

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 05 of 2016

BETWEEN: **VIMAL VIKASH**

PLAINTIFF

AND: **FIJI NATIONAL UNIVERSITY**

DEFENDANT

Appearances:

Mr. D. Nair for the Plaintiff.

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

Date/Place of Judgment:

Friday 28 July 2023 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

JUDGMENT

A. Catchwords:

Employment Law – Unlawful and Unfair Dismissal of Employment – Whether the worker’s termination of employment lawful and fair – examination of the reasons and procedure for termination to determine the lawfulness of the termination- to determine whether the termination was fair, the manner in which the dismissal carried out examined.

B. Legislation:

- 1. Employment Relations Act 2007 (“ERA”); s.30 and s. 87.*
- 2. Fiji National University Act 2009; s. 30.*

Cause

1. The plaintiff Vimal Vikash ("*Vimal*") was employed by Fiji National University ("*FNU*") as a Manager Recruitment from 2 September 2015 to 01 September 2020. His contract was summarily determined by the employer on 21 December 2015. He brings this claim for unlawful and unfair dismissal from employment.
2. The reason for the worker's termination was outlined in the termination letter dated 21 December, 2015. It reads:

Re: Termination of Employment

HR has received a number of allegations laid against you. An audit was carried out and the following was noted:

- *Being the Manager Recruitment you had manipulated and colluded with the recruitment process in the recruitment of Ms. Maan Kumari (mother-in-law), Ms. Arti Jyotika Vikash (your spouse) and Mr. Mani Ram Sharma (father).*
- *As HR Advisor you had provided misleading information and wrong interpretation of council resolution to exert approval from AVC resulting in payment of bonus and back pay to HR Assistant Abdul Sahib.*
- *That you failed to comply with the HR Policy No. 02 on the subject of creation of new positions within HR Division.*
- *Failed to ensure that the JD of Medical Coordinator is prepared and approved for advertisement. You endorsed that her salary be pegged to the Medical Coordinator without any proper approval.*
- *Failure to submit Report on discussion with Apollo Hospital Management and Recruitment arrangement taken in India.*
- *As Manager Recruitment you failed to formulate proper HR Plan for the HR Division and proceed to advertise positions by creating ad hoc positions within HR.*
- *That you failed to declare your interest in the recruitment of Ms. Maan Kumari and Ms. Arti Vikash.*

- Failed to declare that Mr. Mani Ram Sharma was your father who was issued a new contract and was referred for medical treatment to India.
- That you as HR Advisor abused your authority and Office to give exorbitant salary increases to few selected HR staff on the pretext of employee retention which has allowed for increase in salary cost.
- That you had recommended to Acting Vice Chancellor for promotion of Ms. Alena Rafaele from HR Assistant to Training Coordinator with substantial increase in salary knowing very well she did not meet the MQR.
- That you as HR Advisor recommended to Acting Vice Chancellor for confirmation of promotion for Deputy Manager People Sourcing Mr. Dharmend Chand with substantial increase in salary knowing very well he was given 1 year acting and his performance was to be assessed for confirmation which did not eventuate.

Please note that the above are serious breaches of HR Policy in that you have grossly neglected your duties. It is noted with concern that as a responsible employee you have failed to abide by FNU HR Policy 02, 29 and Policy No. 30.

This is very serious breach in itself when you are supposed to protect the interest of the University.

Based on the documentary evidence and audit report the above allegations have been proven against you.

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. It also has the potential to give negative signal to other staff and we cannot condone such laxity.

Therefore, pursuant to section 33(1) (a) and (d) of ERP and section 8.5, 27.2(a) and (d) of the FNU HR Policy 29 your employment is summarily terminated with immediate effect.

You are required to duly complete the Exit Form and hand over to the Acting Director Human Resources, together with all FNU property in your possession."

3. The plaintiff and the defendant have agreed that the following issues be tried by the Court.

1. *Whether the decision on 21st December, 2015 to terminate the employment of the Plaintiff was lawful, justified and fair?*
 2. *Whether the then Deputy Chancellor, Mr. Arvind Maharaj had the authority to terminate the employment of the Plaintiff?*
 3. *Whether Section 87 of the Employment Relations Promulgation 2007 (ERP) is relevant to the allegations of the Defendant giving rise to the termination of the Plaintiff's employment?*
 4. *Whether the Plaintiff is entitled to be compensated for the balance of his unexpired employment contract from 21st December 2015 to 1st September 2020?*
 5. *Whether the Plaintiff is entitled to compensation for loss of future earnings?*
 6. *Whether the Plaintiff is entitled to damages for his sufferings caused by the actions of the Defendant in summarily dismissing him from his employment?*
 7. *Whether the Plaintiff is entitled to costs on an indemnity basis?*
4. The claim by the worker was contested and the matter was heard. Two witnesses gave evidence, the worker and a witness on behalf of the employer. The onus to establish that the termination was lawful and fair is on the employer. I will examine the evidence to determine whether the employer has justified that Vimal's termination was lawful and fair.

Evidence Law & Analysis

5. To determine whether the termination was lawful, I will have to examine whether the reasons for the termination was justified and the procedure followed was fair. I will go through each and every allegation outlined in the termination letter to determine whether the allegations were met by the evidence.

6. The first allegation is that Vimal had manipulated and colluded with the recruitment process in the recruitment of Ms. Maan Kumari (mother-in-law), Ms. Arti Jyotika Vikash (his spouse) and Mr. Mani Ram. There is no evidence that Vimal ever recruited, manipulated or colluded in the appointment of the named persons.
7. In respect of his wife, he was never part of any process starting from her recruitment. He had also orally declared his interest to the Vice Chancellor and that is why he was not involved in the recruitment process.
8. There is also not an iota of evidence that it was Vimal who had been involved in the recruitment of his father and mother-in-law.
9. S. 87 of the ERA is an exception to the equal employment opportunities requirement. S. 87 states that restrictions can be imposed by an employer in the following circumstances:-
 - (a) *On the employment of a person who is married to, or living in a relationship in the nature of marriage with, or who is a relative of, another worker if-*
 - (i) *there would be a reporting relationship between them; or*
 - (ii) *there is a risk of collusion between them to the detriment of the employer; or*
 - (b) *On the employment of a person who is married to, or living in a relationship in the nature of marriage with, or is a relative of, a worker of another employer if there is a risk of collusion between them to the detriment of that person's employer.*
10. I have not been shown any policy of the employer addressing section 87 of the ERA. If there were restrictions imposed by the employer then it should be in writing and all the employees made aware of that restriction.
11. The employer's witness had also stated that Vimal should have declared his conflict of interest in writing when these persons were employed. The evidence of Vimal reveals that he had informed the Vice Chancellor that these people were related to him. That evidence was not

controverted. All that the employer insists is that that declaration of conflict should have been made in writing. I have not been shown any policy from the employer that mandates such declarations to be in writing.

12. The employer's witness had reflected on certain policies on conflict of interest. She cited Human Resources Policy No. 30 and identified breaches of clauses 2.1, 2.2, 2.3 and 2.19. That Human Resources Policy was tendered in evidence and marked Exhibit D-V (4).

13. Let me outline what the clauses say:

"2.1 No employee shall engage in activities which can create a potential conflict of interest and conflict of commitment for the people as defined in this policy.

2.2 Employees are required to disclose all potential conflict of interest and conflict of commitment situations.

2.3 Each employee has a duty to act in the best interest of the University.

2.19 No employee shall act in any University matter involving a member of his/her immediate family including, but not limited to, matters affecting family members employment or evaluation or advancement in the University, without first making full disclosure. Such disclosure should include the nature of the familial relationship and the impact or potential impact of the employee's action on such family member".

14. Vimal was not involved in any way in the recruitment of the family members. If he had any role to play then he ought to have made the disclosures. In any event, he had informed the Vice Chancellor about his family members and since he did not act in their matter in any way, he was not required to comply with any other directions.

15. The employer has also not identified how there was conflict of interest when Vimal did not take part in any one of his relatives recruitment and did not act in their matter in any way.

16. The second allegation is that as Human Resources Advisor, Vimal provided misleading information and wrong interpretation of council resolution to exert approval from Acting Vice Chancellor resulting in payment of bonus and back pay to HR Assistant Abdul Sahib.
17. The allegation is based on Exhibit D-V (2) which is an internal memorandum by Vimal to the Assistant Vice Chancellor. The subject of this memorandum was "**staff to be paid the bonus and back pay – Mr. Abdul Sahib**". The memorandum reads:

"We kindly seek your consideration for the staff to be paid the back payment for Mr. Abdul Sahib who is a Technical Assistant for the Department of People Personnel Services, Support Services based at the Nasinu Campus. Mr. Sahib's appointment with the University is from 21/10/2013 and has been with the department till date and has completed 1 year 3 months of service with FNU. His appointment with the University had been effective from 21/10/2013.

His appointment for full time position was not justified to his current roles and responsibility. The appointment had the salary of \$15,201.00 however, failed to incorporate the \$500.00 bonus that was added to all salaried staff for 2013 payout.

Submitting for your approval".

18. Exhibit D -V (2) also consists of an email from Rinika Prakash to Venina Cawanibuka and contains Resolution 4/3/(COU/December) 2013. This is the FNU Council Resolution which contains direction on which staff should get increment in their salary and which staff should get bonus. The employer contends that the subject staff Mr. Abdul Sahib was not entitled to a bonus payment as he was not a full time staff in 2013. It is alleged that Vimal was wrong in writing that internal memorandum to the Vice Chancellor.
19. It is important that I outline the pivotal part of the Resolution. It reads:

"Council endorsed the recommendation of the joint FRC/HRC as follows:

- 1. That in recognition of the improving financial performance of the University, and in light of stronger performance of the University in 2013*

- (a) all full-time salaried staff who are on tenure or on 3 year employment contracts except those who are already on a surplus-sharing arrangement, be awarded a \$500 increment in their salaries with effect from 1 January 2014;*
- (b) the above be in addition to the rewards under the University's performance management system for salaried staff, for 2013 performances.*
- (c) All waged staff who are on a full time employment be awarded an ex-grata bonus of \$500,00 in place of any 2013 performance management reward to be paid preferably before Christmas 2013.*
- (d) The above rewards are to be paid only to staff who have not received any stronger disciplinary penalty than 2 caution letters for disciplinary offences committed during 2013."*

20. The internal memorandum by Vimal was dated 17 February 2015. By then Mr. Abdul Sahib was already on a full time contract. I do note that initially Mr. Abdul Sahib was not a permanent employee. He was on a temporary appointment pursuant to a letter of appointment of 17 October 2013. That letter stated that Mr. Abdul Sahib was on a temporary appointment from 21 October 2013 till 20 October 2014. The letter also said that his appointment would cease on 20 October 2014. He was on an annual gross salary of \$11,301.00.
21. On 5 March 2014, the employer had issued another contract of employment to Mr. Sahib. That contract stipulated that his contract was for a period of 3 years with effect from 7 March 2014 till 6 March 2017. The annual salary in the contract of employment was \$15,201.00 per annum being a sum more than that stipulated in the letter of appointment of 17 October 2013.
22. The contract of employment does not state that Mr. Abdul Sahib's appointment is temporary. Further, the fact that the employer had given the employee Mr. Abdul Sahib 3 year's contract, it cannot be a temporary appointment. Mr. Abdul Sahib had been serving since 2013 and when he became a permanent staff before his temporary appointment expired. Vimal was of the view that he should be paid the bonus. I do not find anything untoward about Vimal expressing his opinion and requesting that a bonus payout be made. If the request was not valid, it ought to have been rejected and Vimal told that his views were not valid.

23. Vimal testified that Mr. Abdul Sahib had made a request to him about the bonus and in his capacity, he had to forward the request of the staff with his views. I do not find any malice or misconduct in what Vimal did. Looking at the Resolution minute, even I cannot make out that those staff who have become permanent in 2014 do not qualify for the bonus. If they do not, that is the end of the matter. No payout should be made for that staff.
24. I do not think that Vimal's opinion that the payout should be made can be classed as an intentional misconduct on his part to deprive the University. It may be a wrong interpretation of the Resolution of the Council, nothing more than that. The employer is grossly unfair in treating this as gross misconduct to intentionally cause loss to the University. If the Acting Vice Chancellor did not wish to endorse the request, he ought to have refused the request of Vimal.
25. The third allegation is that Vimal failed to comply with the HR Policy No. 02 on the subject of creation of new positions within HR Division.
26. There was absolutely no evidence on this third allegation. The employer's witness did not testify how Vimal failed to fulfill his role. The witness also failed to testify as to what Vimal did or did not do that breached the HR Policy No. 2. I was also not told what HR Policy No. 2 says. The allegation is so vague that even Vimal does not know what it means. The allegation is meaningless in the form it is presented and since there is lack of evidence to clarify this aspect, I find that there was no basis to justify the termination on this reason.
27. The fourth allegation is that Vimal failed to ensure that the job description of a Medical Coordinator is prepared and approved for advertisement. It is alleged that he endorsed that her salary be pegged to the Medical Coordinator without any proper approval. It was only in the evidence that it became clear that the pronoun "her" in the fourth allegation refers to one Sharon Lata.
28. Exhibit D-V (3) is an internal memorandum dated 3 February 2015 by Manager People Personal Services Mr. Poasa Koroitamana to Acting Vice Chancellor. The subject is "*salary change and position*"; It reads:

"As per the roles and responsibilities of Ms. Sharon Lata who is at an Assistant level but is performing and looking after operations of the welfare.

Manager People Personal Services wishes to re-class her position as Coordinator with a salary of \$25,631.00. This is to be in line with the Department's Clinic and Wellness Coordinator.

I have a lot of faith in her performance, thus my recommendation that Sharon's salary and position be changed.

I submit for your endorsement.

Thanks

*Mr. Poasa Koroitamana
Manager People Personal Services*

29. The employer alleges that when that internal memorandum was written by Mr. Poasa Koroitamana, the Assistant Vice Chancellor wrote and asked *"if this re-classification is within the FNU Policies then I will be pleased to endorse the recommendation"* after which Vimal had endorsed the memorandum as being *"in line with wellness and clinic coordinator"*.
30. The allegation is that the position had to be advertised before being filled up. I have not been showed any policy of the FNU that was breached by Mr. Vimal. I am not shown that a head of Department cannot request for a good worker's position to be re-classified and his or her salary be re-aligned. In this case I accept Vimal's evidence that if the Head of Department wanted the position advertised then he would have acted on that requirement but since the Head of Department wanted Sharon Lata's position to be re-classified, there was nothing wrong with that as she was already performing those roles and functions well.
31. I do not find that Vimal is to shoulder the blame if the Head of Department wanted a staff who was already performing the functions well to take up the position. All that Vimal did was to support the employer in getting a good worker to continue but in a different position. I do not find any misconduct on the part of Vimal.

32. The fifth allegation is that Vimal failed to submit a report on discussion with Apollo Hospital and Recruitment arrangement in India. Vimal agrees in his evidence that when he accompanied his father to India for treatment, he was to hold discussions with Apollo Hospital Management and see what can be done about sending staff for treatment there. He agrees that he had to provide a report about that discussion to the employer.
33. Vimal gave evidence that a report was emailed to Ms. Sharon Lata. His evidence is not controverted that he emailed the report to Ms. Sharon Lata and that she acknowledged receipt of the report. The employer should have then subpoenaed Ms. Sharon Lata to address that evidence. In any event, even if the report was late, the employer could have made a request that it be provided within a certain time frame. I find it absurd that instead of making a stern request for the report, the employer simply chose to terminate the worker's contract. It appears that the employer was in some kind of rush to see the worker out of employment.
34. Every employer should exercise good faith in an employment relationship. The way this employer has conducted itself shows that it does not have regard to the welfare of this worker. All that the employer is hell bent on is termination.
35. The sixth allegation is that Vimal failed to formulate proper Human Resources Plan for the Human Resources Division and proceed to advertise positions by creating ad hoc positions within Human Resources. There was no evidence tendered in this regard.
36. The seventh allegation is that Vimal failed to declare his interest in the recruitment of Ms. Maan Kumari and Ms. Arti Vikash. I have addressed this issue already. This allegation is repeated to show how bad an employee Vimal was. The employer is duplicating the allegations. I once again repeat my sentiments regarding bad faith on the part of the employer.
37. The eighth allegation is that Vimal failed to declare that Mr. Mani Ram Sharma was his father who was issued a new contract and was referred for medical treatment to India. Vimal had nothing to do with the recruitment of his father or continuation of his employment. There was no evidence to that effect. I am also surprised that the employer is raising that Vimal failed to declare that Mr. Mani Ram Sharma was his father when it was the employer who had approved

Vimal to accompany his father to India for his medical treatment. The employer had also paid all the costs for his father's treatment and paid the costs for an accompanying person's travel to India which was Vimal himself. It was also part of the arrangement that when Vimal is in India, he will also work for the employer by holding discussions with the Apollo Hospital Management. I have discussed this issue before.

38. Why is the employer acting as if it did not know that Mr. Mani Ram Sharma was Vimal's father? I find it outrageous.
39. The ninth allegation is that Vimal abused his authority and office to give exorbitant salary increases to few selected HR staff on the pretext of employee retention which has allowed for increase in salary cost. There was no evidence in this regard as to which staff did Vimal give exorbitant salary increases to, when he did that and what salary increase did those staff receive. This allegation is bereft of any evidence.
40. The tenth allegation is that Vimal had recommended to Acting Vice Chancellor for promotion of Ms. Alena Rafaele from Human Resources Assistant to Training Coordinator with substantial increase in salary knowing very well that she did not meet the Minimum Qualification Requirement. There was no evidence tendered on this allegation. The employer's witness did not even address this allegation.
41. The eleventh allegation is that Vimal recommended to the Acting Vice Chancellor for confirmation of promotion of Deputy Manager People Sourcing Mr. Dharmend Chand with substantial increase in salary knowing very well he was given 1 year acting and his performance was to be assessed for confirmation which did not eventuate. There was no evidence tendered on this allegation.
42. I find that the employer has not established that the reasons for terminating Vimal was justifiable. The allegations against Vimal are frivolous and not met by the evidence. I will now turn to the procedure and see if there was compliance of the statutory requirements to carry out the summary dismissal.

43. In terms of procedure, I find that Vimal should have been given a certificate of service at the time of his dismissal. That was not complied with. If he was given his certificate of service at the time of the dismissal, the termination letter would mention that and have with it attached the certificate of service.
44. I now turn to the powers of the Deputy Chancellor to terminate the employment of Vimal. The power to terminate a staff is vested in the Vice Chancellor: *s. 30(3) of the Fiji National University Act 2009*. That power can be delegated to an appropriately qualified member of the University's staff: *s. 30(5) of the Fiji National University Act 2009*.
45. I have gone through the evidence of the employer. It has tendered Exhibit D-V (5). The Exhibit is signed on 31 December 2015. That document indicates that the powers of the Vice Chancellor was vested in the Chancellor. The employer's evidence clearly indicates that the Chancellor and Chair at the time was Mr. Iqbal Janiff.
46. If Mr. Iqbal Janiff was the appointed delegate to perform the functions of the office of the Vice Chancellor then where did Mr. Arvind Maharaj get his authority to sign the termination letter? No one has given evidence that Mr. Iqbal Janiff had delegated his work to Mr. Arvind Maharaj. No such written delegation was given to the court.
47. The employer says that Mr. Iqbal Janiff was out of the country. That does not mean that Mr. Iqbal Janiff could not perform the functions of his office from abroad or that Mr. Arvind Maharaj could presume the powers and authorities vested in Mr. Iqbal Janiff. I find that Mr. Arvind Maharaj did not have the powers to terminate Vimal.
48. Further, the date when Mr. Iqbal Janiff was vested the powers of the Vice Chancellor appears to be post the termination of Vimal. He was terminated on 21 December 2015 and the delegation authority is dated 31 December 2015. This then again raises the question whether even Mr. Iqbal Janiff could have carried out the termination as he was delegated only after Vimal was terminated.
49. I therefore find that Vimal's termination was unlawful in that the reasons for his termination was not justified and that proper procedures were not followed in carrying out the termination.

50. On the question of unfair dismissal, there is no evidence that the employer's conduct was such that caused humiliation to Vimal. Vimal felt the humiliation and his feelings were injured as a result of the termination and not by any conduct of the employer which was not proper.
51. Vimal is complaining that he was served the termination letter at home when he had visitors which humiliated him. How would the employer know that Vimal had visitors at his place when the termination letter was served? It did its best to serve the letter at Vimal's home, in a private setting. I find that that was the proper place to serve the termination letter so that Vimal is not subjected to public humiliation.
52. Vimal also complains that he suffered embarrassment because the termination letter was leaked on "Fiji leaks" blog. I have not been shown any evidence of any posts on Fiji leaks. There is also lack of evidence to the effect that it was the employer, its servants or agents who caused that publication.
53. On the question of what is the appropriate remedy, I find that it is lost wages from the date of termination until November 2016. In August 2016 Vimal moved to Melbourne. I am of the view that having gone to Australia in August 2016, he ought to have secured some work for himself in the two months period. It is not easy to survive in a foreign land without work. The purpose of Vimal leaving for Melbourne was to get work. It may not be anything permanent but when he went to Australia for that purpose, he ought to have secured some sort of an employment for himself. I am not satisfied that he did not find work as he went to Australia.
54. I find that he should be paid lost wages for a period of 11 months. He was on an annual salary of \$55,735 per annum. He would have also received benefits in the form of contributions by the employer towards his Fiji National Provident Fund. On that Fiji National Provident Fund monies, he would have received interest. I find that a sum of \$55,000 should be paid to him as lost wages and benefits for approximately 11 months.
55. Even if Vimal was in Fiji, I would have expected him to have found employment between 6 to 12 months and have mitigated his loss. He would have to show to me why with the

qualification he had, he could not secure work for himself. In this case I find that he did mitigate the loss by leaving the shores in the hope of securing an employment there. Even if he did find work abroad and went there to start work immediately, it is not unfair to allow him 2 months from the time he left the shores to put himself in order and start work without any hindrance.

56. In terms of costs of the proceedings, I find it fair that the employer pays costs to the employee. The trial was very short and Vimal did not incur expenses coming to Fiji as I had allowed him to give evidence through Skype. The employer's counsel had also not consumed any trial time on irrelevant issues. A lot of time was thus saved. The costs therefore would not be huge against the employer.

Final Orders

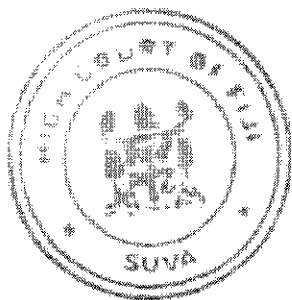
57. I find that the termination of the worker Vimal from his employment was unlawful and that he should be paid a sum of \$55,000.00 in the form of lost wages and benefits. There shall be costs to the plaintiff in the sum of \$3,000.00 as well. All the monies should be paid to him within 21 days.



Hon. Madam Justice Anjala Wati

Judge

28.07.2023



To:

1. Naco Chambers for the Plaintiff.
2. Fiji National University Legal In-House for the Defendant.
3. File: Suva ERCC 05 of 2016.

