vehicle at the Tavua district office, hired a rental car from Goundar's Rental Hire service and drove to Nadi to drop the female visitor from Australia at Nadi Airport.*
- 5. That being rude and aggressive to growers while serving them.*

*Your salary due up to 24<sup>th</sup> January 2014 will be paid and the same shall be deposited in your bank account as per section 34 of the Employment Relations Promulgation Act, 2007."*

The dismissal letter was copied to the permanent secretary of the Ministry of Sugar.

19. The next witness, Mr. Shailendra Prakash, was based at the Tavua office and looked after sugar cane growers in the Tavua, Ba and Rakiraki districts. He gave evidence concerning the use of the office vehicle on 18 October 2013, when the plaintiff was on leave. He said that growers complained regarding the use of the defendant's vehicle on holidays. On another day as well, the plaintiff had taken sick leave but used the official vehicle to drop a female acquaintance at the Nadi airport. He said the vehicle was for official use, and the CEO's permission was needed to use it after office hours. He said that a clerk at the Tavua office, one Pranita Kumar, was sexually harassed on several occasions and that he had asked her to report the matter to the chief executive officer. When cane growers complained of rude behaviour and poor service, he asked them to report the matter to the CEO.
20. Ms. Pranita Kumar worked as the clerk/ typist at the defendant's Tavua office from 2003 to December 2013. She was a single mother. The plaintiff was her senior executive officer. She said that the plaintiff touched her inappropriately on several occasions, and that she warned him to desist from doing so. When she complained to Mr. Chetty, he had asked her to write a memo. She was reluctant to send in a written complaint as Mr. Dass had told her that Mr. Chetty was a close and personal friend of his, and she feared that a complaint would affect her job. She decided to formally complain when the plaintiff began to touch her at regular intervals, mostly in 2013. The plaintiff's employment was in suspension at the time she made the written complaint. The witness resigned a few weeks after she wrote to Mr. Chetty.
21. Mr. Rajendra Ragulu was the last witness to give evidence on behalf of the defendant. He was the president of the Yaladro Farmers Co-operative and held several other positions of responsibility. By letter dated 31 October 2013, he wrote to the defendant's CEO concerning the plaintiff's misuse of the official vehicle after being asked to do so by Mr. Chetty. He said the vehicle was seen at a particular residence after office hours. Some of the growers complained to him that Mr. Dass did not assist them properly and was sometimes rude to them.
22. The evidence shows that the defendant had good cause to invoke the disciplinary procedure in the contract of employment.

**Did the employer act in breach of the employment contract?**

23. Clause 31.0 of the contract of employment is titled, "Disciplinary Procedures". The relevant parts of the clause are set out below:

Clause 31.1:

"An employee who commits a breach of discipline shall be served with a written copy of the charge laid against him".

Clause 31.5

"If the charge is admitted by the employee concerned, and after considering the report relating to the charge and any reply together with the report of the inquiry, the council is satisfied as to the truth of the charge it may after taking into account the service record of the employee, impose one of the following penalties:

- i) Caution and reprimand the officer in writing;
- ii) Transfer the officer to other duties;
- iii) Reduce the employee's salary with or without a consequent reduction in his grading; and
- iv) Dismiss the employee"

Clause 31.6

"Whilst any breach of discipline notification of which has been given to the employee is being investigated and where it becomes necessary for the protection of the Council's interest, the Council may either suspend the employee at once from the exercise and functions of his office or place him on other duties".

Clause 31.7

"An employee may be suspended from duty if criminal charges are laid against him provided that the charges are of a nature which is likely to adversely affect his employment with the council".

24. In terms of clause 31.1, an employee said to have committed a breach of discipline must be served with a written copy of the charge laid against him. The defendant conceded that this was not done. Mr. Chetty's explanation is that charges were not communicated in writing as the plaintiff admitted the complaints against him. Clause 31.7 permits the suspension of an employee where criminal charges are laid against him and if the charges are of a nature

likely to affect his employment with the council. Clause 31.5 permits the imposition of penalties including dismissal. The plaintiff was summarily dismissed from employment by letter dated 23 January 2014 for gross misconduct, wilful disobedience of lawful orders and habitual and substantial neglect of duties. The allegations against the plaintiff are serious in nature. The plaintiff's email sent on 17 December 2013 makes it clear that he did not contest the allegations against him. Taken as a whole, the content of the email is an admission of wrong doing. The email shows some remorse and calls out for one more chance. Clearly, the defendant did not wish to give another opportunity. In Mr. Chetty's words, the disciplinary procedure was initiated to protect the council's interests. In my view, although the defendant did not fully comply with 31.1 by sending the charges in writing, there is substantial compliance with clause 31 of the contract of employment. The defendant was entitled to terminate the plaintiff's employment in terms of the employment contract and the Employment Relations Act. The dismissal does not constitute a breach of the plaintiff's contract of employment.

#### **The jurisdiction of this court to hear an employment grievance**

25. The plaintiff submitted that the main issue in this case is whether the plaintiff's employment contract was terminated fairly, justly and lawfully. That question and whether the manner in which the disciplinary procedure was carried out are questions for the tribunal to determine. For such an adjudication to be made, the tribunal's jurisdiction must be invoked in the manner provided by the Employment Relations Act. The legislature has laid down a statutory scheme by which a worker can refer an employment grievance for mediation, and where the grievance is not resolved through mediation, to have it referred to the tribunal for its determination in terms of sections 194 (5) and 211 (1) (a) of the Act. The process of mediation is made mandatory before an employment grievance can be referred to the tribunal. The tribunal is expressly conferred with the jurisdiction to adjudicate on employment grievance. The tribunal has power to adjudicate on matters within its jurisdiction relating to claims up to \$40,000.00<sup>1</sup>. The tribunal also has the jurisdiction to adjudicate on all actions for the recovery of wages or other monies and on actions involving entitlements<sup>2</sup>.

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<sup>1</sup> Section 211 (2), Employment Relations Act 2007

<sup>2</sup> Section 211 (1) (d) & (e) *ibid*

26. I have held previously that the tribunal must determine an employment grievance in the first instance<sup>3</sup>. Indeed, the tribunal is well equipped to do so. A transfer of proceedings from the tribunal to the court is possible in terms of section 218 (1) and (2) of the Act. The first sub section permits a party to make an application to have the proceeding transferred to the court, and sub section (2) allows the tribunal to transfer proceedings if it is of the opinion that an important question of law is likely to arise or that the case is of such a nature and urgency that it is in the public interest to have it transferred to the court. If the tribunal declines to transfer proceedings, there is provision for the court to do so by applying the criteria applicable to the tribunal, on application for special leave by a party. Once the court is possessed of an employment grievance in this way, it may grant the remedies provided by section 230 of the Act. The present action was not transferred by the tribunal in terms of section 218 of the Act.
27. The plaintiff invoked the tribunal's jurisdiction before withdrawing the matter on 18 September 2017. No reasons were given for the withdrawal. On 18 September 2017, the tribunal made the following orders:
- a) "That this matter is withdrawn and dismissed.
  - b) That there is no order as to costs".
28. The plaintiff states it was entitled to have withdrawn the grievance and filed action in this court as the Act enabled the plaintiff to bring an action in the Employment Relations Court when the claim exceeds the jurisdiction of the Employment Relations Tribunal. He does not specify the provision under which he is able to do so. A court cannot assume jurisdiction unless it is conferred by law. Section 220 of the Act does not confer the Employment Relations Court with the jurisdiction to hear and determine an employment grievance. Therefore, this court will not go into the question whether the plaintiff's employment contract was terminated fairly, justly and lawfully.

### **Conclusion**

29. The evidence does not disclose that the defendant dismissed the plaintiff in breach of his employment contract. The court will not consider whether the dismissal was fair or just as this is a question to be determined by the tribunal in

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<sup>3</sup> Salim Buksh v Bred Bank (Fiji) Ltd [2021] FJHC 259; ERCC02.2019 (27 August 2021)

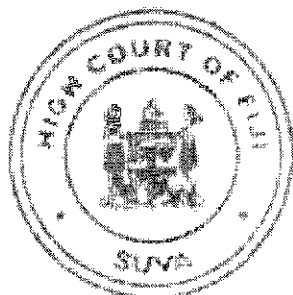
the first instance except where there is a transfer of proceeding in terms of section 218 of the Act.

30. The plaintiff also complained that he was not issued with a service certificate. This is not in dispute. The defendant said that the service certificate was available for collection. As such a direction will be made for its collection by the plaintiff.
31. The defendant sought indemnity costs. Mr. Chetty suggested a sum of \$25,000.00 as costs saying that the defendant incurred expenses on airline tickets, accommodation and other expenses on his behalf to attend court. While I hesitate to order indemnity costs, the circumstances of the case are such that the plaintiff must pay some costs in the matter. A sum of \$1,000.00 is summarily assessed as costs payable to the defendant.

### ORDER

- A. The plaintiff's writ and statement of claim is dismissed.
- B. The defendant is to make available the service certificate to be collected by the plaintiff within seven days of this judgment.
- C. The plaintiff is to pay the defendant costs summarily assessed in a sum of \$1,000.00 within 21 days of this judgment.

Delivered at **Suva** on this 3<sup>rd</sup> day of **April, 2023**.



M. Javed Mansoor  
Judge