IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA 12 of 2018**
BETWEEN:	**FIJIAN TEACHERS ASSOCIATION**
	APPELLANT
AND:	**JOJI NAKAORA**
	RESPONDENT

Appearances:	*Mr. V. Filipe for the Appellant.*
	Mr. F. Anthony for the Respondent.
Date/Place of Judgment:	*Friday 15 September 2023 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

JUDGMENT

Catchwords:

Employment Law – Appeal – the employer alleges that the worker had not pleaded unlawful and unfair dismissal in its claim and it was wrong for the Tribunal to deal with the issues when it was not pleaded – from the Terms of Reference, the preliminary submissions of the worker and the evidence given at the trial, it was clearly discernible that the worker's claim included both unlawful and unfair dismissal – employer raises error of tribunal in assessing costs and compensation when it could not show on appeal the basis on which it is raising the issue of excessive compensation and costs – the trial went onto for 7 days and the costs ordered was justified – the employer's concern and contention that it attempted to settle the case does not give it any factual or legal basis to ask for lesser costs as the matter finally went onto for a trial where the worker was put to expense – the employer's appeal on the basis that it provided the worker with written reasons in writing does not mean that the tribunal cannot go onto examining the validity of the reasons for termination.

Cause and Background

1. The employer Fijian Teachers Association appeals the decision of the Tribunal of 28 March 2018 on its finding that the worker Joji Nakaora was unlawfully and unfairly terminated from work. The Tribunal had ordered that the worker be paid 7.2 months of wages for unlawful dismissal amounting to $46,324.00 which was discounted by a sum of $12,990.14 since this amount was already paid to the worker in two instalments on 15 October 2016 and 29 May 2016. The Tribunal had also ordered that a sum of $5,000.00 be paid for unfair dismissal from work. A sum of $4,000 costs was also ordered against the employer.

2. Joji Nakaora was the General Secretary of the Fijian Teachers Association. As outlined in his letter of termination, he was summarily dismissed from work on 15 October 2016 for:

    1. *Misappropriation of funds, abuse of office and dishonesty; and*
    2. *Insubordination and conflict of interest.*

3. The material part in the letter of dismissal reads as follows:

    " *Misappropriation of Funds, Abuse of Office and Dishonesty*

    1. *The financial advances you self-approved from Fijian Teachers Association Cooperatives Limited (FTACL) above the limits provided in practice as policy and in the registered By-Law.*

    2. *Exorbitant loan balances under your name across all FTA subsidiaries point to dishonesty, misappropriation of funds and abuse of office also. You deliberately breached FTA policy in approving loans above the required (×2) meaning that a member can only loan twice his or her shares held by FTACL. You also self-approved loans above $5,000.00 prohibited by the FTAEC in its final warning letter to you dated 17 December 2015.*

    3. *In addition, according to statements and accounts now available to the President, you also self-approved exorbitant loans taken by some members of the FTA above their*

limits. By self-approving these loans, you have also acted outside your authority and powers and insubordinately to the President, the FTAEC and breached the trust of members. Most of these loans are above $5,000.00 prohibited by the FTAEC in its final warning letter to you dated 17 December 2015.

4. *You also acted dishonestly in misrepresenting to stakeholders that you have the mandate of the President and/or FTA to be nominated and appointed President of COPE. This was incorrect and further from the truth. You resorted to an untruthful email to misrepresent that you had the approval and mandate of FTA to be nominated and appointed as COPE President.*

Insubordination and Conflict of Interest.

5. *As GS, you are contractually mandated to devote your full attention to the performance of the duties of GS of the Association. By accepting to become the President of COPE, you showed utter disrespect and insubordination to the President FTA and the FTAEC including the Vice President COPE at all material times Mrs. Nanise Kamikamica, who could have been President if it was not for your conniving tactics.*

6. *You are now serving and undertaking an activity or responsibility or position* ***that conflicts or potentially conflicts*** *with your GS duties upon a reasonable interpretation of your duties to FTA and duties of COPE. You now find yourself in a precarious position. Your loyalty to FTA will be divided. Your work as GS will be drastically affected.*

7. *More importantly, you were given final warning after your abuse of office in self-approving a loan for your vehicle. The FTAEC noted your previous indiscretion in that you took a loan from FTACL to purchase a vehicle from Shreedhar Motors for $35,000.00. You self-approved the loan and bypassed the correct procedure by not seeking the consent of the Executive Committee of FTACL to use members monies for the purchase. The loan was above the threshold allowed under the FTACL By Law, which is $5,000.00. $30,000.00 above the limit showed abuse. In addition, there was no Bill of Sale drawn up to protect FTACL interest in the vehicle".*

4. When the matter was first listed for scheduling on 13 February 2017, the employer's counsel Mr. Valenitabua indicated that he would be calling four witnesses to give evidence in the proceedings. Mr. F. Anthony for the worker indicated that he would be subpoenaing various members of the Association, as well as calling on the evidence of

Mr. Nakaora himself. As it transpired, the employer did not call any witnesses to give evidence. The worker gave evidence on his own behalf and called two witnesses, Ms. Iva Volavola Powell and Mr. Saimoni Vuetaki. The Tribunal of its own motion, directed that Mr. Marika Uluinaceva, Principal Administration Officer, FTA and Mr. Semi Vela, former FTA Treasurer, appear to give evidence.

5. After hearing the matter, the Tribunal came to a conclusion that the termination was both unlawful and unfair. The reasons for arriving at the decision is outlined below.

Tribunal's Findings

6. In relation to unlawful dismissal, the Tribunal found that there was no evidence of misappropriation of funds, abuse of honesty. The Tribunal however stated that throughout the evidence it got an impression that there was lack of regard shown by the worker to financial procedures, a less than appropriate application of "arms-length" transactions and excessive expenditure of employer's funds, on personal travel and accommodation claims. These aspects were however, the Tribunal found, appeared to have been sanctioned by the former President.

7. The Tribunal said that the evidence suggested that Mr. Nakaora enjoyed the perquisites of office and on occasions these appeared to have been excessive, given the obvious need to remain accountable to the Membership and exercise some level of moderation in the role. According to the Tribunal these issues could have easily been addressed with the worker and could have been arrested quite quickly. The Tribunal stated that after the first warning was issued to the worker in December 2015, these further complaints only appeared to come to the surface in response to an obviously concerted effort by some members of the Women's Network Committee to "retaliate" against what they perceived to be unfair treatment by the worker in the discharge of his duties. The Tribunal said there were other clear signs of a "sloppy" and less than arms-length dealing by the worker in relation to his role as either Chairperson or as a board member of the FTACL.

8. The Tribunal stated that whilst the evidence did not show any occasion when the worker approved his own loan, it would seem that from an administrative point of view, there were occasions when he had to approve the release of funds into his own account and there was prima facie evidence that this happened on occasions, before the appropriate documentation had been fully executed.

9. On the issue of COPE Presidency, The Tribunal said that this was also one another incident that demonstrated the former General Secretary's poor reading of the FTA organization and modus operandi. In the case of the nomination for Presidency, whilst the worker may argue that he was nominated by another member organization, he could have sought the views of those other Executive Members, to ascertain whether there were any objections to him, accepting such an endorsement. The Tribunal nonetheless, did not accept that the work load associated with the Presidency would have significantly hampered the worker's undertaking of duties as the General Secretary of the FTA, however, it found that he was still accountable to the Executive and the Members and the issue was one that he should have sought to clarify.

10. The Tribunal did not accept that the grounds of dismissal pertaining to misappropriation of funds, abuse of office and dishonesty was made out. It accepted that perhaps the worker had not provided expense receipts to support some of the acquittals that had been provided, but that did not mean that he had "pocketed" monies, only that he had not been chased up for the receipts as required. According to the Tribunal, the Association's Treasurer and President had responsibility for the protocols and procedures that governed financial operations and they clearly had failed in their oversight duties. The Tribunal said that there are many examples of where the Association's administrative procedures appeared to be quite ad hoc.

11. The Tribunal also found that the former General Secretary had not been insubordinate or demonstrating conduct that gave rise to a conflict of interest. Having found that, it acknowledged that he had offered himself up for an honorary position and that he had not sought the views of his employer before-hand. This was not a position he undertook in a private capacity. The Tribunal found that the worker could only assume this role,

on the basis of his position as a senior representative of the Association. The acceptance of the nomination showed a lack of judgment, but cannot be characterized as a conflict of interest.

12. The tribunal relied on one of its own case of *Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2* in which it had stated that:

"As a starting point, at least in the context of "unjustifiable dismissal", the question needs to be asked, having regard to the Statement of Reasons provided, whether termination based on those reasons was justified. The question post Central Manufacturing v Kant, where a new regulatory regime is installed, must be, can the dismissal be justified? The initial question to ask is not how the dismissal takes place, or what is relied on as part of that process, but whether the reasons for giving rise to the decision to terminate are justifiable. The concept of whether or not a termination or dismissal at work is justified or not, has been enshrined in international labour law for many years. The Termination of Employment Convention, 1982 (No. 158) adopted at the 68th International Labour Convention session in Geneva, sets out within Part II, Division A, a framework for assessing whether or not a dismissal is justified. Article 4 for example, provides that "The employment of a worker shall not be terminated unless there is a valid reason for such termination concerned with the capacity of conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Article 5 and 6 thereafter provides additional illustrations of circumstances that would not constitute a valid reason for termination. These include union membership, filing a complaint or participating in proceedings against an employer, discriminatory grounds based on attribute, absence due to maternity leave or temporary absence from work because of illness or injury.

Northrop J in Selvachandran v Peteron Plastics [1995] IRCA 333; 62 IR 371 at 373, provided the following clarification when a comparable question was being asked as to whether a termination decision was a valid once. In that case, his Honour stated:

Subsection 170DE(1) refers to "a valid reason, or valid reasons", but the Act does not give a meaning to those phrases or the adjective "valid". A reference to dictionaries shows that the word "valid" has a number of different meanings depending on the context in which it is used. In the Shorter Oxford Dictionary, the relevant meaning given is "Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value." In the Macquarie Dictionary the relevant meaning is "sound, just, or well founded; a valid reason."

In its context in subsection 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purpose of subsection 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly, see what was said by Wilcox CJ in Gibson v Bosmac Pty Ltd, 5 May 1995, unreported, when considering the construction and application of section 170DC.

"...the concept of what constitutes a justifiable decision within the meaning of Section 230(2) of the Promulgation, could well canvas such concepts as to whether the dismissal decision was sound, defensive or well founded; not capricious, fanciful, spiteful or prejudiced"."

13. Relying on the above legal principles and the evidence, the Tribunal stated that it did not see the justification in the dismissal. It said that the worker should have been sanctioned and possibly issued with a final warning by the employer. The Tribunal said that the employer needs to be reminded that this was a senior role and there was also a need in such cases, to expect more from the leader of an organization. The Tribunal found that there was clearly a level of frustration within the Association and a concerted effort by some to see that the worker would be terminated in his role. The process adopted by the employer, the Tribunal found, appeared to be quite arbitrary and less than fair.

14. It said that it was amazing that an employer that fights for the rights of its members, would show such blatant disregard to the very same principles of workplace justice, when investigating the conduct of the worker. The Tribunal relied on the fact that the worker's response to the allegations of misconduct was not given to the Investigating Committee and that the Committee did not interview either the President or the Treasurer.

15. On the issue of unfairness, the Tribunal started off by relying on the case of *Josifini Lagi v Nadi Town Council ERT Grievance No. 173 of 2016; [2017] FJET 7; Grievance 173.2016 (27 March 2017)* which stated that:

> *"The question of whether the dismissal was fair in my mind is quite clear. ...The issue is whether in carrying out the dismissal, the Employer acted in a manner that was harsh, aggressive, humiliating, degrading, embarrassing, or in a manner that otherwise causes humiliation, bad repute and injury to the feelings of the worker."*

16. The Tribunal referred to the evidence of the worker. He had testified that on the day of his dismissal, three members of the Executive attended his family home in order to advise of the decision to terminate him. They were, Messrs. Semi Vela, Jolei Bule, and Netani Drauvesi. The Tribunal stated that this would have been a very humiliating experience for the worker. It said that Mr. Nakaora was a former Deputy Head of one of the country's most prestigious schools. He was entitled to respect. He was entitled to be dealt with in a manner that was not degrading or capable of causing humiliation and embarrassment.

17. The Tribunal was of the view that it was not necessary for the three persons to attend the worker's home and deliver the dismissal letter. The Tribunal also said that the employer should not have withheld the final pay and accrued entitlements due to the worker. This was simply vindictive and in the case of the annual leave at least, unlawful. The Tribunal said that a trade union should know much better.

18. In its concluding remarks the Tribunal stated that within the employer's closing submissions, it was alleged that the employer was guilty of gross misconduct for the purposes of s. 33 of the Employment Relations Act, however provided no case law in support of that proposition. The Tribunal said that the statutory test required that the misconduct is of a sufficiently serious nature that would entitle the employer to regard the contract of service to be at an end. It stated that the best evidence can only amount to very poor administrative practices within an organization. The President of the

Association was accountable for the strict adherence to the financial and operational management of the Association. The Treasurer was the financial controller. Both of these roles and responsibilities are clearly set out within the FTA Financial By Laws 2013-2015. The General Secretary was to some extent reliant on these persons to put in place proper procedures and instructions, for how he was to undertake his role. The Tribunal said that it keeps in mind that the worker was a former educator, not a financial administrator.

19. The Tribunal said that whilst the worker demonstrated a lack of judgment in obtaining an unsecured motor vehicle loan from the FTACL and had been issued with a warning from the President, writing to him in the capacity as Chairman FTACL, some of the arrangements identified and separation of responsibilities between the FTACL and the FTA remained less than clear.

20. The Tribunal stated that little effort had been made by either party to isolate the distinct legal arguments in this regard. Be that as it may be, the Tribunal accepted that the worker may not have had the requisite skills to look after the day to day affairs of the Co-operative.

Grounds of Appeal

21. Aggrieved at the decision of the Tribunal, the employer raised 5 grounds of appeal alleging that the Tribunal erred in law and in fact in:

    1. *Reaching the conclusion it did on 26th March 2018 by failing to consider that the worker is bound by his pleadings.*

    2. *Deciding that the worker was unjustifiably and unfairly dismissed when he never pleaded the same.*

    3. *Assessing compensation and costs which were excessive, manifestly harsh and illegal – the worker did not plead the same.*

4. *Failing to consider and hold that the employer gave a proper statement of seasons and complied with s. 33 and 114 of the Employment Relations Act.*

5. *Failing to consider the parties' settlement endeavours in summarily assessing costs in the amount of $4,000.00.*

Analysis

22. At the outset, I must say that the employer's grounds of appeal does not challenge the substantive finding on unlawful and unfair dismissal. I therefore will not delve into the Tribunal's reasoning for coming to that conclusion as there is no issue surrounding that.

23. The first two grounds of appeal expresses concern that the Tribunal went onto making a finding of unlawful and unfair dismissal when it was not pleaded. I do not agree with Mr. Filipe's argument that the pleadings in this case did not claim unlawful and unfair dismissal.

24. The Terms of Reference to the Tribunal was signed by the Mediator on 21 November 2016. It was in the following terms:

"Joji Nakaora vs Fijian Teachers Association over the alleged unfair dismissal of the grievor who is seeking reinstatement without loss of pay."

25. The worker or its union's claim form to the Mediation Unit is not part of the records so it is difficult to ascertain what the worker had claimed. However, from the terms of reference, it is not difficult for any experienced and careful practitioner to discern that the claim is for unlawful and unfair dismissal.

26. In fact the Terms of Reference clearly states that the claim is for unfair dismissal. In that regard the employer should not have had any doubts. For unlawful dismissal, the statement in the Terms of Reference that the worker is seeking reinstatement without

loss of pay should have clearly indicated to the employer that the worker is also claiming unlawful dismissal.

27. It is clear to those who practice in employment matters that reinstatement is a remedy that is sought if the dismissal is substantially unjustified. Remedies for unfair dismissal is normally lump sum damages or payment of wages for certain period to address the humiliation, loss of dignity and injury to the feelings of the worker suffered as a result of an unwarranted conduct of the employer in carrying out the dismissal. The worker will not seek reinstatement, only in cases of unfair dismissal. It does not stand to justification for reinstatement to be sought where dismissal is lawful but unfair.

28. If the employer exercised prudency, it would have realized that the worker's claim included both unlawful and unfair dismissal. It is the Mediator's error in just summarizing the worker's claim as unfair dismissal but if the claim is read in full there is no prejudice caused to the employer. There cannot be any misunderstanding that the worker's claim included unlawful dismissal.

29. Further, it was clear from the worker's preliminary submissions and the manner in which the trial was conducted that the worker was challenging both the validity of the reasons for dismissal and the proper procedures used to terminate him. These are factors that are considered in determining whether the termination is lawful. How can the employer fail to understand that? If it did, it was ill-advised by its legal representatives.

30. Ground 3 raises that the compensation and costs orders were excessive and not pleaded. The worker's employment contract was for a period of 3 years with effect from 30 September 2015 to 30 September 2018. When he was terminated from work on 15 October 2016, the balance term of the contract was about 23 months. Out of that the Tribunal only ordered compensation for 7.2 months. The Tribunal could have ordered compensation for the entire period of 23 months. It did not and the employer has not shown me any basis why the award of 7.2 months is wrong on the facts of the case.

31. The period for which compensation was given is justified on the basis that it will normally take longer period than this for a dismissed worker to find work for himself. If the worker could have found work earlier and did not then he would be responsible for his lack of mitigation. These matters should have been addressed by the employer during the trial. It did not address the issues. I see no basis to then flaw the decision of the Tribunal.

32. The argument that the cost is excessive is meritless. The trial went onto for 7 days and the worker participated in the trial every day. This is evidenced by the judgment noting that the trial days were between 20 May 2017 and 9 January 2018. It took a period of approximately 9 months before the hearing could be complete. A sum of $4,000.00 is at the lower end.

33. The worker had pleaded reinstatement. The Tribunal considered compensation to be an appropriate remedy. The remedy sought was pleaded. It is within the powers of the tribunal to grant a remedy less than that is sought.

34. Ground 4 states that the Tribunal erred in failing to consider that the employer had given a proper statement of reasons in terminating the worker and complied with s.33 and 114 of the Employment Relations Act 2009. This ground is meaningless as the Tribunal did not make a finding that the employer erred in not giving the written reasons for dismissal at the time of termination.

35. Ground 5 states that the Tribunal erred in not considering the parties' settlement endeavours in summarily assessing costs in the amount of $4,000.00. The parties' did attempt settlement but it did not materialize and the worker had to attend the hearing for 7 days within a span of 9 months. That was a costly exercise for the worker. The employer has to take that responsibility for putting the worker to costs as it did not settle the matter and ended up being unsuccessful. Its attempt to settle was not fruitful and it should be ready to cater for the winning party's cost.

Final Orders

36. I do not find any merits in the appeal and thus dismiss the same. I order the employer to comply with the orders of the Tribunal within a month from today with 4 percent post judgment interest on the sum of $33,333.86 from 28 March 2018 *(date of Tribunal's judgment)* till the date of payment.

37. I also order costs of $3000 against the employer for the appeal proceedings to be paid within 7 days.

HIGH COURT OF FIJI SUVA

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Hon. Madam Justice Anjala Wati

15.09.2023

To:

1. ***Toganivalu & Valenitabua Lawyers, Suva for the Appellant.***
2. ***Mr. F. Anthony for the Respondent.***
3. ***File: Suva ERCA 12 of 2018.***