

IN THE EMPLOYMENT RELATIONS COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 23 of 2018

BETWEEN: **THE FIJI NATIONAL UNIVERSITY**

APPELLANT

AND: **LAIAKINI COLATI**

RESPONDENT

Appearances: Mr. B. Singh and Mr. R. Chand for the Appellant.

Mr. L. Vosawale for the Respondent.

Date/Place of Judgment: Thursday 11 July 2024 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

Catchwords:

Employment Law – Appeal – whether the tribunal was correct in arriving at a finding that the employer had unjustifiably terminated the work of the worker- is the award of lost wages justified.

Cause

1. This is an appeal by the Fiji National University (“FNU”) against the decision of the Tribunal on its finding that the worker Mr. Colati was unjustifiably and unfairly terminated from work. Consequently the employer was ordered to pay to the worker 12 months lost wages in damages.
2. Mr. Colati was employed by Fiji Institute of Technology from 2007 as a Lecturer and upon the merger he was transferred to FNU. His employment contract was terminated on 2 January 2013.

3. The employer had raised 3 disciplinary charges against Mr. Colati. The charges were as follows:

Count 1

Statement of Offence

That you breached section 6.1.2.1 of HR Code of Conduct for Employees Policy where you failed to maintain expected standards of performance which requires carrying out your duties in an efficient and competent manner.

Particulars of Offence

That you continuously procrastinated the issue even though the students had paid their fees for the Unit TDR 401.

Count 2

Statement of Offence

That you breached section 7.2.4 of HR Code of Conduct for Employees Policy by neglecting your University duties.

Particulars of Offence

After receiving the unit descriptor, you as the Unit Lecturer told HOS that it was too late and that all of the drawing classrooms were engaged in this trimester when in fact classroom A108 was already allotted for the said unit on 10th March, 2012.

Count 3

Statement of Offence

That you breached section 6.1.4 of HR Code of Conduct Policy by failing to obey and follow lawful and reasonable instruction given by your supervisor.

Particulars of Offence

Being the Unit Lecturer, you disobeyed lawful orders given by your supervisor in that you refused to teach the Unit TDR 401.

4. The background leading to termination of Mr. Colati arises from his obligation to teach the Technical Drawing Unit (TDR 401).
5. The TDR 401 is a servicing course. This Unit was to be taught by the School of Applied Science. This school did not have a proper personnel to teach the Unit. As a result, it had to rely on Mr. Colati from the School of Building and Engineering to teach the same.
6. It is not in dispute that the School of Applied Science had not made the usual request to service this course. Since Mr. Colati's assistance was sought, the School of Applied Science had to provide to Mr. Colati a Unit Descriptor for TDR 401 to enable Mr. Colati to teach the proper curriculum to the students.
7. Mr. Colati made requests for the Unit Descriptor. It was not given to him until after 3 weeks into the first trimester.
8. After the Unit Descriptor was provided, Mr. Colati raised concerns that there was no proper drawing rooms to teach the students. He was provided with a non-drawing room but Mr. Colati's concern was that that room did not have drawing boards for effective teaching.
9. Dr. Kalla, who was the Head of School of Applied Science was not pleased that the Unit was not being taught when the Unit Descriptor was given to Mr. Colati. He addressed this issue with Mr. Colati who explained the difficulty that there was already delay in teaching the Unit and that the unavailability of a proper classroom did not create a proper teaching environment.
10. Dr. Kalla then raised the issue with the Acting Dean of CEST Mr. Joshua Mataika. Mr. Joshua Mataika then had a meeting with Dr. Kalla and Mr. Colati. At this meeting, it was directed

that the Unit be deferred to another trimester. Dr. Kalla was obviously not happy with Mr. Colati following the directions to defer the teaching of the Unit.

11. Dr. Kalla then set about finding a replacement lecturer in place of Mr. Colati to teach unit TDR 401. He requested one Mr. Pranesh Dutt to take the Unit. Mr. Dutt was studying in Australia. He returned to Fiji to honor the request.
12. Lecturers for Unit TDR 401 eventually started on 16 April 2012. The University says that the whole syllabus was satisfactorily covered by Mr. Dutt with lectures being taken in the evenings and on weekends to cover the syllabus.
13. Dr. Kalla obviously escalated the matter to the higher authorities against Mr. Colati.
14. After the laying of charges, the matter was referred to the Staff Disciplinary Committee ("**SDC**"). The SDC is established under clause 16 of the FNU'S HR Policy No. 29.
15. Under clause 17.1 of the same policy, the SDC is required to report to the Vice Chancellor ("**VC**") of FNU on its recommendations. The SDC presented its report containing the recommendations on 27 September 2012.
16. The recommendation to the VC was as follows:

"It is this Committee's unanimous recommendation that Mr. Colati be found guilty of the charges laid against him."
17. The VC accepted the findings and required a recommendation on the penalty. The SDC then proceeded to hear the mitigation and sentencing on 18 December 2012.
18. The recommendation to the VC after the mitigation and sentencing was as follows:

"It is our unanimous view that Mr. Colati be summarily dismissed from his employment from the FNU and is so recommended to the Vice Chancellor."
19. Following the SDC's recommendation, FNU terminated the employment of Mr. Colati on 2 January 2013.

20. The termination letter reads as follows:

“You were charged for neglecting your duties in that you refused to teach Technical Drawing Unit TDR 401. In accordance with FNU HR Policy on Code of Conduct for Employees, the matter was referred to a Staff Disciplinary Committee (SDC).

*The Committee (SDC), after hearing deliberations from both parties, unanimously found you **GUILTY** of the charges laid against you and recommended to the Vice Chancellor that since you disregarded the essential conditions of your employment by failing to follow what were clearly reasonable orders, you be summarily dismissed from employment with Fiji National University.*

Accordingly, I am directed to advise you that you are summarily dismissed from employment with Fiji National University with immediate effect for willful disobedience to lawful orders given to you by your employer. (A copy of SDC Ruling is attached for your perusal and retention).

You are required to hand over all FNU property that is in your possession to the Dean, College of Engineering Science and Technology”.

21. Mr. Colati appealed his termination which was dismissed by the Staff Conduct Appeals Committee on 1 March 2013.

The Tribunal’s Findings.

22. The Tribunal began by remarking on the apparent disorganization in the School of Applied Science. It stated that the disorganization was clear from the decision to introduce a new Unit without the establishment and availability of the required facilities, and more importantly a qualified staff to teach the subject.

23. The Tribunal found that it was agreed by the parties that the Acting Dean Mr. Mataika called the worker and Dr. Kalla for a meeting and discussed with them the issues surrounding the teaching of the Unit.
24. In that meeting, consensus was reached to defer the teaching of the Unit to a later date. The Tribunal said that the worker Mr. Colati therefore respected that position to defer the teaching of that Unit. The Tribunal found that Dr. Kalla did not obey that direction and that if there was to be any issue of insubordination, it should be against Dr. Kalla, as he actively pursued the teaching of the Unit after that meeting, notwithstanding the consensus reached with the Acting Dean.
25. The Tribunal stated that, from the evidence, it could not discern any reason why Dr. Kalla insisted on the Unit being taught. The Tribunal felt that it had to do with the students already being enrolled in that Unit and having paid the fees.
26. The Tribunal said that it could not establish any instance of in-subordination on the part of Mr. Colati as he belonged to a different School and he could not agree to teach in an imperfect educational surrounding. To do so would be tantamount to obeying an unlawful order, taking into consideration all the circumstances existing at that time.
27. The Tribunal said that there were two contrary views. Dr. Kalla desired that the Unit be taught immediately but Mr. Mataika, the Acting Dean wanted the Unit deferred to a later date. The Tribunal said that in light of the contrary instructions, the seniority rule prevailed. Mr. Mataika was senior to Dr. Kalla and Dr. Kalla ought to have followed the directive of Mr. Mataika.
28. The Tribunal further said that the instruction by Dr. Kalla cannot be reasonable in all the circumstances existing at the time of termination. Classes had already started and it would be unreasonable to expect a staff member to teach in the weekends and after normal hours.
29. The Tribunal also found that Mr. Colati had in no way insulted Dr. Kalla. He had reasoned out why the Unit could not be taught that late. He addressed the issue with reasonable explanation.

The Appeal

30. The employer appeals the decision of the Tribunal on the grounds that the Tribunal erred in law and in fact.

(1) In finding that the worker was unjustifiably and unfairly terminated:

(a) by applying the wrong test for justification and by not considering and applying the statutory law test submitted by the employer; and

(b) by not finding that the misdemeanor caused by the grievor was gross misconduct that constituted summary dismissal.

(2) In arriving at a finding purely from the worker's perspective and failing to consider the decision of the Staff Disciplinary Committee and the Staff Disciplinary Appeals Committee conducted by an independent Barrister and Solicitor.

(3) In failing to give consideration to the evidence and the submissions presented by the employer.

(4) In failing to justify the award of 12 months of lost wages.

Law and Analysis

31. The grounds of appeal collectively require me to examine whether the Tribunal had correctly come to a finding that the worker had failed to carry out his duties effectively and efficiently and neglected it by not teaching the Unit TDR 401 and that he failed to obey and follow lawful and reasonable instructions given by his supervisor.

32. Dr. Kalla's School was responsible for servicing the Technical Drawing Unit. Dr. Kalla's school did not have the relevant personnel to teach TDR 401 yet he decided to go ahead with teaching the Unit. In that situation, it was incumbent on him to ensure that he provided to Mr. Colati the relevant Unit Descriptor and a proper classroom to teach. This ought to have been done on time.

33. By the time the School of Applied Science got its administration in order, the students had lost 5 weeks of teaching. After receipt of the Unit Descriptor, Mr. Colati was of the view that a

proper classroom was needed to effectively teach the class of technical drawing. The room A108 was provided but Mr. Colati found it inadequate and he raised his concerns.

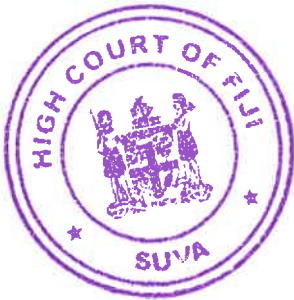
34. When Mr. Mataika, the Acting Dean got involved to resolve the issue, the agreement and directions were to defer the course to another trimester. In light of this direction, Mr. Colati did not teach the Unit.
35. I do not find the Mr. Colati neglected to perform his duties. He had reasonable explanation that he could not effectively complete the course given the delay and given the lack of proper classroom. Mr. Colati was already having other teaching commitments. There is no evidence that Mr. Colati had time available at hand to teach the Unit overtime and cover the syllabus.
36. He could not be pressured to use his personal time to teach the Unit and cover the syllabus. There had to be a mutual agreement for Mr. Colati to use his personal time to teach the students. There was no such agreement and the employer cannot make any such demands.
37. The University did not provide any evidence that if Mr. Colati worked in his free periods during his official hours, he would not have compromised the teaching of the other Units. One must not forget that he had other work to do during his official hours. It is not just TDR 401 that he could concentrate on.
38. Mr. Colati did not agree to go beyond his teaching hours and it was not unreasonable for him to refuse to do so. He had prior commitments. He had informed Dr. Kalla of this. In addition to that, he required a proper teaching room for effective teaching.
39. Mr. Dutt, on the other hand, could conduct the classes in his own time and require the students to attend it whether or not it was convenient for the students. There was no evidence that all the students had happily agreed to the reschedule. Mr. Dutt did not have the same commitments as Mr. Colati.
40. The SDC observed that if Mr. Dutt could do it, why could not Mr. Colati. I find the comparison unfair on the part of Mr. Colati. The SDC did not provide any observations on Mr. Colati's

commitment to teaching other Units and why it thought that Mr. Colati should and could use his free periods or private personal time to teach the TDR 401 class.

41. The SDC also overlooked the fact that it was not disputed that the Acting Dean of CEST had agreed and directed that the TDR 401 be taught in another trimester. In light of that directions, Mr. Colati could not be asked to perform the task. The issue had been resolved. The students involved could have been contacted and explained the situation. To lay the blame on Mr. Colati was unfair.
42. Further, Mr. Dutt may have found room A108 suitable to teach the students. Mr. Colati did not find a room with no drawing boards to be suitable. The SDC said that a right angle desk was sufficient to teach as per Mr. Dutt's evidence. The SDC says Mr. Colati had agreed to this. Even if I accept that the right angle desks were sufficient, Mr. Colati was already suffering a delayed teaching schedule. He did not have time at hand to complete the syllabus. He was also following the directives to defer the teaching. How could his conduct amount to the charges laid against him? I do not find that he failed or neglected to perform his duties or procrastinated it or that he failed to follow lawful directions of his superiors.
43. On the question of award of damages, it was more than 12 months that the case of the worker was not heard. He had lost wages for over 12 months. There was no evidence of him being employed elsewhere in that period. The employer could not establish in evidence that the worker had not mitigated his loss in the 12 months period and outline any basis on which it should not be liable to pay the lost wages.
44. The worker's whole career was involved in teaching and to suddenly take that away from him from an institution he was teaching for over decades had definitely caused him financial adversity.

Final Orders

45. In the final analysis, I dismiss the appeal and order the employer to pay to the worker 12 months lost wages with 4 % post judgment interest for 1 year being the time period between the date of judgment of the Tribunal to the date of hearing of the appeal.
46. The above sums shall be paid within 21 days of the judgment.
47. The employer is also ordered to pay costs of 5,000 to the worker within 21 days.



Anjala Wati

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Hon. Madam Justice Anjala Wati

Judge

11.07.2024

To:

- 1. Fiji National University, Legal In-House, for the Appellant.***
- 2. Ministry of Employment, Productivity and Industrial Relations for the Respondent.***
- 3. File: Suva ERCA 23 of 2018.***