

**IN THE EMPLOYMENT RELATIONS COURT OF FIJI AT SUVA**  
**CENTRAL DIVISION**

**ERCA No. 11 of 2022**

**BETWEEN:**                **GOLDEN OCEAN GROUP**

**PLAINTIFF/APPLICANT**

**AND:**                      **VALATIA INIA**

**DEFENDANT/RESPONDENT**

<b>Date of Hearing</b>	<b>:</b>	<b>25 August 2023</b>
<b>For the Applicant</b>	<b>:</b>	<b>Ms. Singh A.</b>
<b>For the Respondent</b>	<b>:</b>	<b>Ms. Veikoso A. N. (National Union of Factory and Communal Workers)</b>
<b>Date of Decision</b>	<b>:</b>	<b>15 January 2024</b>
<b>Before</b>	<b>:</b>	<b>Mrs. Levaci, SLTTW Acting Puisne Judge</b>

**J U D G M E N T**

**(APPEAL AGAINST THE DECISION OF THE EMPLOYMENT RELATIONS TRIBUNAL)**

**PART A – BACKGROUND AND TRIBUNAL DECISION**

1. This is an appeal by the National Union of Factory and Commercial Workers (NUFCW) on behalf of the Appellant against the decision of the learned tribunal holding that the Employer was right in summarily dismissing the Respondent for gross misconduct.
2. It was alleged that the Respondent was found entering the work premises drunk, urinating inside the work premises and exiting from the work premises on the day he was supposed to come to work. A letter of summary dismissal on 25<sup>th</sup> July 2020 was issued to him received by him on 27<sup>th</sup> July 2020.

3. The Respondent (Grievor) had contested the Notice of Summary dismissal issued to him in the Employment Tribunal and after trial, the Tribunal concluded with the following Orders:
- (i) The decision of the Employer to terminate the service of the Grievor is unlawful and unfair.
  - (ii) The Employer to immediately reinstate the Grievor to his former position or another position no less advantageous to him without loss of any benefit;
  - (iii) The Employer to compensate three months' wages and the rest to be assumed as leave without pay.
  - (iv) The Employer to pay the Grievor within 21 days thereof.

#### **PART B: GROUNDS OF APPEAL**

4. The Grounds of Appeal are as follows:

1. "The Employment Relations Tribunal erred in law and in fact in the decision that the Respondent was represented by Mr Sosiceni Bainivuwai.
2. The Employment Relations Tribunal erred in law and in fact in the decision that the Respondents reason for termination was because of reporting to work under the influence of alcohol.
3. The Employment Relations Tribunal erred in law and in fact in the decision by stating the Employer did not present the money lender employee as their witness to confirm or deny the Grievor's arguments for being at the gate on the day of the incident.
4. The Employment Relations Tribunal erred in law and in fact in the decision by considering that the Respondent was standing outside the Appellants gate at the day of the incident when the security officer caught him at the entrance and stopped him from entering the work premises and not punched in at work on the day of the incident when in fact the code 5. The Employment Relations Tribunal erred in law and in fact by considering that the Employer within seven days from the incident did not attempt to get the Respondents side of the story but issued a termination letter.
6. The Employment Relations Tribunal erred in law and in fact by considering that the Respondent could have been given a warning letter instead of being summarily dismissed thereby admitting that the conduct of the Respondent was wrongful.
7. The Employment Relations Tribunal erred in law and in fact by considering that the Respondent was outside the work premises on the day of the incident.
8. The Employment Relations Tribunal erred in law and in fact by considering that the Respondent was outside the conduct of the Appellant applied to the Respondent at all times.
9. The Employment Relations Tribunal erred in law and in fact by using the words termination and summarily dismissal interchangeably.
10. The Employment Relations Tribunal erred in law and in fact by not considering the Respondents display of his manhood to female workers as gross misconduct.
11. The Employment Relations Tribunal erred in law and in fact by considering that the Respondent requested the Appellant for CCTV footage of the day on which the incident occurred.
12. The Employment Relations Tribunal erred in law and in fact by stating Ms Lal as a witness of the Employer/Appellant at trial.

13. The Employment Relations Tribunal erred in law and in fact by considering that Mr Zhang (Employers witness at trial) did not see the Respondent punch in on the day of the incident when in fact it was the job of the security officer at the entrance.”

### **PART C: LAW ON APPEAL**

5. Section 220 (1) of the Employment Relations Act 2007 stipulates that –
  - ‘220 (1) The Employment Relations Court has jurisdiction –
    - (a) To hear and determine appeals conferred upon it under this Promulgation and any other written law.’
6. Section 242 (2) (4) and (7) of the Employment Relations Act 2007 states –
  - ‘(2) An appeal to the court must be made in the prescribed manner within 28 days from the date of the decision of the tribunal.
  - (4) Subject to subsection (2) an appeal lies as of right to the Employment Relations Court –
    - (a) From any first instance decision of the tribunal; or
    - (b) Where any ground of appeal from any appellate jurisdiction of the tribunal involves a question of law.
  - (7) When hearing or determining an appeal the court may-
    - (8) Confirm, modify, or reverse the decision or a part of the decision of the tribunal or set aside the decision of the tribunal and substitute its own decision; or
    - (9) Refer the matter with or without any direction to the tribunal to reconsider, either generally or in respect of specified matters, the whole or part of the matter to which the appeal relates.”
7. An Appellate court will be slow to interfere with the factual findings of an original court unless they are plainly wrong or drew wrong inferences from the facts and the Appellate court need not exercise jurisdiction to interfere with the Tribunal’s decision only because it exercised its discretion in another way (see Tuckers Employees and Staff Union -v- Goodman Fielder International (Fiji) Limited ERCA No. 28 of 2018). The Appellate Court will review a decision where-
  - (i)From the face of the record the Court finds that the Tribunal has blatantly erred in facts or law and
  - (ii)Has acted in ultra vires or has failed to consider a pertinent issue raised before the Tribunal.
8. The Appellate Court will not overturn a decision of the Tribunal unless the above factors have been met. Consideration is made to the observations of Lord Reid in Benmax -v- Austin Motors Co Ltd [1955] ALL ER 376 at 329 :

‘I think the whole passage, refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. That be right, I see no reason to doubt anything said by Lord Thankerton. But in cases where there is no question the credibility or reliability of any witness, and in cases where the point in dispute is the proper inferences to be drawn from proved facts, an appeal court is generally in as good a position in evaluating the evidences as the trial judge, and ought not to shrink from that task, though it ought of course to give weight to his opinion....’ (underlining my emphasis).

#### **PART D: SUBMISSIONS**

9. In their submissions the Appellant argued that hearing was conducted by Ms Gaga and not Mr Bainivuwai. The reasons for termination was for reporting under influence of alcohol, urinating at the main gate and Security chasing the Appellant away. The Appellant had appropriately provided reasons in accordance with section 114 of the Employment Relations Act. The Respondent did not prove through its witnesses that it did not enter the work premises that day and did not raise the issue of money lending when first discussed with the Appellant. There were also eye witnesses given in the court records of the Respondent entering the premises and urinating at the gate.
10. The Appellant submitted that the Respondent gave evidence that he visited a money lender, there was no witness to confirm this. That the Appellant was not required to give written reasons for summary dismissal. The Appellant had given the Respondent time to be heard by replying to enquiries from the Union. The summary dismissal letter was given to the Respondent as he was drunk and disorderly and the others who accompanied him were only given a warning letter. They had a meeting and thereafter the Respondent again showed his behavior.
11. The Appellant also submitted that the ground of appeal was that the Respondent was summarily dismissed and not terminated. Definition is provided in section 33 of the Employment Relations Act. There were three reasons given for his termination and the Tribunal was to have analyzed to find if all three reasons were proven which they did not, they looked only at one of the three reasons and found it was not proven.
12. In Response, the Respondent filed their written submissions and also argued in Court that in accordance with the case of Yanuca Island Ltd trading as Shangrila Fijian Resort and Spa -v- Vani Vatuinakuru ERCA 9 pf 2014 the onus is on the Employer to establish the cause and the investigation will establish the guilt.”
13. In reference to Ground 2, the Respondent argued that the Appellant failed to establish that the Respondent reported to work that day. There was no investigation into the CCTV camera as well as an interview of the money lender.
14. Fr Grounds 4 and 7, the Respondent denies that there was proof of entrance into the premises on the day in question.

15. In response to Ground 8, there was no code of conduct submitted during trial as part of the contract or referred to for the purposes of the summary dismissal. For Ground 9 provides that the Respondent was summarily dismissed through the termination letter. In ground 10 there was no evidence that the Respondent had displayed his manhood nor was it included as a ground for his dismissal. The only ground for dismissal was his failure to report to work when he was under the influence of alcohol. Ground 12 and 13, the officer who gave evidence was a security officer and not a factory hand on the day in question. For Ground 14 there was no evidence that the Respondent had entered the premises for work whilst intoxicated.

## **PART E: ANALYSIS**

16. The Court considered the first three grounds - Grounds 2, 3, 4. Ground 1 is irrelevant to the crux and merit of the Appeal.

### **Grounds 2, 3, 4**

*2. The Employment Relations Tribunal erred in law and in fact in the decision that the Respondents reason for termination was because of reporting to work under the influence of alcohol.*

*3. The Employment Relations Tribunal erred in law and in fact in the decision by stating the Employer did not present the money lender employee as their witness to confirm or deny the Grievor's arguments for being at the gate on the day of the incident.*

*4. The Employment Relations Tribunal erred in law and in fact in the decision by considering that the Respondent was standing outside the Appellants gate at the day of the incident when the security officer caught him at the entrance and stopped him from entering the premises.*

17. The Court considered the records of the Tribunal. According to the evidences, the Respondent came to the gate and urinated at the gate. He was stopped at the gate from entering into the premises by the security officer, Ms Lata. The Respondent's evidence is that he came to meet a money lender. No evidence was submitted by the money lender to confirm or deny meeting with the Respondent. There was no CCTV footage available although the mechanism was there, hence there was no evidence to confirm whether or not the Respondent entered the premises. Hence the tribunal had to weigh the credibility of the direct evidences from Ms Lata and Mr Zhang and the direct evidence of the Respondent himself.
18. According to the Tribunal it determined as follows –

“[41] The employer's reason for termination in this instance was “reporting to work under influence of alcohol”. It is important to consider that the grievor was not at work under the influence of alcohol actually conducting work at the time of the incident. Both the employers witness and that of the grievor confirmed through the evidence that the grievor was not at the work site but that he was outside the gate. Before he could even enter the premises to conduct his duties, he was stopped at the gate by security and told to leave. He had not even signed in yet. In this regard, the employer cannot maintain that the grievor had reported to work under the influence since he had not signed in or conducted any work under the influence of alcohol. Lawful cause is therefore not justified. In this

regard, lawful cause to terminate was not established thus the termination is wrong and unlawful.”

19. When considering the copy records, the employer witness stated the Respondent entered the guard house which was located inside the work premises. He was chased out by the employer eye witness. The Respondent had urinated outside the gate, this was not disputed by either party in their evidences. They later left in a red taxi.
20. The Respondent denied entering the premises. However from the evidences in the copy records, there is strong evidences that the Respondent and his friends had entered the gate into the guard house. It was at the guard house that he was chased back. It is not disputed by all the parties in their evidences that the Respondent and his friends were drunk when they entered the gate of the premises into the guard house.
21. The Respondent denied he was attending work drunk as there was no evidence by the Employer that he had reported in for work. The Employers evidence from the two witnesses was that the Respondent was at work when he was found by the Employers witnesses drunk and thus chased home.
22. There was no evidence from his colleagues that they were there only to obtain monies from the money lender and not to attend work. Although the Respondent gave evidence he excused himself from attending work with Jim, there was no evidence directly by Jim consistent with this part of the Respondents evidence. Jim only chased him from work because he was drunk.
23. There was consistent evidence by the Appellants witnesses that the Respondent had entered the premises and consistent circumstantial evidence that his conduct showed that there was no other reason but to come to work and that there was no contradictory independent evidence from the Respondent that he was to collect monies from the money lender.
24. However the Court found that the Tribunal correctly analyzed that the Respondent did not report to work as there was no records by the Appellant of the Respondent signing in or clocking in his time. Hence he was present inside the gate drunk but did not clock in or report to work as he was chased away by the two employers witnesses.
25. Court finds that the Tribunal was correct and did not err in law or fact that the Respondent did not report to work drunk. However Tribunal was incorrect to determine that the Respondent was found standing outside the gate. He was however outside the building within the work premises and did not enter the building for work purposes.
26. Finally it was incorrect for the Tribunal, which it erred in fact, to determine that the onus was on the Employer to gather information from the purported money lender. The Respondent had relied upon the name of the money lender, he was to have proven his defense by calling the money lender to give evidence. His failure meant only his evidence would be analyzed.

27. Finally, the Tribunal did not err in law or facts when she confirmed that there was lack of evidence that the Respondent had had reported to work whilst being drunk as the reason for termination by way of summary dismissal.
28. When the Court analyzed the letter of summary dismissal, there were a number of reasons raised however the only reason that justified breaches of the code of conduct giving rise to summary dismissal for gross misconduct was reporting to work under influence of alcohol.

#### **GROUND 5, 6, 7, 8 and 9**

*5. The Employment Relations Tribunal erred in law and in fact by considering that the Employer within seven days from the incident did not attempt to get the Respondents side of the story but issued a termination letter.*

*6. The Employment Relations Tribunal erred in law and in fact by considering that the Respondent could have been given a warning letter instead of being summarily dismissed thereby admitting that the conduct of the Respondent was wrongful.*

*7. The Employment Relations Tribunal erred in law and in fact by considering that the Respondent was outside the work premises on the day of the incident.*

*8. The Employment Relations Tribunal erred in law and in fact by considering that the Respondent was outside the conduct of the Appellant applied to the Respondent at all times.*

*9. The Employment Relations Tribunal erred in law and in fact by using the words termination and summarily dismissal interchangeably.*

29. The Tribunal determined:

“[43] The Tribunal is therefore of the view that the grievor did not turn up for duty on 18 July 2020 to report for work and therefore the allegation for gross misconduct by reporting to work under the influence of alcohol is wrong and unjustified. In this regard and because the gross misconduct alleged by the employer was not due to grievor’s work performance, the Tribunal is of the view that the grievor could have been given a warning instead in line with the employers disciplinary procedure.

[46] The employer had consulted four witnesses on the incident of 18 July 2020 prior to issuing the termination letter. It is unfortunate though that within the seven days from the date of the incident until the termination of the grievor, the employer did not at any time attempt to get the grievor’s side of the story. The action of the employer is therefore procedurally unfair.”

30. Given that the Tribunal had determined that the summary dismissal of the Respondent was unlawful, which the Court holds as correct, there was no duty to the Appellant to give reasons for any summary dismissal under section 33 (1) of the Employment Relations Act.

31. However where a reason is to be given, the Employer must have exhausted all investigations pertaining to the gross misconduct. A right to be heard by the Respondent was not necessary where the summary dismissal is lawful.
32. In this instance as the dismissal was unlawful, the Appellant was misconstrued by adopting the wrong processes and thereafter dismissing the Respondent.
33. There was no suggestion in the summary dismissal letter to other misconducts by the Respondent in the company. Hence the suggestion by the Tribunal was correct in suggesting a warning was appropriate.
34. The Court found that the Tribunal did not err in law or fact in regards to Grounds 5,6,7,8 and 9.

### **Grounds 10, 11, 12 and 13**

*“10. The Employment Relations Tribunal erred in law and in fact by not considering the Respondents display of his manhood to female workers as gross misconduct.*

*11. The Employment Relations Tribunal erred in law and in fact by considering that the Respondent requested the Appellant for CCTV footage of the day on which the incident occurred.*

*12. The Employment Relations Tribunal erred in law and in fact by stating Ms Lal as a witness of the Employer/Appellant at trial.*

*13. The Employment Relations Tribunal erred in law and in fact by considering that Mr Zhang (Employers witness at trial) did not see the Respondent punch in on the day of the incident when in fact it was the job of the security officer at the entrance.”*

35. Despite the very serious allegations of a display of manhood when urinating, there is nothing in the court records that confirms this. Despite the employers witness stating there were two other witnesses present when it happened, she did not succinctly describe what she saw at the Trial nor did any other witness for the Appellant do the same. Hence the Tribunal was not in error for not referring at all to the display of manhood as there was no corroborative evidence of the same.
36. The records show that the Appellants witness relied upon the CCTV footage to confirm if the Respondent entered the work premises via the gate or any other entrance. However no such evidence was tendered as per the Court records. The Tribunal erred in fact by referring to the Respondent as asking for the footage. No request was made by him.
37. Both the security officer Ms Lata and Mr Jim, from the copy records, did not see the Respondent sign in or punch in for work. There clear evidence of this and hence the Tribunal did not err in arriving at this conclusion from the facts.

### **Conclusion**

38. The Court finds that the Appellant was unable to prove the Grounds of Appeal and the Tribunal was correct in arriving at its conclusion which it did.

**Costs**

39. The Court will award costs against the Appellant for the sum of \$300.

**Orders of the Court:**

40. The Court orders as follows:

- (a) That the Appellants grounds of appeal are dismissed;*
- (b) That the decision of the learned Tribunal is upheld;*
- (c) That costs of \$300 be awarded to the Respondent.*



The seal of the High Court of Fiji is circular, featuring the text "HIGH COURT OF FIJI" around the top and "SUVA" at the bottom. In the center is the national coat of arms of Fiji. To the right of the seal is a handwritten signature in blue ink.

Mrs Senileba LWTT Levaci  
Acting Puisne Judge