

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 14 of 2018

BETWEEN: **FIJI NATIONAL UNIVERSITY**
APPELLANT

AND: **ANEI LAKABARA**
RESPONDENT

Appearances: Mr. B. Singh for the Appellant.

No Appearance for the Respondent.

Date/Place of Judgment: Monday 22 November 2021 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

Catchwords:

Employment Law –Employee alleged to be stealing food from the employer’s kitchen – she admitted taking food away but upon paying for the same - no evidence provided that she paid for the food or that the employer’s policy allowed her to remove the food in that manner – the tribunal’s finding that she paid for the food and that it was a legitimate way for the worker to take away the wasted food was not supported by any evidence – Tribunal’s finding is an error of fact – the act of stealing food is a serious offence and the employer was correct in determining the employment of the worker.

Cause

1. The employer appeals against the decision of the Employment Relations Tribunal (“Tribunal”) of 30 May 2018 on its findings that the employee was unlawfully terminated from work and that the employer is liable to pay to the employee 12 month’s lost wages.

2. Anei Lakabara was employed as a kitchen hand for a term of 3 years with effect from 1 January 2010 to 31 December 2012.
3. On 7 May 2012, she was issued with a suspension letter through which it was alleged that on 6 May 2012 at around 8.45 pm she was caught at the main security gate taking food ration materials that were allegedly stolen from the FNU Lautoka Canteen. The specific item that was alleged to be stolen was 2 dozen buns.
4. The employee was suspended without pay and asked to provide her response as soon as possible. She responded on 9 May 2012. In her response she stated that two buns were left from the nurse's breakfast and she went and paid \$0.50 at the cafeteria to take it home. When the security had stopped and asked her about the buns, he did not ask for the receipts. She also realized that she did not have the receipts with her. She stated that she has evidence of payments recorded on the wastage cafeteria copy.
5. On 21 May 2012, the worker was terminated. The letter of termination in its material parts reads:

“It was alleged that on 6th May, 2012 at around 6.45pm you stole two dozen buns from Lautoka Campus Canteen.

You were given an opportunity to explain your conduct which you did by letter dated 9th May, 2012.

After due consideration the University finds you guilty of gross misconduct in that you stole two dozen buns from Lautoka Campus Canteen.

Therefore, and pursuant to section 33(1) (a) of the Employment Relations Promulgation 2007 and sections 8.3 and 26.0 of FNU HR Policy No. 29, your employment is terminated with immediate effect...”

6. After her termination, she filed a claim in the Tribunal for unlawful dismissal.

Findings of the Tribunal

7. In arriving at a finding that the worker was unlawfully terminated, the Tribunal accepted her evidence that she had only taken two buns from the kitchen and paid for the same. The Tribunal found that that was a legitimate way of taking left over food from the employer's kitchen and thus the termination was not justified.
8. The Tribunal also found that the employee was charged with an offence which was factually wrong and on that basis the allegations against her must be struck out.
9. It went to further conclude that the employer acted unreasonably by not conducting a proper and thorough investigation and without disclosing the contents of the investigation to the employee. According to the Tribunal, the employer ought to have provided the employee with an opportunity to cross examine those who had made adverse reports against her. In absence of all that there was breach of procedural fairness and natural justice.
10. The Tribunal also found that the employer should have dealt with the matter through the Staff Disciplinary Committee.

Appeal

11. The concern on the appeal is that in arriving at the conclusion that the employee was unlawfully terminated, the tribunal did not have regard to the evidence of stealing food placed before it and the proper procedure required by law to deal with cases for summary dismissal.

Analysis

12. The tribunal had found that the worker had not stolen the buns. First of all the allegation was in respect of 2 dozen buns and not 2 buns. The Tribunal ought to have appreciated the allegations that the employer made when it terminated the worker.
13. The basis on which the Tribunal found that the worker did not steal the buns was that she had paid for the same and that was a legitimate way of taking left over food. The worker did not provide any receipts for paying for the two dozen buns. She said that she recorded the payment in the wastage book. The employer provided the records of the wastage books which appears

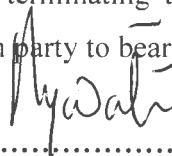
on pages 44 – 47 of the records. There is no such transaction showing any payment made by the worker. In absence of any evidence for payments it is clear that the worker had not paid for removing food from the employer's kitchen.

14. Even if the worker had paid the money, I am surprised that she felt that two dozen buns were worth \$0.50. She made an excuse about paying to justify her actions. If she was genuine, she would have asked the employer to do the costing for the two dozen buns and paid the money to the cashier. There is not a single individual who accepted money paid by her. What weight can then be attached to her evidence? I find none.
15. It also concerns me on how the Tribunal arrived at the finding that Anei's act was a legitimate way of taking wasted food home. There was no evidence that the food was wasted. If it was wasted then it cannot be used by Anei and if it was good it was to be used by the University. There is also no evidence to suggest that the employer allowed the employees to remove wasted food from the Campus.
16. All the food there is meant for specified students and staff and Ana was not supposed to remove that food which was there for the benefit of someone else. By removing food for her use, it is clear that the food was not wasted but good to be utilized by the desired people.
17. The employer's position was that because of the stealing racket, the students who had been doing overtime classes did not have food for themselves and the university was at a loss to find what was going wrong until it discovered the racket. The worker's action was also affecting the students who were innocent victims.
18. The security guard who had conducted a check on the suspected vehicles found Anei with two plastic buns. The car in which she was travelling in had other staff taking some more items like the driver taking 3kgs of lamb chops and one Ms. Marama taking left over food in the takeaway container. This indicates that there was stealing of food taking place which is a serious offence for which the employer is entitled to take an action for dismissal. The statement of the security guard appears on pages 41 and 42 of the records.

19. If the employees are to remove food from the kitchen then the students and staff will suffer and the employer will be at a loss in not being able to meet the needs of the students who are paying for the food. It is a serious act which must not be condoned. I do not think that one must look at the size of the stealing. Stealing of any item is a serious offence and on my part I find that condoning such acts will only encourage workers to continue to deprive the employer every day in small scales to avoid punishment.
20. The worker's conduct was reprehensible and was not something that could be dealt with by any other measure. I find that the employer had a valid reason to terminate the employee.
21. On the question of procedure, this was a case for summary dismissal and in a case where gross misconduct is involved, the employer is not obliged to provide the employee with all the evidence it has and give the employee a chance to cross-examine the witness.
22. The employer conducted its own investigation and found out the truth of the matter based on which the termination took place. That reason is justified on the evidence in Court. The employee was asked to respond and she was given a chance to provide her side of the story although in serious cases warranting summary dismissals, this is not even mandatory a process. To that end, the Tribunal's finding on breach of procedure is an error of law.

Final Orders

23. In the final analysis, I allow the appeal and set aside the decision of the Tribunal wholly. I find that the employer was justified in terminating the worker when she stole food from the employer's kitchen. I also order each party to bear their own costs of the appeal proceedings.



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Hon. Madam Justice Anjala Wani

Judge

22. 11. 2021



To:

1. FNU In – House Legal Department for the Appellant.
2. Respondent.
3. File: ERCA 14 of 2018.