IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 20 of 2018**
BETWEEN:	**CHAND SHEKAR NAND**
	APPELLANT
AND:	**FIJI NATIONAL UNIVERSITY**
	RESPONDENT

Appearances:	*Mr. D. Nair for the Appellant.*
	Mr. B. Singh and Mr. R. Chand for the Respondent.
Date/Place of Judgment:	*Monday 22 November 2021 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

JUDGMENT

Catchwords:

Employment Law – Whether the Tribunal has properly analysed the evidence to come to a finding on the worker's claim that he was unlawfully and unfairly dismissed from work.

Cause

1. The worker appeals against the decision of the Employment Relations Tribunal ***("Tribunal")*** of 5 July 2018 when it dismissed his claim for unlawful and unfair dismissal.

2. The worker was employed as a Trade Testing Officer III in the National Trade Testing Department attached to the National Training and Productivity Centre based at Narere Training Campus. He had entered into a contract of employment dated 30 May 2012 to be employed for a period of 3 years with effect from 2 July 2012 to 1 July 2015.

3. He was dismissed from employment on 20 January 2014 for gross misconduct. It was alleged that the worker had improperly approved the application of one candidate namely Rajnil Rohit Chand in enrolling him for class II Motor Vehicle Mechanic Program. The specific allegations against him is outlined in the termination letter dated 20 January 2014 which in its material parts reads as:

"The following allegations are put against you:

1. *That you had improperly approved the application for candidate (Rajnil) when he was enrolling for class II in Motor Vehicle Mechanic Program. The important documents such as last school report and Principal's Testimonial were missing and the work experience section in the application form was incomplete.*

2. *That the class III application form for Rajnil had been altered. The entry number 7 in application form has 3 years of work experience had been changed to 6 years when its insufficient to register for class II MVM program. However, the declaration part on same page states 3 years of work experience.*

You were given a chance to explain the allegations against you to which you had denied the allegation that was put against you.

Your wrongful act of manipulating and doctoring of official documents is classified as gross misconduct as it had brought disrepute to the University. Your behavior is unethical as you were not being honest and you did not act with integrity.

According to FNU HR Policy No 29 on Code of Conduct for Employees Policy which inter alia states in clauses

8.1.5 Gross misconduct: This comprises one or more serious breach (es) of University policy (ies) or regulations (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.

8.1.5.3 Manipulating and/or doctoring of documents and/or records that are crucial for the smooth functioning of the University, including manipulating or attempt to manipulate records or minutes of meetings.

After reviewing the allegation and the response from you, we are of the opinion that your wrongful act of manipulating and doctoring of official documents has the potential to create an adverse impact on the reputation and stature of the university.

Therefore and pursuant to section 33 1 (a) of ERP 2007 and subsection 8.1.5, 8.1.5.3. and 27.2 of the FNU HR Policy No 29 I recommend that your employment is being terminated with immediate effect.

You are required to duly complete the Exit Form and Exit Questionnaire and hand over to HR office together with all FNU property in your possession".

4. The summary of the allegations are that the worker:

1. ***Approved the applicant into the program without the applicant's last school report and without a copy of the School Principal's testimonial.***

2. ***Did not ensure to see that the section of work experience on the application form was also complete as it was not filled in by the applicant.***

3. ***Altered the class III application for the same student. The application form had 3 years of work experience which was insufficient to register for class II Motor Vehicle Mechanic Program.***

5. The worker was asked for an explanation on the allegations. On 28 November 2013, the worker responded to the allegation against him. His response was as follows:

"Approval for class II MVM Trade Test – By looking at class 3 approved application as per provided and vetted by HOTT, the candidate had 2 years and 8 months of work experience.

- *2 years 5 months – Auto Scan*
- *3 months – P.W.D.*

To qualify for class 2 trade test, the candidate needs to have 4 years of work experience.

The candidate work experience as shown on the class application shows 5 years of work experience from Rajen towing date 09/01/2007 – 30/12/2011. Upon having a verbal communication via telephone to the director (Rajen Towing) Ph. 9466387, he said the candidate has been working for there (sic) company from that period on the application form, He has been working 3 hours part time every day. On request he can also provide the written evidence for it.

By adding all his hours, he qualified for class II trade test and I vetted his application form".

6. After collating the information, the worker was dismissed. The worker then proceeded to file a claim by Form 1. In his claim he stated:

"The decision of the employer to terminate my employment from 20/01/2-14 is unfair, unjustified and procedurally wrong.

Further the employer breached section 77 (1) (c) of the ERP, as the actions of the employer by not following the disciplinary procedures was discriminatory. I was further not given any

opportunity to defend myself or provide an explanation on the allegations that formed the basis of my dismissal.

I seek reinstatement without any loss of benefits and entitlements and compensation of $20,000".

7. I will outline the basis on which the claim was dismissed.

Findings of the Tribunal

8. In dismissing the application for unlawful and unfair dismissal, the Tribunal stated that its only role in the case was to find out whether the worker was treated fairly, with appropriate respect and dignity and not whether the decision to terminate was actually justified in the first place.

9. The Tribunal found that the worker was treated fairly and given the due process. He was being briefed on the allegations against him and probable consequences. He was therefore not denied natural justice.

10. It also found that the FNU had clear and incontrovertible grounds to justify its belief that gross misconduct had taken place. The employer was thus justified to draw that conclusion as there is enough documentary evidence of that. The University had to terminate him because he was actually interfering with the business of the University in conducting trade tests thus endangering the validity of such trade testing, certificates and qualifications.

Appeal

11. The employee raised 4 grounds of appeal urging that the Tribunal erred in law and in fact:

    1. *In acting unreasonably when it held that the worker was treated with dignity based on his irregular and inconsistent finding that the worker was accorded due process and that an investigation was conducted.*

    2. *When it dismissed the employment grievance without properly analyzing the documentary and oral evidence that established that the worker was not employed at the material time.*

3. *In holding that the Tribunal is only required to consider the manner a worker is treated at the time of dismissal and not whether the dismissal was justified.*

4. *In dismissing the grievance based on the finding that the worker failed to establish his grievance when the onus in dismissal cases vests upon the employer to prove that the dismissal was not only fair but also justified and lawful.*

12. From the appeal, the issue that arises is whether the Tribunal had come to a proper finding that the employee was lawfully and fairly dismissed.

Analysis

13. I wish begin by expressing concern on how the Tribunal narrowed down its role to the issue of unfair dismissal only. When the claim is perused, it is very clear that the worker had made a claim for unlawful and unfair dismissal. He had in no uncertain terms stated in his claim that ***"the decision of the employer to terminate my employment from 20/1/2014 is unfair, unjustified and procedurally wrong".***

14. I cannot fathom why the Tribunal chose to read the application in the way it did. Perhaps the appellant's counsel is right is saying that this maybe because the Tribunal rushed to finalise this file as he delivered the judgment on the last day of his office. He did not hold office thereafter.

15. Having said that the Tribunal will only focus on whether the dismissal was unfair, it then went onto make a finding that the dismissal was both substantially and procedurally justified. I have summarized the findings of the Tribunal above.

16. In making a finding on whether the dismissal was justified substantially, the Tribunal only states that the FNU had clear and incontrovertible grounds to justify its belief that gross misconduct had taken place. The employer was thus justified to draw that conclusion as there is enough documentary evidence of that. The University had to terminate him because he was

actually interfering with the business of the University in conducting trade tests thus endangering the validity of such trade testing, certificates and qualifications.

17. The Tribunal makes no reference to any oral evidence or the documentary evidence which assisted him to arrive at a finding that the dismissal was for a justified reason. I think that it is grossly wrong for an adjudicator of facts to just say that there are enough evidence to arrive at a conclusion without outlining what evidence he considers enough and which evidence is being discarded.

18. Such findings cannot be upheld unless the appellate courts revisits the evidence and arrives at the same conclusion after the analysis of the evidence. In this case too, I will go through the evidence as it has been placed before me through the records and determine whether the employer has been able to establish that it had valid reasons to terminate the employment of the worker.

19. Let me go through each reason based on which the termination occurred. The first is that the worker had improperly approved the application for candidate (Rajnil) when he was enrolling for class II in Motor Vehicle Mechanic Program. The important documents such as last school report and Principal's Testimonial were missing and the work experience section in the application form was incomplete.

20. I have seen the Application Form for Motor Vehicle Mechanic Class II. The application very clearly states that *"If age is below 25 years, provide evidence of education, attach last school report and Principal's testimonial"*. It is therefore axiomatic that if the applicant is above the age of 25, the need to provide those documents does not exist.

21. The applicant was born on 29 January 1988. He filled in the application on 12 April 2013. At that time he was above the age of 25 and therefore he need not have provided those certificates. It is by the University's own requirement not to provide the information which was followed by the applicant and the worker who was the vetting and approving officer.

22. Further, the applicant had already obtained from the same institution a Motor Vehicle Mechanic Class III course. It is expected that the institution would have all the relevant documents with it. His first application was neither vetted nor approved by this worker.

23. It is absurd to ask the applicant to continue to provide documents when he continues his education with the same institution. If there is problem in keeping records then the University should correct its procedures.

24. I do not find that there is any basis to fault the actions of the worker in this situation. The worker did not do anything erroneous to even be asked to explain.

25. The second reason is that the worker did not ensure that the form was properly completed in that the applicant had not filled in how many years of experience he has had to apply for the Motor Vehicle Mechanic Class II qualification.

26. It is not disputed that to qualify to study Motor Vehicle Mechanic Class II Course, the applicant had to have 4 years of work experience. The application form does show that the worker had not filled in that part but how can that be treated as fatal when the form had a provision to provide evidence of employment which was needed to be filled by the applicant's employer(s) and that section was meticulously complete. That form showed that the worker had 5 years of experience which was evidenced by the common seal of the employer. Even if the applicant had not completed the form, it was not fatal to his application as the information was clear from another section.

27. I do not find that such a trivial matter which does not even affect the application could or should have affected the worker's employment. If there was any concern, the most that the University should have done was to ask the applicant to refill the form.

28. I will now examine the final reason for which the worker was terminated which is that the worker has altered the class III application form for Rajnil Rohit Chand in entry number 7 to show his work experience to be 6 years as opposed to 3 years when 3 years of work experience was insufficient to register for class II MVM program.

29. I have searched for the application form which the University alleges has been altered by this worker. There is one page of the form provided in the records at page 79. That page does not show any alteration. Apart from that document there was no such altered form provided in the evidence for me to see who was the vetting and the approving officer. It is for the University to establish that the worker was the vetting and approving officer to have altered the form to approve the applicant for the Motor Vehicle Mechanic Class III course or that he did it at some other point in time.

30. The HR Assistant, Mr. Kunal Prasad had carried out his own investigation in the matter. His report appears in the Court records. From that report, it is clear that the applicant's Motor Vehicle Mechanic Class III application was approved by one Mr. Rajendra Prasad on 19 June 2012. The worker was not even employed at this time. How can he then have altered the same before it was approved by Mr. Rajendra Prasad?

31. If there was no alteration to the form when Mr. Rajendra Prasad approved the application for the Motor Vehicle Mechanic Class III course then why did he approve the application as the requirement for 6 years work experience was not met? This means that the alteration was already made that is why the application was approved. In that case it was for Mr. Rajendra Prasad to explain the discrepancies between 3 years and 6 years. Where is there any nexus to the worker in regards the alteration?

32. According to that report by Mr. Kunal, it was this worker who had altered the work experience when the issues arose? On what basis that finding was made is just not in the report. It is like Mr. Kunal preferred to blame someone and he chose this worker. Why would this worker make the alterations in the Class III application form when by the time the applicant had applied for Class II, he already had the requisite 4 years' experience. It can be understood if the allegations were made against him that he altered the work experience in the Class II application to make the applicant qualify for the course but there was no reason for him to alter the class III application as he had no links to that application.

33. I find the report to be unsubstantiated which cannot be placed any weight on. What concerns me more is that the maker of the report did not even turn up in Court to be cross- examined on some matters which would have shed light on the veracity of the blame on the worker.

34. I now turn to the oral evidence. There is nothing in the notes kept by the Tribunal to show that any one witness had stated that the worker had altered the class III application form. The witness Praveen Raj stated that he does not know who altered the forms. The witness Sahadeo Singh stated that the worker did not alter the application and that the termination was based on hearsay evidence.

35. I therefore find it surprising that in absence of any documentary and oral evidence, the Tribunal found that the employer has justifiable reasons to come to the conclusion that the worker had altered the application forms.

36. I find that the employer was not able to establish any allegation for which it terminated the worker's employment and that the Tribunal erred in coming to the conclusion that the termination was lawful.

37. I now turn to the allegation of the worker that he was not accorded natural justice and an opportunity to respond to the allegations. The worker says that the employer had breached its own policy pursuant to which he was terminated.

38. Let me examine the law before the policy. In a summary dismissal case, the worker will not have a right to be heard. What the employers are entitled to do is to make an assessment of the allegation by any means which is suitable to arrive at a conclusion on whether there is a case for summary dismissal. If employer is satisfied on the information it receives that the cause has been established, it can terminate the worker immediately. If the worker is not satisfied with the employer's decision, he can bring a claim for unlawful dismissal where the employer will have to establish the basis for the termination.

39. There will be instances where the employer might carry out its own investigation and also ask for explanations from the worker but that does not mean that the worker is entitled to be heard and to challenge the information with the employer.

40. The ERA requires that the worker be provided with written reasons for the dismissal, the up to date pay and a certificate of service. The worker has complained that he did not get the certificate of service and the employer has agreed that none was provided making the dismissal procedurally improper. There are no other concerns raised on non- compliance of any other requirements of the ERA.

41. Let me now examine what the employer's policy requires in terms of procedure in case of alleged gross misconduct. The appropriate policy that the parties referred to was provided for on page 95 of the Court Records. The Policy is titled *"Professional & Personal Conduct Policies"*. The relevant provisions are clauses 8.1.6, 8.1.7, and 8.1.8. It reads:

> *"8.1.6* ***Nothing in this policy prevents the University in dealing with cases of gross misconduct as the Vice – Chancellor deems fit.***
>
> *8.1.7* ***The Director of Human Resources, in consultation with the Vice Chancellor, shall determine whether certain conduct comprises gross misconduct. The penalty for gross misconduct is summary termination of employment of the employee.***
>
> *8.1.8* ***Where the evidence of the alleged misconduct needs to be assessed independently, the Vice Chancellor may refer the matter to the Staff Disciplinary Committee. The Staff Disciplinary Committee shall deal with the matter as per the procedures of the SDC".***

42. The above provision only gives a right to be dealt with the Staff Disciplinary Committee when the Vice Chancellor and the Director of Human Resources have some conflict in the matter. There was no evidence of any such conflict which means that the Vice Chancellor had the discretion to determine that summary termination can take place.

43. There is no mandatory right to be dealt with by the Staff Disciplinary Committee where the worker could be heard on the allegation and a finding made before the termination occurred. I

therefore do not find that there was any breach in the procedure by the employer under its policy in summarily terminating the employment of the worker.

44. On the aspect of unfair dismissal, I did not find any evidence on record from the employee that the employer had not treated the employee with dignity and respect in dismissing him which caused him humiliation, loss of dignity and injury to his feelings. As such I do not find that the dismissal was unfair.

45. I now turn to the remedies that is suitable in this case. On the aspect of reinstatement, the worker's contract had expired on 1 July 2015. He had almost 17 months left into his contract when he was terminated. Even if he is to be reinstated, it can only be for the remaining period of his contract. The employer might not renew his contract thereafter. The most suitable option for him is the monetary loss arising from the dismissal.

46. Further, it is now 7 years since his employment with the employer. In this 7 years, it is expected that he would have found work. I have not been updated on the viability of ordering reinstatement.

47. I also do not see any evidence extracted by the employer on whether the worker could find any form of work in the 17 months and why he could not mitigate his loss. This was very essential for the employer to extract in evidence as the employee has been claiming reinstatement and damages both.

48. I must say that the employer is to shoulder the responsibility of not providing the worker with a certificate of service which is useful for the worker to find work in other places. His work experience would fetch him work.

49. In absence of any evidence that the worker did not attempt to find any work to mitigate his loss or that he had found some work, I find that the employer should pay to the employee the balance of his contract, his FNPF contribution as per the contract and his annual leave entitlement for the remaining term of the contract.

Final Orders

50. In the final analysis I allow the appeal with the finding that the dismissal of the worker was unlawful but fair. The employer should pay to the employee the balance of his contract, his FNPF contribution as per the contract and his annual leave entitlement for the remaining term of the contract.

51. The employee is also entitled to the costs of the proceedings in the sum of $1,500.

52. All the above amounts shall be paid within 21 days of the date of this judgment.

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Hon. Madam Justice Anjala Wati

Judge

22. 11. 2021

To:

1. ***Mr. D. Nair for the Appellant.***
2. ***FNU In – House Legal team for the Respondent.***
3. ***File: ERCA 20 of 2018.***