

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 04 of 2016

BETWEEN: **FIJI DEVELOPMENT BANK**
APPELLANT

AND: **ROBERT VICTOR MISAU**
RESPONDENT

Appearances: *Mr. D. Sharma for the Appellant.*

Mr. D. Nair for the Respondent.

Date/Place of Judgment: *Wednesday 21 September 2022 at Suva.*

Coram: *Hon. Madam Justice Anjala Wati.*

Cause

1. This is an appeal by the employer against the decision of the Employment Relations Tribunal of 22 March 2016. The findings of the Tribunal were:

1. ***That the employer had unlawfully terminated the employment of Mr. Robert Victor Misau ("Mr. Misau") and that it is liable to pay to him 4.5 months' salary lost as a result of the grievance.***
2. ***That the employer had unfairly terminated the employment of the worker as a result of which it is liable to pay the worker 3 months of wages for humiliation, loss of dignity and injury to the feelings of the worker.***
3. ***The parties are to bear their own costs of the proceedings.***

2. The employer has raised 5 grounds of appeal. It says that the Tribunal has erred in law and in fact in:
 1. *Not giving due weight to the fact that the worker had made threats against the employer in his letters dated 28 February 2012 and 18 April 2012.*
 2. *Failing to consider the employer's letter dated 5 July 2012 where it had answered issues relating to the grading of the worker as well as the reasons why he was not given the position that was offered by the employer to Ms. Emaline Lobendhan.*
 3. *Saying at paragraph 93 of the award that there were lawful causes to invoke summary dismissal.*
 4. *Holding at paragraph 101 of the award that it was an aggravating factor that the employer had asked the worker to refrain from entering its premises or communicating with its employees during the period of the worker's suspension.*
 5. *Awarding compensation in the form of 7.5 months' salary to the worker.*
3. Before I turn to the grounds of appeal, it is essential that the circumstances giving rise to the conflict between the parties which later led to the termination of the worker be outlined.

Background: Employment and Termination

4. Mr. Misau commenced his employment with the Bank as an Internal Auditor from 1 July 2008 by a contract of service dated 30 June 2008. He was summarily dismissed from his employment by a letter dated 17 August 2012 which outlines the reasons for his termination as follows:
 1. *Failure to comply with the Appeals and Grievance procedures.*
 2. *Wilful disregard of instructions by the Chief Executive Officer.*
 3. *Breach of Code of Conduct – Confidentiality.*
 4. *Threats leveled at the Chief Executive Officer.*

5. The specifics of the allegations are set out in the pre- termination letter dated 5 July 2012 by which the worker was granted 14 days to respond to the allegations. This is an essential letter and I outline the same in full:

"We wish to advise you that at the Board Human Resource Sub – Committee's meeting on 20th June 2012, the Management tabled a report concerning the unsatisfactory manner in which you had conducted your recent appeals. Other concerns about your violations of certain Bank policies were also brought to the Committee's attention.

The Committee was extremely disappointed and dismayed with the manner in which you conducted your appeals. It is noted that you have blatantly violated Bank policies and procedures on multiple occasions. We now present these as follows:

1. *Failure to comply with the Appeals and Grievance procedures.*

The appeals procedure requires that all staff lodge their appeal through the Office of the CEO. If the employee is not satisfied with the decision, he can either register a dispute with the Union or the Ministry of Labour. It is noted that you have failed to comply with the above procedure and lodged your grievances directly with the Board Chairman.

CEO as per his letter dated 9 November 2011 has advised you to address the PMS grievances as per procedures. However despite the official instructions, you still went ahead and lodged your grievances with the Board Chairman.

2. *Willful disregard of official instructions by the Chief Executive Officer.*

You also carried out a special audit which did not have the prior approval of the Chief Executive Officer as required by the Audit Charter. Despite repeated instructions from the Chief Executive Officer to withhold the special audit report you prepared, you defiantly proceeded to circulate the report to the Board Audit Committee members.

The Board Human Resource Subcommittee noted that you have deliberately disregarded the official instruction from the Chief Executive Officer, which is deemed as act of insubordination and serious penalty applies to the staff as per the provision of GI Section 5 clause 5.2 – wilful disobedience to lawful orders given by the Bank.

3. *Breach of Code of Conduct – Confidentiality.*

All employees must maintain confidentiality in relation to the affairs of the Bank and its clients and must not divulge any information that comes to their knowledge in the performance of their duties. The Bank is built to a major extent on confidentiality and trust where each employee is required to be loyal to the Bank and to fellow employees.

It was noted that you have printed a report involving MIS/IT matters that was intended for an outside party. You have verbally admitted printing the report to CEO and Manager Audit. By doing so, you have breached the Banks policies on confidentiality (GI Section 4), Code of Conduct Section 10, Clause 10.8 and 10.13.

Even the Whistle Blower Policy requires staff to exercise sound judgment to avoid baseless allegations.

Divulgence of such information or document demonstrates lack of professional ethics and judgment that brings disrepute to the Bank. As a Bank employee you should be protective of the reputation of the Bank.

4. *Threats leveled at the Chief Executive Officer.*

The Committee was appalled by the threats made by you against the Bank, in particular, the Chief Executive Officer. You have made serious allegations and threats to approach the Board Chairman, Prime Minister's Office and the FICAC. The Bank has its owned Complaints Management Procedure and you should have complied with this procedure to lodge your complaint.

Despite being advised to address the grievance as per procedure, you still went ahead to write to the Chairman. Your appeals are all Human Resource issues and should have been rightfully dealt with the Human Resource Department.

This clearly indicates that there is no longer cordial, respectful and trusting relationship with the Board and Senior Management.

These four violations of policies and procedures tantamount to gross misconduct on your part and warrants summary dismissal.

However to provide you an opportunity to explain your position, the Board Human Resource Subcommittee has resolved to suspend you for an indefinite period, with full pay, and will allow you 14 days from the date of this letter to provide an explanation as to why the Bank should not terminate your employment for the allegations leveled against you as in 1 to 4 above.

The Committee will then deliberate on your explanation and a decision will be relayed to you.

Furthermore you are to refrain from entering the Bank's premises and communicating with other employees in the Bank during the period of your suspension".

6. The conflict between the parties arose from the issue of work performance assessment of the employee for the year 2011. Mr. Misau was not content with how his work performance assessment was reviewed by the CEO.
7. The appraising officer for Mr. Misau's was his immediate Supervisor Manager Internal Audit. The Chief Executive Officer of the Bank was the reviewing officer.

8. On 1 August 2011 the Manager Internal Audit had allocated the worker a score of 86.7% which was a Grade 5. That was the highest score on the scale of 1 to 5. On 22 September 2011, the CEO changed the same to Grade 3 without showing any specific percentage score. On 3 October 2011 the worker signed the work assessment report and noted in it that he did not agree with the reviewing officer's grading.
9. The worker expressed his concerns with his Manager Internal Audit. The worker was informed by the Manager Internal Audit on 25 October 2011 that he met with the CEO on 24 October 2011 and it was made clear that the CEO would not change the grade and that the issue was not up for any discussion.
10. The worker's position at all times has been that there was non-compliance with the provision of the work assessment procedure. He says that if the reviewing officers overall grading differs from that of the appraising officers grading, the appraising officer is to explain and justify to the worker the areas where the reviewing officers overall grading differs.
11. Since the worker felt that the Manager Internal Audit was not able to justify and explain the difference as the CEO did not want to discuss the issue, the worker wrote a letter to the Board Chairman on 4 November 2011 to voice his dispute. The subject of the letter was "*Re: Appeal regarding Unjust Work Performance Assessment for year ended 30/06/2011*".
12. In his letter of 4 November 2011, Mr. Misau had extensively outlined his issues and concerns that he could not appeal his assessment to the CEO who had finalized the assessment. The letter also indicated that his appraising officer was unable to get an audience with the CEO and that he had tried to exhaust all means of communication but had failed.
13. The worker did not receive any response from the FDB Board Chairman. Instead the CEO wrote to the employee on 9 November 2011. The letter reads:

"Re: Appeal regarding Unjust Work Performance Assessment for Year Ended 30/06/2011

I refer to above and our subsequent discussion on Monday, 7th November 2011 in which I had expressed my disappointment at the manner you have conducted yourself by failing to discuss the matter with me first or followed proper procedures.

A copy of the relevant clauses of the Master Agreement, Clauses 52(b) and (c) is attached for your reference.

Although you had approached your line Manager to raise your grievances, you opted to pursue the matter further directly with the Board Chairman without referring it to my office as the Chief Executive Officer.

This is deliberate breach of Bank procedures on your part whilst fully understanding the procedures to follow. It is also a serious breach and clear disrespect for authority on your part.

Furthermore, it is disappointing that as an Audit Officer of the Bank you have failed to comply with the said procedure.

This letter serves as a file note for the record and also a reminder that you are to address your PMS grievance as per procedures.

I am willing to consider the matter further provided it comes through the proper channel”.

14. The next development was a letter by the Human Resources Department to the worker. The letter was dated 12 December 2011. The letter stated that in the employer’s Executive Committee meeting, the worker’s grade was finalized at Grade 3. This frustrated the worker as he felt that his issue had not been attended to and explained to him. He was alarmed that the grade was confirmed without any justification given to him and a percentage score being allocated. He felt that the CEO had influenced the decision.

15. Mr. Misau then wrote back to the CEO on 28 February 2012. He attempted to justify why he had written to the Board Chairman. He again detailed his frustration at not being able to get an audience with either the CEO or his Manager who had told him that his issue was not up for discussion. Mr. Misau at this stage was raising an internal grievance against the employer's failure to allocate a percentage score to justify grade 3. He had disputed with the employer in the way it had handled his performance assessment. He had pointed out to the CEO that his immediate supervisor had given him a score of 86.7. However, if there was any disagreement as to that score, then the CEO was obliged to show or justify the areas, arrive a score of his own, and then allocate the relevant consequent grade.
16. According to the worker, the employer had not properly discharged this obligation and by this letter, Mr. Misau was further pointing out when his dispute had actually taken a turn for the worse. He had stated in his letter "*this is perhaps possible starting point of a formal dispute because the Bank through EXCO has officially confirmed a grade (3) without a score*". Mr. Misau made a request to resolve his issues within 30 days before he would seek help elsewhere, mainly the Board Chairman or the Office of the Prime Minister.
17. Mr. Misau's letter was acknowledged on 16 March 2012. The acknowledgment stated that the Executive Committee was looking into the matter and that he will be advised of the outcome.
18. Mr. Misau had also written a separate letter on the same date. The subject of the letter was "*Re. Appeal on my unsuccessful quest for the position of Senior Relationship and Sales Officer at Customer Care Centre*". In this letter Mr. Misau had expressed his concerns as to how another person was appointed to the position when he felt that he was better suited for the job. He had asked the employer for the assessment criterion, score matrix and how the decision was deliberated for the choice of the candidate. The letter was again addressed to the CEO and received by the FDB the very next day as indicated by their official stamp.
19. On 18 April 2012, the employer had finally replied to Mr. Misau's second letter dated 28 February 2012. After setting out the Bank's selection process to identify the best and most suitable candidate for the position, it stated that "*based on the above, we note that you have done well in "Experience" and "Qualification", however your score on "Performance" was*

affected since you achieved PMS Grades 3 in 2009 and 2011. This had a direct bearing in your overall score in the final assessment. Furthermore, the Executive Committee (EXCO MEETING # 138/2012 and Resolution 27/138(Z)) had resolved that any officer appointed to a post must serve in that position for a minimum period of twelve months before the officer can be considered for other transfer or appointments”

20. Mr. Misau wrote back on 19 April 2012. He raised his concerns regarding his performance assessment for the year 2011 and also the denial of senior relationships and sales officer position based on his performance and grading. He indicated that his work performance assessment issue was under dispute and for him to be marked down for having scored Grade 3 is very concerning. He also expressed his concerns in terms of the delay in getting a response, any written communication or a resolution to both appeals. In that letter Mr. Misau also set out the possible breaches of the grievance procedures and the ERA as he felt that the two months of dialogue had not given him any effective remedy. Mr. Misau then stated that he may contact the Prime Minister’s Office, FICAC and the Board. The pertinent terms of his letter in this regard was that *“I may at my discretion advise the FDB Board to keep them in the loop as to the level and quality of HR and Industrial Relation being dished out by Management at FDB; may contact FICAC because there seems to be some form of corruption as to which my case is only the tip of the ice berg; and seriously consider informing the Prime Minister’s office so that the owner of the bank [Government] is also aware just like FICAC”*.
21. On 20 April 2012, the General Manager Finance and Administration wrote back to the employee. The letter stated that the purpose of the letter was to keep the worker posted about the two issues facing the parties. The letter further went onto say that the *“Executive Committee has completed its deliberation on the matter. This took some time as the Committee endeavored to ensure that the decision to be made is proper and just for all concerned. In the spirit, it was resolved to refer the matter to the Board HR Sub Committee. At this point, we wish to inform you that a meeting date has yet to be set. It is clear that this will be much clearer by late April or early May. We sincerely apologise for the delay and we will duly inform you of the outcome of the meeting in the normal manner”*.

22. Then on 5 July 2012, the employer wrote two letters to the employee. In the first one it explains how the employee got grade 3 for his performance assessment and in the second one it outlines how the employee has violated the banks policies and procedures. Mr. Misau was responded to the allegations on 18 July 2012 after which he was terminated.

23. Having outlined the background of the dispute, I will now look at what the employer is urging in respect of each ground of appeal.

Appellant's Submissions

24. The appellant's appeal is only limited to certain findings of the Tribunal. I will deal with what is under challenge on the appeal. The first ground of appeal states that the Tribunal *erred in law and in fact in not giving due weight to the fact that the employee had made threats against the employer in his letters dated 28 February 2012 and 18 April 2012.*

25. Mr. Sharma argued that the appellant had internal procedures for specific grievance procedures. The employees threats were meant to imply that if his request for justice was not met within 30 days he would consider informing the Board Chairman and if need be, the office of the Prime Minister to see to his case. The employee was already accusing the employer of bad ethics and depriving him of natural justice.

26. Mr. Sharma argued that in his letter of 19 April 2012 the worker again issued threats to contact the Board, the PMs Office and FICAC because he felt there was corruption in his case and this corruption was the tip of the iceberg.

27. It was argued that the Tribunal considered this conduct to be justified. This was a direct threat made against the CEO and the employer. What message does this give to the other employees? They can make threats against an employer in this manner? Mr. Sharma then submitted that the employee ought to have considered proper channels in appealing against the issue of work assessment performance instead. The employee had a right to exhaust the internal procedure and then seek relief from the Tribunal. What relevance did the Prime Minister or FICAC have in relation to the employment grievance?

28. In respect of ground 2, Mr. Sharma submitted that the letter of 5 July 2012 sets out the reasons why the worker got a Grade 3 and why another employee got the position which this worker had also applied for. This shows that when a proper appeal was made by the worker, the employer's Human Resources Sub Committee considered the two issues raised in the appeal and came to a decision which was neither unreasonable nor unfair. There were valid reasons why the decisions of the employer were upheld.
29. In respect of ground 3, it was argued that the Tribunal had found that the employer had followed proper procedures to dismiss the employee but that the reasons for the dismissal were exceedingly unjustified. Mr. Sharma argued that these findings were not based on the evidence but purely on the opinion of the Tribunal.
30. Mr. Sharma further argued that the employee had indeed not followed proper procedures by directly writing to the Board Chairman. He made threats against the CEO. He also breached confidentiality by making copies of documents which he should not have. He had prepared a special audit report without complying with proper instructions. There were thus lawful causes to terminate the worker.
31. Mr. Sharma said that it was improper for the Tribunal to have required the issues before the appellant to be resolved in such a short period of time. When the CEO wrote to the worker on 9 November 2011, the employee only responded to this on 28 February 2012. Once the appeal was received on 29 February 2012 on the two issues, the employer responded on 16 March 2012 and on 18 April 2012. On 19 April 2012, the employee again wrote to the Manager Human Resources asking for further response and the employer replied on 20 April 2012. On 5 July 2012, the employer made a decision on both appeals. An explanation was received by the employee on 17 July 2012 and the decision to terminate the employee was made on 17 August 2012.
32. In respect of ground 4, Mr. Sharma argued that it was not unreasonable for an employer to make such a request whilst an investigation is underway or where an employee is charged with disciplinary offences and suspended on full pay. There was no prejudice caused to the

employee as he was on full pay. The Tribunal gave no analysis or reasoning why she in her opinion considered this to be an aggravating factor.

33. In respect of the final ground, Mr. Sharma argued that the employee did not make full disclosure about damages. He failed to disclose his earnings if any between the period of his dismissal and the time he got a new job. He could have got a letter from his employer to say when he started his new position but he was vague about this. So the award of 4.5 months' salary was made without any firm evidence before her.

34. On the issue of compensation for alleged humiliation and loss of dignity. It was submitted that there was no basis for this award.

Analysis

35. I will deal with the first ground of appeal which states that the Tribunal did not give weight to the fact that the employee had issued threats to the employer and considered this conduct justified. I have in detail outlined the background of the dispute between the parties. In the circumstances, I do not agree with Mr. Sharma that the employee's conduct in making the statements he did amounts to threatening the employer and/ or that the statements are unjustified and unwarranted thus giving it a reason for the employer to terminate the employment.

36. I will address the first letter of 28 February 2012 where the employee said this to the employer:

"I humbly request for justice within 30 days, with effect from the date of this letter, before I consider informing the Board Chairman, and if need be, the Office of the Prime Minister to see to my case. This is to avoid any procrastination in the service of justice because this is a clear cut and a crystal clear case of bad ethics and no natural justice. I am just a low level officer that seems to be trampled on for no good reason. So we need not waste time".

37. This statement was made not as a threat but a notice to the employer that the worker needs early justice of his concerns when he felt that the employer was not interested in resolving his grievance. In October 2011, the CEO had refused to enter into any discussion with the worker

on why he had given a lower grade to him on review and how the grade was justified when no percentage score was allocated. The worker had no resort. He then tried to get justice from the Board which in a way forced the CEO to look into the concerns of the employee.

38. It is after the worker's letter to the Board Chairman that the CEO had a meeting with the employee on 7 November 2011. Even in that meeting it appears that the CEO was again not willing to consider the issue. This is confirmed by the employee in the same letter of 28 February 2012. The employee wrote *"In our subsequent discussion on 7/11/11 in the presence of Manager Administration – Asaeli Tokalau, discussion kept going in circles – basically you continued to hold the position that as a Reviewing Officer, you did not have to justify your decision to amend my PMS grade; not even to justify a score"*. The CEO never contested this statement of the employee at the relevant time of the dispute.
39. The CEO's attitude in not wanting to provide any relief to the worker in terms of considering his grievance is apparent from his letter of 9 November 2011 where he writes and says for the worker to raise his grievance through proper procedures and he will consider it. Why did the CEO not consider the worker's concerns when raised with the Board Chairman? Why could not this letter to the Board Chairman be considered as an internal grievance procedure and looked into without delay and extended agony to the worker?
40. In any event, the CEO had acted on the worker's letter to the Board by holding a meeting on 7 November 2011. Why was the CEO then creating hurdles for the worker and interested in technicalities under the disguise of proper procedures to be followed when he is the one who did not want to look into the issue when raised with him by the worker's appraising officer in the first place?
41. When I look at the conduct of the CEO objectively, I find that he would not even listen to anyone unless he feels that someone superior is looking into the issue. He did not even bother what concerns the worker had until the Board Chairman indicated to him about the worker's concerns.

42. The issue of the work performance assessment was still alive and not dealt with by the CEO when the Manager HR and Training wrote a letter to the worker and confirmed that in the Executive Committee Meeting of 9 December 2012 the worker's Grade 3 had been confirmed. There is no reason why the Human Resources Team would do this in light of the pending dispute. I presume that the CEO may have been waiting for a formal grievance addressed to his office but this I find outrageous as a formal dispute had already been lodged with the Board. All that was needed was that the dispute be determined.
43. This letter by the Human Resources Team obviously concerned the worker. He was understandably dismayed as to how this can happen when the CEO had not even allocated a percentage score to him and when the dispute regarding the same issue was pending for consideration. The worker then wrote the 28 February 2012 letter.
44. In my view, the worker was convinced that the CEO did not have any interest or care or good faith in trying to resolve the issue of the worker's work performance assessment. The worker was convinced that the only way to get the CEO to look into the issue was to state that he will approach someone superior than him if he failed. After all, he was only able to get audience from the CEO when he had approached the Board Chairman on 4 November 2011.
45. I find that the worker's statement in the letter of 28 February 2012 was out of necessity and that he was compelled by the CEO to write such a statement. If he did not, he would not have had his concerns looked into by the CEO.
46. I now refer to the alleged threat made in the letter of 19 April 2012. Whilst the worker's work performance assessment was under dispute and consideration, the employer decided not to appoint him to a higher position for which the worker had applied and there being a vacant position. The application of the worker was largely refused on the grounds that he had received Grade 3 twice which included year 2011 as well.
47. The filling of the vacancy by the employer without resolving the dispute raised by the worker shows that the employer was not interested in resolving the concerns of the worker regarding his work performance assessment or that it had pre-determined that it will not objectively look

at the worker's concerns. If it had any objectivity left in the dispute, it would have suspended the consideration of the promotion of the worker. Once the dispute was resolved then the vacancy could have been finalized as one of the components of the assessment for the position was work performance assessment grade.

48. Once again the worker felt that unless the employer is informed that someone superior will look into these issues, he will not have a fair and objective resolution to his dispute. That caused him to write the statements in his letter of 19 April 2012. I do not find this unwarranted or without any basis. The conduct of the employer is preposterous. It has shown no objectivity and fairness in dealing with the worker.
49. It is evident that since the worker was able to stand up for himself and challenge the decision of the CEO, he was being targeted by the CEO. The worker was initially told that his concerns on the work performance assessment will not be discussed followed by the CEO's hard and careless attitude not to treat the employer's concerns to the Board Chairman as an appeal proper. Then the employee without having had a resolution to his dispute on work performance assessment is marked down for his promotion for having scored a Grade 3 for year 2011 inclusive. The employer's conduct was meant to disturb the employee as much for having stood up for himself, to discourage him from raising concerns against his superior CEO. The whole actions of the employer clearly indicates that the worker was targeted for termination when he questioned the CEO. That is why the CEO did not give the worker an early consideration of his grievance and suspend the consideration of his promotion pending resolution of the dispute.
50. I do not find that the Tribunal erred in making a finding that it is the employer's making that the employee had suggested in the two letters that it will engage some superior people and that the worker was compelled to take that line of action. The employer does not have any justifiable basis to terminate the worker on its perception that the worker has threatened the employer.
51. In respect of ground 2, I find that Mr. Misau could not have raised any appeal to the CEO directly as he was told in no uncertain terms by the Manager Internal Audit that his issue

regarding the CEO's decision to give him a Grade 3 without allocating a percentage score was not up for any discussion. How could the employee then have raised an issue with the CEO? If he did, he will not be provided any response. The only option left for him was to employ some other means to get the internal grievance procedure activated. He had to approach the Board Chairman. Even after that, although the CEO gave the employee audience on 7 November 2011, he maintained his position not to justify his review score to the employee. The CEO's adamant attitude was because he was more superior in position than the worker and because of his superiority he felt that he could treat the worker unfairly. A fair minded employer will listen to the employee and discuss his concerns rather than make this statement that he cannot be questioned or asked to justify. The CEO expected the worker to listen to him no matter how unfair he sounded.

52. In respect of ground 3, I must say that the appellant has failed to point out which parts of the decision is the opinion of the Tribunal. I do not find that the Tribunal had expressed any opinion but made findings based on the evidence. It referred to the evidence and concluded that there was no evidence of procedural non-compliance. It again referred to the evidence and dealt with each and every allegation raised by the employer and assessed whether the allegations were met and were justified to terminate the worker.
53. In respect of the allegations for threats made to the employer, the Tribunal had similar views to what I have expressed in my appeal findings. I therefore find that there was evidentiary basis on which the Tribunal had come to the conclusion that the statements of the employee to refer the issue to the Prime Minister's Office, to FICAC and the Board Chairman was not unwarranted in the circumstances of the case.
54. Mr. Sharma also argued that in respect of its findings on other grounds of termination, that is, for breach of confidentiality and carrying out special audit, the Tribunal had again based its findings on its opinion rather than the evidence before it. I fail to fathom the basis on which Mr. Sharma can possibly submit that the Tribunal has based its findings on its opinion only. The judgment of the Tribunal from paragraphs 67 to 84 extensively deals with the two allegations and the evidential and legal basis on which the Tribunal finds that the employer did

not have justifiable grounds to terminate the employment. Let me specifically look into the reasoning of the Tribunal.

55. I will first look at the reasoning of the Tribunal in respect of the issue of carrying out special audit without prior approval of the CEO as required by the Audit Charter and despite repeated instructions from the CEO to withhold the special audit report.
56. The Tribunal had arrived at a finding that since the evidence did not show any express written specific orders or directions by the employer to withhold the audit, it was minded to accept the employee's version of the evidence.
57. The Tribunal stated that since Mr. Misau was an Internal Audit Officer, it accepted the worker's rationale behind conducting a special audit which the worker said was his duty and function as an auditor of the Bank, mandated and regulated by the Internal Audit Charter 2009. It was accepted that the worker's core function was to ensure proper audit report of the Bank and its finances and table it before the responsible Board and Committees.
58. The Tribunal made reference to the employee's evidence that his department was tasked to audit and report certain issues of outstanding and un-reconciled cards usage and the expenses of the Senior Management Staff including the CEO. The Tribunal said that the CEO had also stated that the reporting had to be free, objective and impartial. The employee had stated in his evidence that the special audit reporting exercise was required by the bank to intentionally address 3 particular issues after an issue was raised concerning un-reconciled and outstanding payment of monies owed to the Bank by credit card usage. The employee's report were made to be part of the Board Paper. The employee said that he was later informed that the Bank Management had recalled the report and that the report did not reach the Board.
59. Given the evidence on the worker's role and responsibilities, the Tribunal stated that it cannot cast any suspicion or doubt on Mr. Misau's real purpose or intention behind this audit report. The Tribunal found that the worker had worked on the principles of corporate and good governance. The Tribunal said that the report did not harm anyone, especially the Bank. The Tribunal stated that it has in totality weighed how detriment was the defiance of the CEO's

instructions, if at all, and further that the worker would deliberately not attempt to do something his employer does not approve or when he does not have any authority to perform that function.

60. The Tribunal accepted the worker's evidence that the internal audit section owed a fiduciary duty to the Bank as an auditor to ensure transparency and good governance to maintain the integrity of the Bank. The Tribunal also accepted that the audit of the Finance Division was an approved audit, endorsed and approved by the Board of Audit Committee and therefore the worker maintained that it did not require approval or endorsement of the CEO. The Tribunal found that maybe because the CEO did not get to endorse and approve the report it caused him to believe that the worker was acting against his instructions or at least doing something behind his back which he did not give direct approval of.

61. The Tribunal then went onto find that the employer did not deny that under the Internal Audit Charter 2009 (section 2.4), the Manager Internal Audit was to report functionally to the Board of Audit Committee and not to the CEO. The Tribunal was satisfied with the employee's explanation that as the Acting Manager Internal Audit the worker was acting in accordance with the Charter. Even if the employee was reporting to the CEO, the Tribunal said that it was not persuaded that the employee had acted in defiance of any instructions, express or otherwise as the employee's primary job description at all times was to protect the bank's finances from any unscrupulous dealings or mismanagement. The Tribunal said that the audit whether regular or special was the worker's core duty which he did. There was no harm or disrepute to the bank or even any financial loss. The employee cannot be blamed for carrying out his work that did not harm anyone or brought any disrepute to the bank.

62. I do not find that the Tribunal arrived at a finding of whether the employee conducted an unauthorized special audit report without analyzing the evidence. Its findings are based on its acceptance of the employee's evidence over the employer's and the Internal Audit Charter 2009. It was open to the Tribunal to arrive at that finding and I have no basis on the evidence before me to find otherwise. Mr. Sharma has not elaborated on how he feels that the above findings amounts to opinion of the Tribunal without any evidential basis.

63. Similarly, there was evidence based on which the Tribunal found that the employee had not breached any confidentiality principles. In regards this allegation, the Tribunal started by stating that the letter of 5 July 2012 by the employer had expressed disappointment and alleged that the worker had intentionally printed certain confidential material intended for third party circulation. The Tribunal found that it was not contested that the worker usually printed work related materials through the printing system at the Bank. The printer machine was placed some distance from the employee's work place.
64. The Tribunal then referred to Mr. Misau's evidence that he admitted printing materials which he left at the printer for some time before it would be picked up later. The allegation arose when he had as usual printed some work related material, but did not fully retrieve the same as it was intercepted by the CEO. The Tribunal found that in his response of 18 July 2012, Mr. Misau had candidly admitted printing something relating to MIS/IT but said that he was unable to read the material which was picked up by another staff and possibly handed to the CEO.
65. The Tribunal found that although the employee was not clear of the actual material being complained of because it was given to the CEO before he could properly read it, the materials were work related. The Tribunal stated that staff will often come across materials and print them even if it was not department-related and only intended for reading and information. The Tribunal stated that occurrence of such incidents at work is natural unless the material is offensive and has potential to cause the workers or the bank harm in some way.
66. In this case, the Tribunal found that the employer was not able to establish how this material was highly protected and why it deemed that the worker's lack of vigilance in exposing these materials by leaving it unattended at the printer indicated that he intended it to be used by other third parties. The mere printing, the Tribunal found, does not prove that it was designed to breach the trust and confidentiality of the policy of the bank. There was no breach of code of conduct for confidentiality established.
67. Once again I find that the Tribunal had properly looked at what was alleged and whether there was any misconduct on the part of the worker. As per evidence he had printed some materials for his use and since the printer was away from his desk he did not collect all the materials and

another staff collected it and gave it to the CEO. How the employee wanted to circulate this information to the third parties and as a result there being breach of the principles of confidentiality could not be satisfactorily established by the employer. It was therefore open to the Tribunal to come to the finding it did.

68. I will deal with grounds 4 and 5 together. Let me first of all deal with the remedy for unlawful dismissal. An award was made by the Tribunal for payment of 4.5 month's salary. The Tribunal has based this finding on the evidence before it. There was uncontroverted evidence that the employee was not in employment for 4.5 months after dismissal. He was then employed by Fiji Higher Education Commission. There was no evidence as to his earnings given. The Tribunal found that although the trial had taken place after lapse of 2 years, it was not going to punish anyone for this. However it found that the employee was out of employment for 4.5 months and was working until the date of trial to sustain himself. The employee had mitigated his loss by trying to find work quickly. The Tribunal found that the employee must be paid at least for the period he was unemployed. The Tribunal also found that it was the employee's responsibility to show how he suffered with any difference in pay he was taking home even when he found the job and since no evidence was given, he cannot be compensated for that.
69. I find that there was no evidence by the employer that the employee had started earning earlier than he testified and that his earnings were more. Even though there was no letter from the new employer or any pay slip, I do not find that the award can be flawed in light of the evidence before the Tribunal which it accepted. It was open to the Tribunal to accept the evidence before it.
70. I now turn to the award made for humiliation, loss of dignity and injury to the feelings. The Tribunal outlined various basis to come to the finding. It stated that at least 2 grounds of termination was already known to the employer in November 2011 and February 2012, that is, the threat to the employer and bypassing the grievance procedure. The Tribunal then questioned as to why the employee was not terminated at the relevant time.

71. The employer did not take any action and pretended to give an audience to the employee to resolve his grievance. The Tribunal said that it was sound to assume that CEO was waiting to add on other baseless issues to justify the dismissal. In fact the Tribunal said that that is what eventually happened. The delay in processing the grievance gave basis to add another two grounds of allegations being breach of confidentiality and preparing special audit report.
72. According to the Tribunal, Mr. Misau would have definitely had mental anguish regarding the delay in getting a response regarding his performance assessment issue as that had an impact on his promotion. He was told that his promotion was affected by low grading. If his performance issue was addressed he would have had some respite but without having clarified this issue, this decline of promotion based on low grading was definitely suffering for him. Then when he was asked not to enter the bank's premises or communicate with anyone, the worker was precluded from keeping the good faith dialogue alive. This, the Tribunal found aggravated the worker's sufferings. This was a blow to his self-respect and dignity.
73. I do not disagree with the Tribunal that the whole manner in which the employee was removed by the bank was anything short of bad faith and unnecessary conduct of the bank. The CEO did not want to engage with the worker after having reduced his assessment grade. When the employee approached the Board that forced the CEO to engage with the worker. The worker was then asked to file his grievance through proper procedure which he did.
74. If the worker had not followed the procedure and that was viewed as misconduct then the employee should not be kept in dark and given a false hope that his issue will be looked at. The deliberate and unconvincing delay by the employer in determining the grievance on the performance assessment issue led to the employee losing his application for another job in the bank. In fact the bank should have fairly waited to fill in that post as the grading of the employee was an important factor in consideration of whether he will get the position.
75. The employer then filled in the position causing the employee more stress and humiliation. When this promotion issue became another grievance, the employer then decided to deal with the 2 issues together. However it decided to dwell on the actions of the employees from which the parties had moved on. The stage at which the parties were in terms of timeline required the

employer to deal with the 2 grievances and not to deal with the employees conduct for which the employee was not addressed earlier. The employer's act of dwelling on the employees actions in November 2011 and 28 February 2012 shows bad faith on its part as properly concluded by the Tribunal as an attempt to find more reasons to justify the dismissal. The employer was, I would say determined to treat the employee in a way that causes him trauma and feel lack of self –respect and that is what has happened. The worker was dismayed, frustrated and shown that he was of a lower standard than the CEO who could not be questioned. The conduct of the employer indicates malice designed to punish the employee.

76. I do not find anything wrong in the award on 3 months' salary for the way in which the employer had conducted itself. I am not inclined to disturb that award. I must add that I do not agree with the Tribunal that when the employer asked the worker in its letter dated 5 July 2012 to keep away from the Bank's premises and not to communicate with other employees that aggravated the worker's situation. I agree with Mr. Sharma that that is the normal process to allow fair investigation. Notwithstanding this, I still find that the conduct of the employer in handling the issues of the worker indicates malice and that the worker had suffered anguish, humiliation and loss of dignity and the award of 3 month's is still justified.

Final Orders

77. In the final analysis, I dismiss the appeal by the employer and affirm the decision of the Tribunal. I order the employer to pay to the employee a total sum of 7.5 months of wages for unlawful and unfair dismissal. The employer shall comply with the order within 7 days of the judgment. I also grant costs to the employee in the sum of \$1,500 to be paid within 7 days.

Anjala Wati

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Hon. Madam Justice Anjala Wati

Judge

21. 09. 2022



To:

1. ***R. Patel Lawyers, Suva for the Appellant.***
2. ***Mr. D. Nair for the Respondent.***
3. ***File: Suva ERCA 04 of 2016.***