

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 06 of 2016

BETWEEN: FIJI NATIONAL UNIVERSITY

APPELLANT

AND: PRAMESH MUDALIAR

RESPONDENT

Appearances: Mr. R. Chand for the Appellant.

Mr. D. Nair for the Respondent.

Date/Place of Judgment: Wednesday 16 August 2023 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. Catchwords:

Employment Law - Appeal - whether the tribunal was correct in arriving at a finding that the reasons to terminate the worker was not valid and the procedure to terminate the worker was wrong in law making the dismissal unlawful - tribunal proceeds to deal with other reasons which were not the basis for the termination- the employer could not rely on other reasons to terminate the worker as it was in no way connected to the reason why the worker was terminated from work.

The Cause

1. The employer Fiji National University ["FNU"] brings this appeal against the decision of the Tribunal of 31 May 2016 wherein it had found that the worker's employment was unlawfully terminated as the employer did not have a valid reason to terminate his contract and that proper procedures to terminate him was not followed. Upon its finding on unlawful dismissal, it ordered the following remedies against the employer:

- (i) *payment of the remaining part of the worker's contract. This was to be reduced to one year to reflect the worker's contribution towards the situation that gave rise to the employment grievance,*
 - (ii) *payment of accrued leave, and*
 - (iii) *issuance of a reference letter to the worker.*
2. The worker Pramesh Mudaliar was employed as a Building Maintenance Officer based at Samabula Campus to oversee all maintenance work at FNU premises between the Suva – Nausori Corridor. His final contract was for a period of 28 August 2013 to 27 August 2016. The worker had under his supervision 80 building technical staff undertaking maintenance work and one of them was Francis Murti.
3. On 24 October 2014, the worker was summarily terminated from work. The allegation was that he had asked and permitted Francis Murti to take some paint and other materials in Murti's private vehicle from Naisnu site to Koronivia for painting works to be done.
4. The employer's position was that work materials are not transported in private vehicles but in vehicles belonging to the employer and if private vehicles were to be used, the approval of the management was necessary.
5. It became apparent that Francis Murti followed the instructions to transport the material in his private vehicle but he did not have the delivery dockets to indicate that he was authorized by the security to remove those materials. When his vehicle was checked at the employer's security gate, it was found that Francis Murti was removing the items from the premises without delivery dockets. This in fact amounted to theft as there was no account of items being removed from the employer's premises and the reasons for the removal.
6. Since the directions to transport the materials in the private vehicle came from the worker Pramesh Mudaliar, he was terminated from work for allowing such acts which

the employer alleged amounted to unauthorized removal of property belonging to the employer and theft of the employer's property. The employer stated that the worker had breached FNU HR Policy No. 29. The breaches were identified in the letter of termination as follows:

"Re: Summary Dismissal

It has been alleged that on 30th September, 2014 you informed Francis Mani to take some paint with the boys for work to be done in Koronivia.

It is also noted that you are aware that Francis Murti was using his private vehicle to transport FNU items from one campus to another without the management's approval.

When you were asked to explain and you stated that security used to check the items and signed the delivery docket.

Please, note that you have breached FNU HR Policy HR - 29 which inter alia states in clause;

9.10 *Examples of other conduct constituting misconduct(s), the unauthorized removal of, or any willful damage to, property belonging to the University, other employees, students, guests, consultants or visitors.*

It is noted with concern that you have committed a very serious breach which can create adverse effect to the University and according to FNU HR Policy HR - 29 which inter alia states in clause;

8.5 *Gross Misconduct. This comprises one or more serious breach(es) of University policy(ies) or regulation(s), or a conduct that causes, or has the potential of actually or potentially creating an adverse impact on the reputation and/or stature of the University. Gross misconduct includes conduct that involves fraud, theft and attempted theft.*

This is a very serious breach in itself when you are supposed to provide proper arrangement for the transfer of FNU materials from one campus to another.

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.

Therefore, and pursuant to section 33(1) of ERP and section 9.10(s) 8.5(i), 27.1, 27.2(a) of the FNU HR Policy 29 you are summarily dismissed with immediate effect.

You are required to duly complete the Exit Form and hand over to Director Properties & Facilities, together with all FNU property in your possession.”

7. The incident that gave rise to the worker’s termination is fully recorded and reported in the employer’s internal memorandum of 6 October 2014. This memorandum is from Insoi Nabuka, the Human Resources Assistant to Director Finance and Human Resources. It reads:

“1.0 Introduction

The Department of Peoples Relation received email from GMUS/AU on 1 October, 2014 regarding the attempted theft reported from Nasinu Campus.

2.0 Issues

1. *Property staff Francis Murti’s vehicle was stopped by Nasinu security at the main gate for security check on 30 September, 2014 and found four (4) new gallons of paint inside the vehicle.*

3.0 Analysis/Findings

- 3.1 *Security Officer Filipe Vuebalavu stated that he was on duty at Nasinu main gate on 30 September, 2014 with S/O Rakanace when he received a call from Team Leader Laisiasa Ravula to check the vehicle registration number DU183. The vehicle driven by Francis Murti arrived at 1720 hours. The driver was told to open the booth and the following items were found inside: 4 × 4 litre Galvanized Iron Primer, 1 × new paint brush, 5 × 1 party knife, 2 × steel brush, Handy Sander, 1 × Silicon Gun, 1 × 8 meter tape line, 14 × 1 Keys, 2 × Silicon , 1 × 4 4 Aerotape , 3 × blue tapes , 1 × 1 Rasene. (folio# 1, 2, 3, 4, 5).*
- 3.2 *Francis Murti stated that he got a work order for the painting work at Koronivia. Pramesh, the supervisor asked him if he had any paint available for the roof at Koronivia shed. Francis said yes and loaded the paint in the car and was going home when the security stopped him at the main gate. They removed the paint with his personal tools. He further stated that he wanted to take the paint home so that he could head straight to Koronivia early in the morning. (folio# 18).*

- 3.3 *Pramesh Mudaliar stated that on Tuesday he talked to Francis to arrange work for Koronivia shed. He asked him to arrange four (4) boys and the metal primer which was in Nasinu to be used in Koronivia. He has to arrange the material with the boys and transfer the material from Nasinu to Koronivia with a delivery docket according to their practice and procedures. In the past they had delivered some small materials in his vehicle with delivery dockets signed by the security with work order and delivered to the site for the work to be done. He was using his vehicle to transport four (4) boys with his personal tools with him (folio#15, 16). He was asked to provide the delivery docket that was signed by security but he stated that it was a long time and he cannot provide the evidence.*
- 3.4 *Nitin Kumar stated that he asked Francis in the afternoon if he could go with him on his way home. He did not see Francis load the paint but he noticed that the security stopped them at the main gate and inspected the booth. He did not get out of the vehicle and was not aware of what was happening (folio# 13, 14).*
- 3.5 *Sarjeet Singh stated that he always accompanies Francis in his vehicle as usual and on 30 September 2014, he took a ride and was not aware that Francis had the paints inside the booth. The security stopped the vehicle at the main gate, inspected the booth and took the paint with other materials out. Francis got in the vehicle and they all let out (folio# 11, 12).*
- 3.6 *Sakiusa Saulilai stated that he asked Francis if he could come with him in his vehicle and got in the front seat. When they reached the security check point the security stopped the vehicle and inspected the booth. Security Officer Filipe took out the paint with other materials and they left out (folio# 9, 10).*
- 3.7 *Ritesh Ravinish stated in his statement that he never witnessed Francis loaded the paint in his vehicle. On 30 September 2014, he was on lunch break when Francis loaded the paint in his vehicle. They were travelling in the vehicle when the security stopped them at the main gate and inspected the vehicle. He saw that the paint and the tools were covered with a white cloth. The security asked for the pass but Francis stated that they will bring the paint back to the University (folio# 7, 8).*

- 3.8 *Principal Security Officer (Samu Vesikula) confirmed that they have not come across any situation where security signed delivery docket for FNU items taken by Francis Murti's vehicle (folio# 20).*

FNU HR Policy HR -29 which inter alia states in clause;

- 9.10** *Examples of other conduct constituting misconduct.*
The unauthorized removal of, or any willful damage to, property belonging to the University, other employees, students, guests, consultants or visitors.
- 8.5** *Gross Misconduct: This comprises one or more serious breach(es) of University policy(ies) or regulation(s), or a conduct that causes, or has the potential of actually or potentially creating an adverse impact on the reputation and/or stature of the University. Gross misconduct includes conduct that involves:*
- (i)** *Fraud, theft and attempted theft.*

4.0 **Recommendation**

Pramesh stated that they used to transport FNU items in the vehicle with delivery docket signed by security but cannot provide the evidence. Francis was taking the FNU items home without the delivery docket and we can confirm that this practice has been going on for a while because the items were well covered with white cloth inside the booth (folio# 8).

Therefore, it is recommended that both Pramesh Mudaliar and Francis Murti be issued with termination letter for attempted theft.

(Signed)
Inosi W. Nabuka
HR Assistant"

Tribunal's Findings, Appeal and Analysis

8. The employer has appealed the decision of the Tribunal on several grounds but the main issue in this matter is whether the tribunal had properly found that the employer did not have a valid reason to terminate the employment of Pramesh Mudaliar for the reason it did by the termination letter and that proper procedures were not followed.

9. In its judgment, the Tribunal went onto analyse other reasons which had formed the basis of the warning letters to the worker. The warning letters and the reasons for which the warning letters were issued did not form part of the termination of the worker. The reasons for the warning letters were being absent from work without proper leave and without informing the employer and not getting work done on time. These were not related to the incident causing the termination. I therefore do see any connection or reason why these matters were allowed to be part of the evidence and the findings.
10. The reason the employer appeals the other findings is that it became part of the judgment but since those reasons did not become the basis for the termination, I see no reason why it made its way in the evidence and in the judgment and why I should unnecessarily deal with. I repeat that the main issue is unauthorized removal of employer's property from the premises and theft. That is what the parties and the Tribunal should have concentrated on.
11. This was a case of alleged unauthorized removal and theft of 4 gallons of paint and other incidental materials like paint brushes. These items were being carried in the private car of Francis Murti without a delivery docket. The employer's policy can be understood quite clearly. It cannot allow staff to remove work materials in their private vehicle as it would lose control of the situation if all staff start removing materials. This can lead to a menace. Staff can steal the materials and use it in places where it is not in the benefit and interest of the employer. The employer in its interest does not wish to have its work material stolen from work sites or the premises therefore it has a policy of not removing materials in private vehicles of staff.
12. When the worker was questioned as to why he has authorized such an act, his statement to the employer was as follows:

"On Tuesday I talked to Francis Murti to arrange work in Koronivia Brouder Shed. I asked him to arrange 4 boys and the metal primer which was in Nasinu to use it in Koronivia since C. B. Store was already in Koronivia campus to paint the roof.

He was to arrange the material and the boys and transfer the material from Nasinu to Koronivia with a delivery docket since this is our practice and procedure.

In the past we had delivered some small material in his vehicle with a delivery docket signed by the security and delivered on the site and work done and work order filled and the material listed which is closed by the client to confirm that the work has been done.

He is using his personal vehicle all the time at site and he has also carried the 4 boys with him to get the work done. He is also carrying personal tools in his car all the time he comes to work.”

13. The worker’s statement clearly indicated to the employer that he knew that Francis Murti was using his private vehicle to transport work materials when that was not authorized. In fact there was no delivery docket for the materials seized in Francis Murti’s car. It is therefore, obvious that Francis Murti was stealing these items from the FNU premises.
14. The worker, as his supervisor, should never have authorized any employee to use their private vehicle to remove the employer’s assets and materials out of the premises. No one had the authority to do so as use of private vehicles to remove materials amounts to theft.
15. The worker should have asked the employer to provide the vehicle for transportation of the materials. There is no evidence that he made a request for the transport to shift the materials. He asserts that Murti’s private vehicle had been used in the past for transportation of work materials from one site to another with delivery dockets but no such evidence could be provided by him. It is clear that if that happened before, then there was theft before as well.
16. The worker should not have allowed Francis Murti to use his private vehicle because this act can cause loss to the employer of its property. In this case there was going to be loss until the security confronted Murti and found that there was no delivery docket and thus seized all the items. I do not think that the worker can be exonerated by saying that

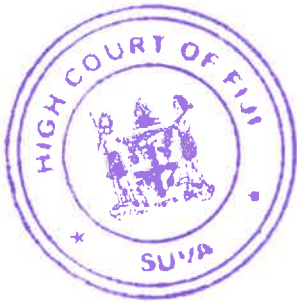
it was for Francis Murti to follow all procedures of removing the items from the premises. Why did not he follow the procedure of seeking approval of the management for removal of work materials in the private vehicle?

17. One need not be explained the importance of staff not using private vehicle for employer's work such as transporting work materials. I am of the firm view that the worker either deliberately allowed Francis to work in that fashion for their gain or his neglect of the employer's rules allowed Francis Murti to steal the items from the University. Whatever the situation is, the worker should shoulder the responsibility.
18. I do not find that the employer was wrong in terminating the worker's contract for promoting theft. This was a case for summary dismissal and the worker was not entitled to any warning or a right to hearing. He could be dismissed instantly. Clause 27.1 of the employer's Human Resources Policy states that "nothing in this policy prevents the University from dealing with cases of gross misconduct as the Vice- Chancellor deems fit". This was a case of gross misconduct and the University could summarily dismiss the worker under clause 27.2 of the same policy.
19. The worker was allowed an opportunity to explain himself and that formed part of the consideration of whether the worker should be terminated. I find that the employer had established the reason for terminating the worker.
20. I therefore, find that the Tribunal was wrong in coming to a finding that the termination was not justified substantially and procedurally. I find that the tribunal erred in analyzing the facts of the case in coming to a finding that the worker was grossly at fault for allowing Francis Murti to use his vehicle to transport materials from one site to another without proper approval. This caused Francis Murti to remove materials without proper procedures being followed.

Final Orders

21. In the final analysis I find that the termination of the worker was lawful. I therefore allow the appeal and set aside the orders of the Tribunal wholly.

22. Each party shall pay their own costs of the appeal proceedings.



Anjala Wati

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Hon. Madam Justice Anjala Wati

Judge

16.08.2023

To:

1. ***Fiji National University Legal In-House for the Appellant.***
2. ***Fiji Public Service Association for the Respondent.***
3. ***File: Suva ERCA 06 of 2016.***