

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

ORIGINAL JURISDICTION

CASE NUMBER: ERCC 08 of 2015

BETWEEN: **DAMODARAN NAIR**

APPLICANT

AND: **FJI PUBLIC SERVICE ASSOCIATION**

RESPONDENT

Appearances: Mr. N. Tofinga for the Applicant.

Mr. H. Nagin and Ms. M. Rakai for the Respondent.

Date/Place of Judgment: Friday 21 July 2023 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

A. Catchwords:

Employment Law –Summary Dismissal – Claim by employee that he was unlawfully and unfairly dismissed from employment- issue before court is the question of unlawful and unfair dismissal - in examining whether he was unlawfully dismissed, the reasons for dismissal scrutinized to see if it was justified and whether the procedure was in accordance with the law – in determining whether the dismissal was fair, the conduct of the employer in carrying out the dismissal analysed.

B. Legislation:

1. The Employment Relations Act 2007 (“ERA”): s. 30(6).

Cause

1. This is a claim by the former employee of the Fiji Public Service Association ("**FPSA**") against his employer for unlawful and unfair termination of employment. The employee is Mr. Damodaran Nair ("**Mr. Nair**"). Mr. Nair is seeking reinstatement of his employment or alternatively lost wages from the date of termination until the expiry of his contract.
2. Mr. Nair's claim was brought through an originating summons but since there were controversies in the parties' affidavits, I had granted the parties an opportunity to call oral evidence. The matter was therefore heard viva voce.
3. Through the originating summons, Mr. Nair seeks the following declarations:
 1. ***That the Executive Board and the National Council of the employer that convened on 12 September 2015 and decided to terminate his employment was unlawfully constituted.***
 2. ***That the decision to terminate the employment is unlawful and ultra vires and in breach of the principles of natural justice and the process followed to terminate his employment lacked impartiality and independence.***
 3. ***That the use of the Human Resource Policy to institute the disciplinary action against him is discriminatory, unlawful and unjustified.***
4. Mr. Nair was employed by the FPSA since 21 July 2008 as a temporary Senior Clerical Officer. On 4 February 2009, he was appointed to the permanent position of Industrial Relations Officer. On 18 June 2015, his position was regarded to Principal Industrial Relations Officer and his salary was re-aligned to that position as well. It was from this position as a Principal Industrial Relations Officer that he was terminated. At the time of his termination, his salary was \$39,452.00 per annum.
5. On 18 July 2015, exactly after a month of re-grading Mr. Nair's position to Principal Industrial Relations Officer, FPSA suspended him from work to allow investigations into publications of

certain articles in the coconut wireless column of the Fiji Sun on 27 May 2015, 3 July 2015, 10 July 2015, 11 July 2015, 14 July 2015 and 17 July 2015.

6. The letter of suspension alleges that Mr. Nair had been obtaining and passing materials and information to one of Fiji Sun's journalist Mr. Nemani Delaibatiki who caused other journalists to publish incorrect information against the employer to cause disrepute to it.
7. Mr. Nair was suspended on half pay. Then on 7 August 2015, Mr. Nair was served with the disciplinary charges which Mr. Nair denied via his response on 20 August 2015. On 14 September 2015, Mr. Nair was terminated from work.
8. The letter of termination states that Mr. Nair was being terminated for being guilty of all the charges specified in the charge sheet. It was also stated in the letter of termination that the charges amounted to gross misconduct.
9. Since Mr. Nair was found guilty of all the charges in the charge sheet, it is important that I lay out the allegations in the charge and the particulars pertaining to the allegations. I will summarise the charges as it is long and winded in the form it was presented to Mr. Nair and the many annexures makes the document large and meaningless to be replicated in this judgment.
10. There were 4 disciplinary charges as follows:

Charge 1

Statement of the Charge

"Promoting or encouraging malicious mischief including gossiping and rumour mongering" contrary to Chapter VIII, Disciplinary Offence Clause 34.6 of the FPSA Human Resources Policy.

Particulars of the Charge

That on 26 May 2015, Mr. Nair made two calls to Mr. Nemani Delaibatiki of Fiji Sun within a span of 26 minutes lasting 4 minutes 39 seconds and 6 minutes 14 seconds respectively. On

the next day on 27 May 2015, Fiji Sun, in its coconut wireless column, printed a comment under "Coincidence? A trade union office is getting a makeover at the same time that a unionist's house is getting spring clean. Is it a coincidence?"

Charge 2

Statement of Charge

"Dealings with information: knowingly disclosing confidential information relating to any FPSA matter, which is of confidential nature which the employee has no authority or right to divulge including disclosing information to an outside body that the employee knows should be kept confidential" thereby breaching clause 34.5 of the Human Resources Policy making it a ground for disciplinary action under section 37.0 of the said policy.

Particulars of Charge

Obtaining Information about FPSA properties from a FPSA staff namely Mr. Anil Prasad through a phone call made to Anil Prasad on 9 July 2015 and relaying the information to a journalist of Fiji Sun Mr. Nemani Delaibatiki which information was not true and when published in the coconut wireless column of the Fiji Sun dated 10 July 2015 maligned the employer.

Charge 3

Statement of Charge

Mr. Nair is guilty of improper conduct in his official capacity or any other improper conduct likely to adversely affect the performance of his duties or is likely to bring the FPSA into disrepute thereby breaching clause 34.10 of the Human Resources Policy which is a ground for disciplinary action under section 37.0 of the said policy.

Particulars of Charge

In the morning of 16 July 2015, Mr. Nair confronted one of FPSA's staff namely Manoa Lenakuru and verbally threatened him and also put him on notice to take legal action. Mr.

Nair stated that he will give Manoa Lenakuru and Anil Prasad summons to appear in High Court for giving statements against him.

Charge 4

Statement of Charge

In the course of his duties disobeyed, disregarded or made wilful default in carrying out lawful orders or instructions given by a person having authority to give the order or instruction, or by word or conduct displayed insubordination which breached clause 34.3 of the Human Resources Policy and is a ground for disciplinary action under section 37.0 of the said policy.

Particulars of Charge

That Mr. Nair had been devoting most of his time in doing private industrial cases and providing full industrial relations services to a sister union for monetary gain when he was always and repeatedly been reminded to assist sister unions without monetary gains.

Mr. Nair had been handling Employment Relations Tribunal and Employment Relations Court cases for another union being National Union of Commercial and Factory Workers for a very substantial fee and gaining monetary benefit without informing his employer that he has been engaging himself in the employer's official time to earn additional remuneration thereby cheating his employer who had placed full faith and trust in him as a senior officer.

Mr. Nair had been representing employers in the Employment Relations Tribunals cases which is against all norms.

11. Although the suspension letter only stated that Mr. Nair was being investigated for publications in the Fiji Sun coconut wireless column on various dates, the disciplinary charges are only in respect of publications made in the Fiji Sun coconut wireless columns on two days being 27 May 2015 and 10 July 2015. There are also additional charges for threatening fellow employees and deriving income from legal representation of parties when being specifically prohibited by the employer not to gain any monetary benefit by assisting employees of sister union and when specifically prohibited from representing employers.

Issues

12. Mr. Nair's claim and evidence requires me to deal with whether his employment was lawfully and fairly terminated. In order to deal with the question of the lawfulness of his termination, I need to examine whether the reasons for which Mr. Nair was terminated is justified. I will also need to examine whether the procedure for terminating Mr. Nair was proper as required by the law.
13. In order to determine whether the termination was fair, it has to be determined whether in carrying out the dismissal, the employer had conducted itself in a manner which caused Mr. Nair humiliation, loss of dignity and injury to his feelings. The conduct of the employer must be beyond reproach. I will now deal with the issues.

Law and Analysis

14. I will deal with the issue of unlawful dismissal first. All the charges allege that Mr. Nair breached the Human Resources Policy. Mr. Nair has vehemently denied that the Human Resources Policy applied to him. That is what I need to decide first. Does the Human Resources Policy, which Mr. Nair is said to have breached, applied to him? If it does not then the charges/allegations are not valid as there is no proper code of conduct that Mr. Nair is said to have breached otherwise apart from the said Human Resources Policy.
15. Let me make it clear that the Human Resources Policy that is subject of the dispute and is alleged to have been breached is that of 13 June 2015. There is no other Human Resources Policy which has been made reference to during the hearing.
16. The evidence of the employer's witnesses, the General Secretary Mr. Rajeshwar Singh ("**Mr. Singh**") and Mr. Karam Chand Bidesi ("**Mr. Bidesi**") were that the Human Resources Policy applied to Mr. Nair because it was under that policy that his position was re-graded to the position of a Principal Industrial Relations Officer. Both of the witnesses testified that Mr. Nair

was given a letter dated 18 June 2015 (*Exhibit 3*) informing him of his position re-grade and salary realignment. That letter, both asserted, was pursuant to the Human Resources Policy of 13 June 2015. They both testified that Mr. Nair did not take any objections to the letter of 18 June 2015 or raise any other issues which means that he accepted that the Human Resources Policy applied to him.

17. I do not concur with Mr. Singh and Mr. Bidesi that since Mr. Nair had accepted the letter stating that his position has been re-graded, he knew about the Human Resources Policy which came in force on 15 June 2015.

18. The letter to Mr. Nair of 18 June 2015 reads as follows:

“This is to advise that upon a review carried out and the results recommended by the FPSA Executive Board, the FPSA National Council at its meeting held on 13 June 2015, has approved the re-alignment of your salary and to re-grade your position, in accordance with the Association’s staff terms and conditions of service.

As a result, with effect from 29 June 2015, your position will be re-graded to be Principal Industrial Officer [PIRO] and be aligned to SS01 grade. From that date, your annual salary will be \$39,451.00 at Step 07 in the SS01 scale (\$39,452 - \$ 51, 580).

We have also taken note of your service to date and also wish to remind you that the Association has been generous to allow you to pursue your studies on a part time basis without any adjustment to your salary or hours of work. We are certain that you will respond to this generosity by diligent and faithful service as always”.

19. The letter of 18 June 2015 does not at all mention that the position of Mr. Nair had be re-graded pursuant to a new Human Resources Policy and that it had come into effect and from then onwards applied to Mr. Nair’s employment. The letter says that the re-grading and re-alignment was in accordance with the employer’s terms and conditions of service which to anyone means the existing terms and conditions of service. Where does that then leave Mr. Singh and Mr. Bidesi’s argument that since Mr. Nair had accepted the re-grading and re-

alignment, he knew or ought to have known about the Human Resources Policy being made into effect and applicable to him? I find the insinuation unfair and without any legal basis.

20. Mr. Nair was never given a copy of the Human Resources Policy. There is no evidence that he was given a copy of the same and informed that it will bind him from the date the policy came into effect. Exhibit 23 is a memorandum from the FPSA General Secretary to All Staff. It reads:

“The National Council at its meeting on 13 June, 2015, while discussing the pay rise and re-grading, decided to replace the civil service terms and conditions with the Human resource (HR) Policy effective 15 June, 2015.

The HR Policy is applicable to both the established and unestablished staff including those that will be appointed on contract in future.

Please read the attached HR Policy and indicate your agreement and acceptance to the new terms and conditions under the HR Policy by signing beside your name in this circular memorandum.

1. *Praveen Chand*
2. *Bua Vuli*
3. *Mohnish Dutt*
4. *Julia Mavoa*
5. *Cilia Nasaroa*
6. *Manoa Lenakuru*
7. *Anil Prasad*
8. *Apinito Raganivatu.*

21. Besides all the employees' names above, there are signatures which purports to be signatures of those employees. The memorandum does not contain Mr. Nair's names. He has also not signed the said memorandum which makes it clear that he was never given a copy of the same nor was he privy to the new Human Resources Policy.

22. When Mr. Nair was appointed in 2008, his employment was governed by FPSA Staff Term & Conditions of Service. This is very clearly stated in his first offer of employment dated 21 July 2008 (*“Exhibit 21”*). At that time he was on a temporary appointment. His appointment was confirmed on 4 February 2009 by a letter of that date (*“Exhibit 22”*).
23. Both the letters indicate that *“your service will be subject to the applicable Staff Terms & Conditions of Service”*. No one has tendered the said Terms and Conditions of Service to the court in evidence. Mr. Singh and Mr. Bidesi stated in their evidence that it was the civil service terms and conditions of service and not any Collective Agreement. Whatever the Terms and Conditions of Service was, it ought to have been made part of the evidence. It did not form part of the evidence and I thus find that the employer is not able to state with any degree of conviction as to what provisions of the terms and conditions of service applicable to Mr. Nair was breached by him.
24. It is at this stage that I wish to briefly mention that if there was any collective agreement that applied to the parties then I ought to have been provided with a registered collective agreement. None was provided and any unregistered collective agreement does not have any legal effect. I am mentioning this to address Mr. Nair’s insistence that there was a collective agreement that applied to him.
25. Back to the issue on the Human Resources Policy, the charge sheet prepared by the employer in its first page at paragraph 4 very clearly states that the *“approved draft HR policy by the National Council could not be circulated to the staff soon after the NCM due to the factors beyond our control. However, the staff of FPSA as indicated above officially endorsed and accepted the policy and a copy of the HR Policy can be obtained from the Finance and Administration Officer with prior arrangement”*.
26. I have not been shown any evidence that Mr. Nair endorsed and accepted the policy as applicable to him. The charge sheet also indicates that he was never given a copy of the Policy. It is therefore unfair to apply that Policy against him in laying any charges. The charges pursuant to the Human Resources Policy therefore is improper and not made out.

27. I reiterate that all the charges are pursuant to the Human Resources Policy. If the Human Resources Policy did not apply to Mr. Nair then he cannot be said to have breached that policy.

28. Further, the first charge is for conduct relating to information published in the Fiji Sun of 27 May 2015. The Fiji Sun Article of 27 May 2015 reads as follows:

"A trade union office is getting a makeover at the same that a unionist's house is getting spring clean. Is it coincidence?"

29. When the publication was made, the Human Resources Policy did not even come into effect. Let it be presumed for a while that Mr. Nair did relay the information to be published. How is he supposed to know that there is a particular provision in the Human Resources Policy which does not allow him to talk about something if he feels that a wrong is being committed? How is he supposed to know that he is precluded from giving information under any whistle blowing policy or precluded from providing to the members or the general public information which provides truthful news to the people of this country? I find that there was truth in what was published in the coconut wireless column of the Fiji Sun on 27 May 2015.

30. Mr. Bidesi testified in his cross-examination as follows:

Q: All comments made were correct? Then? Annexure 1 of Tab 3.

A: That statement was fact. First paragraph.

Q: Mentions any dates?

A: Obvious it was as it happened.

Q: What is wrong?

A: Paints a bad picture. I feel it is not right. Precisely the General Secretary's driveway was being cleaned.

31. The General Secretary Mr. Singh testified that when works were going on for the employer, he took one boy to his home to check one fitting for the hose pipe. It may have been 15 minutes overall. Mr. Singh said that this spring clean issue was not true.

32. I do not accept that Mr. Singh has been honest in his evidence that he had used one of the boys working for FPSA to check a fitting for the hose pipe only and that it only took 15 minutes. Mr. Bidesi testified that Mr. Singh's driveway was being cleaned. Why would the employer's witness say that when it did not happen? Mr. Singh obviously has a motive to conceal the truth as he did not want to be reflected in that light. So this issue of spring clean has truth in it.
33. If the information in the coconut wireless column was correct, I cannot fathom how it can paint a bad picture on the employer unless what the General Secretary was doing was wrong. It was obvious that the General Secretary did not like what was being published and he instigated an investigation against Mr. Nair on the basis that the employer was being brought to disrepute rather than that he was being brought to disrepute. The General Secretary's disrepute was his personal problem and not a problem which should have been equated to the employer.
34. What the FPSA should have done was to issue a report in the Fiji Sun and clarified what had happened if what the General Secretary did was not wrong. Why does Mr. Bidesi say that a wrong picture was painted when the facts were correct? Why does the employer not like facts being published about it if nothing wrong was happening? One must not forget that it is the members funds that are being used to run the institution and the members are entitled to the correct information from any source that is available.
35. If the members were being informed through the mass media that something is happening with the institution then I do not think that the FPSA should be worried and alarmed because what happened was happening as per something that was authorized by FPSA. If it was not, then the General Secretary should be the one who should answer the concerns, not Mr. Nair.
36. My findings above applies presuming that it was Mr. Nair who had released the information to Fiji Sun. Did he? What the employer needs to establish first is that it was Mr. Nair who related the information to Mr. Nemani Delaibatiki. The employer relies on two calls made by Mr. Nair on 26 May 2015 on phone number 9777236.. One call was made around 3.38pm and the other call was made around 4.04pm.

37. Mr. Nair denies speaking to Mr. Nemani Delaibatiki or any one from the Fiji Sun and passing any information to him or anyone else. He denied doing that when he was confronted with the allegations via the suspension letter and the disciplinary charge and also when he testified in court. The onus then was on the employer to establish that the phone number belonged to Mr. Nemani Delaibatiki and that Mr. Nair spoke to him. It was also necessary to establish that Mr. Nemani Delaibatiki was asked to publish the information in the Fiji Sun and that he relayed the information to Mr. Maika Bolatiki who is the person who published the information.
38. There was no phone records from the service provider to establish that the telephone number belonged to Mr. Nemani Delaibatiki or anyone else from the Fiji Sun. The person who published the information is also not Mr. Nemani Delaibatiki. It was some other journalist who did not get the information from Mr. Nair. If the information was relayed to Mr. Nemani Delaibatiki then he would be the one publishing the article as he had the source to verify the information. Mr. Maika Bolatiki did not have reliable source to publish that information.
39. Further, Mr. Manoa Lenakuru's statement indicates that Mr. Nair had called him between 3.30 pm to 4.00 pm to clear the rubbish bin and enquired why he did not get his tea at 3pm. Mr. Manoa Lenakuru's statement also indicates that he informed Mr. Nair that he had gone to the General's Secretary's home to fix the hose pipe when Mr. Nair responded by saying that whenever work was done at the office, the General Secretary also wants work to be done at him home.
40. If Mr. Manoa Lenakuru had spoken to Mr. Nair between 3.30 to 4.00pm and had that conversation with him than it is not possible that Mr. Nair would be speaking to someone at the Fiji Sun during the same time. Mr. Manoa Lenakuru's statement is highly questionable and cannot be accepted. Mr. Nair has denied speaking to Mr. Manoa Lenakuru and making those statements. He had at all times made it clear to the employer that that was a false accusation against him by Mr. Manoa Lenakuru. In that situation, Mr. Manoa Lenakuru should have given evidence in court for his evidence to be tested. I do not accept Mr. Manoa Lenakuru's statement as it could not be tested and tried.

41. I am therefore not satisfied on the balance of probability that Mr. Nair had relayed the information to Mr. Nemani Delaibatiki or anyone else to be published in the Fiji Sun. The allegation against him in charge 1 is not established by the employer.

42. I now turn to the second charge. The second publication was once again done by Mr. Maika Bolatiki on 10 July 2015. The article reads:

“ The Trade Union office has moved?

The shifting of a trade union office from town to outside this town boundary has upset some members. Some members did not even know the office was relocating.

One member had to hire a taxi to get to the new office only to find out that the new office was closed because the salaried employee had not turned up.

“Why was the office moved when it was conveniently and centrally located in the hub of the town?” the member asked.

For his information, the union had bought the building and it was good business sense to move the office there.

Hang on a minute, has the union explained this to its members.

Questions also hang on the union's property acquisitions and sales. Sometime ago the union's co-operative was liquidated. The grounds are unclear.

The co-operative had a string of property investments which included the Nasoso property in Nadi. Incidentally that property which had a valuation of \$200,000 was recently sold for \$100,000. Have members been told about it?

What about the properties at Navau St, Khemendra St and Flagstaff in Suva? As we speak papers for the sale of 14 prime lots, in Savusavu are being prepared. The lots are valued at several millions of dollars.

Then there is that property at Pacific Harbour. Could that be going too? What members are asking is: Where is all this money going to and for what purpose? Will member shave a bite of the cherry in the form of dividends?

43. Apart from my finding that the Human Resources Policy did not apply to Mr. Nair because he was not aware that one existed or that a copy was given to him, there is no evidence that it was Mr. Nair who had relayed the information to be published. The allegation is that Mr. Nair would have used his private phone number to call Mr. Nemani Delaibatiki to relay the information which he obtained from another employee Mr. Anil Prasad. It is alleged that Mr. Nair spoke to Mr. Anil Prasad from his private phone on 9 July 2015 and enquired about FPSA properties. Mr. Anil's phone number is said to be 9939144.
44. Firstly, the employer has failed to establish that Mr. Nair had used his private phone number to call Mr. Nemani Delaibatiki. There is no evidence of that. No phone records have been provided to make that allegation. The telephone service provider was not subpoenaed to give evidence in the case. It is only presumed by the employer that that is what Mr. Nair did. I am not satisfied on the balance of probability that Mr. Nair relayed the information to Mr. Nemani Delaibatiki.
45. There is also no phone records to say that Mr. Nair called Mr. Anil Prasad and obtained the information. Mr. Nair denied having that conversation with Mr. Anil Prasad. In that situation, Mr. Anil Prasad ought to have come to court to give evidence for his evidence to be tested or his phone records produced to indicate that Mr. Nair did call him as alleged on 9 July 2015. He failed to come to court and give evidence. The employer also failed to produce evidence which it could have easily extracted. I cannot accept Mr. Singh's evidence or Mr. Anil Prasad's statement as truthful.
46. I now turn to the 3rd charge which says that *in the morning of 16 July 2015, Mr. Nair confronted one of FPSA's staff namely Manoa Lenakuru and verbally threatened him and also put him on notice to take legal action. Mr. Nair stated that he will give Manoa Lenakuru and Anil Prasad summons to appear in High Court for giving statements against him.*
47. I do not accept that Mr. Nair had threatened anyone orally. None of the witnesses including Mr. Singh gave evidence that Mr. Nair had threatened Mr. Manoa Lenakuru orally. Mr. Singh only confined his evidence to the written letter by Mr. Nair to him of 16 July 2015. What Mr.

Nair had done was that on 16 July 2015, he wrote a letter to Mr. Singh and informed him of his intention to bring legal proceedings against both Mr. Manoa Lenakuru and Mr. Anil Prasad.

48. If Mr. Manoa Lenakuru was threatened orally which Mr. Nair denied, then he should have come to court and given evidence for the court to assess his credibility along with Mr. Nair's. Mr. Nair's letter, which I reproduce below indicates that that is the first time that he had informed anyone of his intention to sue both the named persons. His letter reads:

"General Secretary

Re: *Legal Proceedings against:*

- 1. Manoa Lenakuru, Cleaner/Gardener*
- 2. Anil Prasad, Messenger/Cleaner*

This is to advice you that I will be initiating legal proceedings against the above named two persons for providing false, malicious and scandalous written statements which I view as detrimental and borders on defamation of character.

I will be writing to them, whereby they will be put on notice of my intention to claim \$100,000.00 in damages and compensation. Once the writ is processed, it will be served on them by the bailiff to appear personally in the High Court to respond to the claim.

I believe that it is only appropriate that I inform you of my intentions.

D. Nair

PIO

16/7/2015"

49. I do not find anything wrong, unfair or improper that Mr. Nair informed the General Secretary of his intentions to sue the two persons. I do not find that the letter is a threat but a letter expressing his intention to sue. Such letters are not uncommon in this country. Most litigants write letters before action. Some escalate to proceedings and some do not.

50. If Mr. Nair had orally threatened Mr. Mano Lenakuru then in his second paragraph he would not write that he will be writing to them about his intention to sue them. He would have mentioned that he has already informed them about his intention to sue.
51. Further, the termination letter at paragraph (ix) mentions the written threat made to Mr. Manoa Lenakuru and Mr. Anil Prasad when the charge sheet mentions verbal threat being made to Mr. Manoa Lenakuru. The allegations in the two documents are different. In the termination letter, there is no mention of any oral threats made to Mr. Manoa Lenakuru. Since no one has deposed on oath that Mr. Nair had verbally threatened Mr. Manoa Lenakuru, that allegation is not established.
52. Upon receiving the letter by Mr. Nair, the General Secretary makes a note in the following form:
- “Noted. It is your democratic right to sue if you decides to do so and it is your personal choice”.*
53. The General Secretary Mr. Singh raised no queries or questions about Mr. Nair threatening Mr. Manoa Lenakuru orally. He also did not take any issue about that letter at the time. Later he uses the letter to strengthen his allegations against Mr. Nair. This is the kind of bias that the principle on conflict of interest detests. Mr. Singh had the conflict of interest in the matter as he was implicated in the publications by Fiji Sun. He ought not to have taken part in the investigation of the complaints that he made to the Executive Board. The process of investigation was unfair and full of malice. It lacked independence which tainted and clouded the decision of the Executive Board and the National Council.
54. The 4th charge is in relation to Mr. Nair representing other union members and employers and charging fees. The allegation is that Mr. Nair was not supposed to represent any one else except the sister unions without any costs and that he was precluded from representing the employers.
55. I find the evidence of Mr. Nair credible over the evidence of the employer’s witnesses. I accept that it was within the knowledge of the employer that Mr. Nair was representing other union

members and the employers. There was no express indication or direction by the employer that Mr. Nair should not be paid any costs for representing anyone who is not a member of the employer.

56. Mr. Nair's evidence was that he was paid the disbursements, travel and accommodation costs only by the parties who were not members of FPSA and whom he represented. He did not charge anyone fees as a lawyer or was being paid in the form income by anyone. The General Secretary Mr. Singh's evidence was that he allowed Mr. Nair to represent the parties who were members of the sister union but that he was not supposed to charge them any money.
57. How was Mr. Nair then expected to pay court costs, his travel, accommodation and other expenses if it needed paying? Was Mr. Nair expected to fork that out from his own pocket? That would be most unreasonable to say the least. His income from FPSA was for his living which he could not use to assist anyone in their proceedings. It was also uncontroverted that to represent the parties Mr. Nair had to travel to various courts throughout Fiji and for that there were costs involved. He had to pay for the transport and accommodation as well. Along with that, there would be associated expenses like his food bills.
58. Mr. Singh's evidence cannot be accepted for lack of clarity. How he expected Mr. Nair to assist was not identified. He simply said that Mr. Nair was not supposed to charge anyone any fees. There is no evidence of Mr. Nair charging any fees. Yes, he was paid costs and allowances to provide the assistance which is not an offence or a misconduct. Mr. Singh's evidence only reflected vengeance on his part to show Mr. Nair in a negative standing.
59. Mr. Nair also gave evidence of how Mr. Rajeshwar Singh wanted Mr. Nair to represent his sister in a case when she was not a member of FPSA. Mr. Nair stated that his sister paid \$200 to Mr. Nair for his allowances to attend the case. Mr. Nair testified that Mr. Singh was aware of that payment and said that it is a matter between the two of them. I do not find that Mr. Nair has concocted that story. He had put that evidence to Mr. Singh about representing his sister and being paid the allowance. Mr. Singh does not deny that he engaged Mr. Nair to assist his sister but denies any knowledge about the allowances being paid. Mr. Nair would not put that statement to Mr. Singh with the confidence he did, if that was not true. It was Mr. Singh who

was evasive and appeared to avoid knowing the issue about the allowances being paid to Mr. Nair. I find that Mr. Singh was aware that his sister had paid Mr. Nair allowances to travel to court and represent her. He did not take any objection as there was no prohibition on Mr. Nair being paid his expenses to assist them in their cases.

60. Exhibit 18 is a letter dated 23 July 2015 by the General Secretary Mr. Singh to the General Secretary of the National Union of Factory and Commercial Workers. The second and third last paragraphs reads:

“During his service with FPSA, Damodaran Nair was only advised to assist the sister unions and not to charge any fee as he was paid by our Association. It has now been revealed that he has been charging fee from sister unions while employed by FPSA as a full time IR Officer.

We shall very much appreciate if you will kindly give us copies of payment voucher etc for the sums paid to him. It will not be made public but as a record to support the internal investigation against him. He will not be shown or given the documents received”.

61. In response to the letter being Exhibit 18, the National Union Of Factory and Commercial Workers Union wrote back and said:

“We acknowledge receipt of your letter dated 23rd July 2015.

In response to the same, we confirm that Mr. Damodaran Nair was paid by our Union to assist us with various cases. As per our audit financial report it reveals that the following payments were made in the respective years as mentioned below:

2012	-	\$9,054.00
2013	-	\$11,225.00
2014	-	\$8,075.00

We sincerely hope that the mentioned information would be of assistance to your office in as far as the investigation process is concerned. The committee is welcome to sight the reports should the need arise”

62. The letter by National Union of Factory and Commercial Workers Union supports Mr. Nair's version of the evidence that he was paid disbursements and allowances to assist in the cases. He was not paid any income. If he was paid as a lawyer or derived income for assisting in various cases, then the amounts paid each year will not be so less. Mr. Nair for sure would not charge less than \$10,000 a year in fees to assist in various cases, if he was charging fees. For a practicing lawyer, \$10,000 would be fee for one matter only or maybe half the fee for representing a client in one matter.
63. The payments made indicates that whenever Mr. Nair was assisting, he was paid for the disbursements and expenses and I find nothing wrong or untoward about it. No Union or party can expect free service when it costs to access court.
64. When the General Secretary of the FPSA wrote and requested for the payment vouchers, none were provided. It would have shown what Mr. Nair was paid for in each case. In absence of any payment vouchers and receipts, I am not at all satisfied that Mr. Nair was charging professional fees or deriving income for representing parties in the tribunal or the court.
65. Further, if the employer knew that Mr. Nair was representing the people and it did not want him to be paid the disbursement and expenses he incurred for providing those services then those instructions should have been in writing. The instructions should also have said as to who was going to bear the expenses. This would have then clarified to Mr. Nair how he was expected to provide those services. The absence of any prohibition cannot be used against the employee. It is the employer who is unfair in trying to lay a blame on the employee who is not being told the framework for working for parties outside the employer's union.
66. Further, the tone of the letter strongly suggests that the General Secretary of the FPSA knew that Mr. Nair was being paid disbursements and allowances for work done that is why he writes

and collects the information. How else would he know where to gather the information from? Mr. Singh said that he gathered that information from Mr. John Mudaliar, the General Secretary of the National Union of Factory and Commercial Workers. Mr. Mudaliar will not volunteer that information unless it was Mr. Singh who knew about the arrangements which he earlier endorsed and later used it unfairly against Mr. Nair.

67. What is also clear is the bad faith in which the General Secretary was influencing the Executive Board and the National Council in attempting to secure Mr. Nair's dismissal. Initially, Mr. Singh did not advise the Executive Board that there was any other misconduct for which Mr. Nair should be investigated. The General Secretary was initially only aggrieved about the coconut wireless saga. When he realized that that may look weak and self-serving, he started more investigations to put Mr. Nair in a precarious position and lump more charges against him. This shows the motive of the General Secretary to anyhow get rid of anyone who questions his conduct. This is bad faith on the part of the employer to allow such personal motives of individual employees to affect the employment relationship with other staff.
68. Mr. Singh's own evidence revealed that he managed to get Mr. John Mudaliar, the General Secretary of National Union of Factory and Commercial Workers to give information against Mr. Nair. It was known to Mr. Singh that there was a rift between Mr. John Mudaliar and Mr. Nair. He used that rift to create a situation against Mr. Nair when Mr. Nair's evidence clearly reveals and which I accept that Mr. Singh knew that the arrangement was that Mr. Nair would assist Mr. Mudaliar in representing members of his union and what was to be paid to Mr. Nair was to be arranged by Mr. Nair and Mr. Mudaliar. Mr. Singh denies that he knew that there was any arrangement that Mr. Nair would be paid anything at all. Why was the National Union of Factory and Commercial Workers Union then paying Mr. Nair when the arrangement was not to pay him any costs and allowances? This in fact does not support the evidence of Mr. Singh.
69. The Executive Board ought to have realized that the General Secretary was working against Mr. Nair personally and as such he was not the right person to investigate into the allegations by the General Secretary that Mr. Nair was maligning the institution by providing false information to the Fiji Sun journalist. The General Secretary had a conflict of interest and any

investigation that he did was tilted towards proving Mr. Nair to be an incompetent, dishonest and disloyal employee.

70. The process in that regard to investigate Mr. Nair was unfair as it lacked independence generally and in the specific incident which I have identified when the General Secretary goes to the extent of bringing and incorporating other matters to justify Mr. Nair to have committed gross misconduct.

71. I turn to another piece of evidence which is Exhibit 24. Exhibit 24 is a letter by the General Secretary Mr. Rajeshwar Singh to the Registrar of the Tribunal. It reads as follows:

“Re: Representation in the Employment Tribunal

I understand the Legal Tribunal has on various occasions questioned Mr. D. Nair’s locus standi in appearing before the Tribunal. His appearance in his personal capacity was never questioned by the employment court, the Chief Tribunal as well as the Resident Magistrate Andrew See. The appearance before the Tribunal is clearly provided in section 229 and all a person has to produce is an authority from the party he is representing.

His representation was even questioned in a High Court matter by Justice Calanchini and the Chief Justice had advised that in the High Court Civil, the representation is at the discretion of the judge whereas in the Employment Court and Tribunal, “section 229 gives a wide and easy access to a party of a representative, who need not be a counsel”.

I hope the above clarifies the issue regarding his appearance before the legal Tribunal”.

72. This exhibit is a clear indication that the General Secretary knew that Mr. Nair was appearing in his personal capacity in the Tribunal and the Court. In that letter he uses the word ***“personal capacity”*** which means that he was representing the clients personally and not as a union representative. Further Mr. Singh indicates that all that Mr. Nair had to do was to produce an authority from the party he was representing to be able to represent the parties. Mr. Singh does not write to the Registrar and say that Mr. Nair was only supposed to represent its members. His letter includes any and all representations which is not confined to members of the FPSA.

That letter does not preclude Mr. Nair from representing the employers. I therefore do not find that Mr. Nair had usurped his powers or authority when he represented employers.

73. I agree with Mr. Nair that the General Secretary all along knew that Mr. Nair was being paid the expenses for representing other people in the Tribunal and the Court and there was no prohibition against that. That was never made an issue until the General Secretary Mr. Singh needed more ammunition to remove Mr. Nair from his employment. He was only aggrieved when his personal matters started surfacing in the coconut wireless columns in the Fiji Sun. That caused him to collect more information to strengthen Mr. Nair's removal.
74. Further, the employer's witness Mr. Vishwa Deo also gave evidence. He was the National Vice President. In his cross-examination evidence, he testified that he knew that Mr. Nair was representing non-union members too. In his re-examination evidence he clarified as follows *"to my knowledge I didn't know whether he could charge for representing people"*. Why was Mr. Nair then not reported and stopped from representing non-union members. I find that there was no prohibition against Mr. Nair representing other people in the Tribunal and the Court and as such there was no prohibition against being paid his expenses.
75. If there was any express information or direction that Mr. Nair could not be paid his expenses, Mr. Nair might have then chosen not to assist anyone at all. That strict prohibition should have been expressly provided to him in writing.
76. I do not find that any of the reasons used to justify the termination of Mr. Nair lawful or justified. I find that Mr. Nair could not or should not have been terminated for the reasons the employer did.
77. Let me now examine the correctness of the procedure for his termination. This is a case for summary dismissal for gross misconduct. In that situation Mr. Nair ought to have been provided with the written reasons for his termination. That was complied with by the employer.
78. Mr. Nair also ought to have been paid his salary up until the date of his termination. There is no evidence by Mr. Nair that he was not paid his dues from the date of termination.

79. Mr. Nair was also entitled to a certificate of termination when his employment was terminated. That is mandated by s. 30 (6) of the ERA. It states that *“upon termination of a worker's contract or dismissal of a worker, the employer must provide a certificate to the worker stating the nature of employment and the period of service”*.

80. I do not find from the evidence that a certificate of termination was provided to Mr. Nair. In that regard, I find that the proper procedure was not followed. If the law mandates that the employer observes certain protocol and procedure in dismissing a person, it ought to be followed. One cannot overlook the same to anyone's detriment. Mr. Nair was entitled to a certificate of service and that was not provided to him. That is wrong in law.

81. I now turn to the question of procedural unfairness. I find that Mr. Nair was humiliated when the employer served him with a letter of termination at the R.B. Centrepoint. Two people went to serve Mr. Nair.

82. Mr. Nair was called by one of the agents and asked where he was. He said that he was shopping with his family. One of them then said that he needed Mr. Nair to assist him in signing a declaration and for him to come out in the car park.

83. Believing that, Mr. Nair, who was shopping with his family came out in the car park. He was then handed over the termination letter and asked to acknowledge it. Mr. Nair got very furious. He felt tricked and since there was public near the car park, he asked whether he could sign the acknowledgement inside the car. When that was refused by the server, Mr. Nair, I understand, shouted at one person and even expressed his disgust at the way he was being treated. That erupted in a commotion near the car park.

84. I accept Mr. Nair's evidence of the way he was treated. There is no other evidence by the servers. Mr. Nair was understandably upset as he was shopping with his family and he was not in the mind frame to disturb his personal time.

85. Further, he was tricked by one of the agents of the employer which angered him as no one would prefer to be handed termination letters like that. Anyone in his position would go

through the same emotions. When the commotion broke because Mr. Nair confronted the server why he had lied and tricked him, there was public around and Mr. Nair found it extremely difficult to digest the public humiliation. That ought to have been avoided by the employer.

86. The employer ought to have handled the service of the termination letter tactfully and done it in Mr. Nair's private setting and not in a public place where a commotion broke out causing Mr. Nair distress and humiliation. I do not put any blame on Mr. Nair for losing control of the situation because he reacted to how he was treated. If the employer had any grace and dignity, it would not treat any employee whether current or former in that manner. I find that Mr. Nair's evidence on how he was treated by the two agents of the employer in serving the termination letter uncontroverted and that their actions culminated to Mr. Nair behaving in the way he did. The employer should take responsibility for that action.
87. I find that the termination of Mr. Nair's employment to be both unlawful and unfair. I will now decide on the appropriate remedy to be given to Mr. Nair. I do not find that reinstatement is an appropriate remedy. Mr. Nair has moved on in terms of his professional life. He is now a qualified lawyer and the position that he previously occupied is a non-legal position. It will no longer suit him to be reinstated to that position. He should be compensated for loss of income.
88. So many questions were raised regarding Mr. Nair representing parties after his dismissal. Many newspaper articles were published about him making representations. These articles appeared in the Fiji Sun for the year 2017. Mr. Nair admits too that he made representations but that he was studying and assisting people. He did not make any income. He would be paid some allowances and from the date of termination till the date of trial he would have collected disbursements and allowances in the sum of \$15,000 to \$17,000.
89. I find that there is no evidence that Mr. Nair was earning an income from representing parties in the tribunal and the court. He was assisting them in their cases and would get some allowances but that was to sustain his expenses for appearing in the cases. He could not have charged a full blown fee as he was not entitled to practice as a lawyer without getting admitted

to the bar. He continued to assist people but still had lost income from his termination for which he should be compensated.

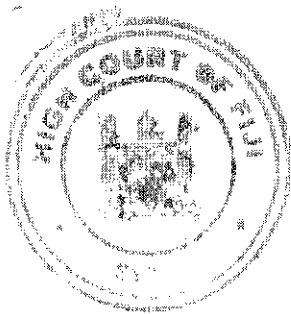
90. Mr. Nair was studying when he was terminated and it would be unfair if I were to say that he should have found employment when he was terminated. He needed to study to up skill himself to be able to earn money. From the date of termination to the date of trial he lost income for 18 months. I find that the employer ought to pay Mr. Nair a sum of \$30,000 for unlawful dismissal and a sum of \$5,000 for the humiliation he suffered by the employer. The sum of \$30,000 represents approximately 9 months wages. This is far less than what he has lost in the form of wages. The total compensation to be paid to Mr. Nair is \$35,000.

Final Orders

91. I find that Mr. Nair was unlawfully and unfairly terminated from his work by FPSA and that he should be paid a sum of \$35,000 for unlawful and unfair dismissal.

92. The employer should also pay to Mr. Nair costs of the proceedings in the sum of \$5,500.

93. The total sums of monies in the sum of \$40,500 inclusive of costs is to be paid within a month from the date of the order.



A handwritten signature in black ink, appearing to read 'Anjala Wati', is written above a horizontal dotted line.

Hon. Madam Justice Anjala Wati

Judge

21. 07. 2023

To:

1. *Applicant in Person.*
2. *Messrs Sherani & Company for the Respondent.*
3. *File: Suva ERCC 08 of 2015.*

