

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
EMPLOYMENT RELATIONS COURT
APPELLANT JURISDICTION**

**ERC Appeal No. 01 of 2021.
ERT GRIEVANCE NO- 119 of 2019**

IN THE MATTER of an Appeal against the decision of the Employment Relations Tribunal pronounced on 2 February, 2021 in Employment Grievance No. 119 of 2019.

BETWEEN : **SHALENDRA ANDREW**
GRIEVOR –APPELLANT.

AND : **WESTPAC BANKING CORPORATION**
EMPLOYER- RESPONDENT.

BEFORE : Hon. A.M. Mohammed Mackie- J

COUNSEL : Ms. Cava – For the Appellant.
: Mr. R. Singh- For the Respondent.

DATE of HEARING : 20th May 2024.

WRITTEN SUBMISSION : By the Appellant filed on 20th May 2024.
: By the Respondent filed on 20th May 2024.

DATE OF JUDGMENT : 09th October 2024.

JUDGMENT

A. INTRODUCTION:

1. Before me is an Appeal preferred by the Griever – Appellant (“the Appellant”) by filing his NOTICE and GROUNDS OF APPEAL on 11th February 2021 against the decision of the Employment Relations Tribunal of Lautoka. (ERT) delivered on 2nd February 2021.

2. The Appellant is seeking the following reliefs from this Court;

***An ORDER** that the decision delivered by the Resident Magistrate Mr. Indula Ratnayake on 2nd February, 2021 be wholly removed and quashed.*

***A Declaration** that the dismissal of Shalendra Andrew, the within named appellant from his employment on 9th July, 2019 was unfair unlawful and unjustified.*

***An Order** that the Appellant be reinstated to this employment without loss of salary, benefits and entitlements from the date of this dismissal until the determination of this Court.*

***Any FURTHER** orders or relief that this Court deems appropriate and expedient in the prevailing circumstances.*

B. GROUNDS OF APPEAL:

3. The grounds of Appeal adduced on behalf of the Appellant are as follows.

a) *THAT the learned Magistrate erred in law and fact when he held that the Appellant acted in conflict of interest due to the following reasons:*

i. *The Appellant had purchased the property in his personal capacity pursuant to the Sales and Purchase executed between him as the purchaser and the vendor with the consent of the I-Taukei Land Trust Board.*

ii. *The Defendant was not a party to the agreement and nor was it a requirement under the Land Transfer Act and the Defendant’s policy for the Appellant to disclose the purchase of any personal property. The Respondent by imposing the requirement for disclosure has directly interfered with the fundamental right of the Appellant.*

iii. *The Defendant did not have any interest in the said property that was purchased by the Appellant and any citizen of this Country has the right to purchase a property subject to the prevailing laws.*

b) *THAT the learned Magistrate erred in law and fact when he held that the Appellant withheld information from customers without disclosing the specifics of the information and its relevance to the Code of Conduct when purchasing a personal property.*

c) *THAT the learned Magistrate erred in law and fact when he held that there was breach of trust and confidence in the absence of any evidence tendered to establish that the Appellant was dishonest in the cause of his employment but solely relied upon the case authority of **State Bank***

of India v Bela Bagchi (1976) ALR 599 and Concut Pty Limited v Morrel and Anor (2005) HCA 494 of 2002 the facts of the two cases are distinctively deferent.

- d) **THAT** the learned Magistrate erred in law and fact when he held that the Appellant was dishonest in his conduct in the absence of credible evidence tendered to support the element of breach of trust and confidence or fiduciary duty.
 - e) **THAT** the learned Magistrate erred in law and fact when he held that the Respondent had acted fairly when the decision of dismissal was preconceived and the procedures was followed merely to satisfy the requirements of the disciplinary action.
 - f) **THAT** the learned Magistrate erred in law and fact when he failed to uphold that the Appellant did not conceal the purchase of the property but acted honestly by disclosing all material facts in his loan application that was well within the knowledge of the Defendant.
 - g) **THAT** the learned Magistrate erred in law and fact when he disallowed the email dated 22 March, 2018 during the hearing even without considering its relevance and this was prejudicial to the case of the Appellant as the Tribunal is not bound by the strict rules of evidence.
 - h) The appellant reserves the right to add further grounds of appeal upon receipt of the Employment Relations Tribunal records.
4. The matter being mentioned before my predecessor on several dates and finally before me on 20th September 2022 , was finally taken up for hearing on 20th May 2024, where learned Counsel for both parties , having filed their respective written submissions , made oral submissions as well.
5. Though, this judgment was fixed to be delivered on 26th September 2024, due to my absence from the Bench on account of my ill-health, same could not be delivered on time. I tender apologies to the parties and their learned Counsel.

C. **BACKGROUND**

- 6. The Appellant was an Employee of the Respondent Bank' "Namaka" branch in the position of 'Retail Home Finance Manager' during the time material with responsibilities, inter alia, of reporting to Mr. Harry Solomon, Area Manager West, Corporate and Business Banking.
- 7. As an Employee of the Respondent Bank, the Appellant was aware and expected to comply with its policies and procedures, including its Code of Conduct (COC).
- 8. In his capacity as Retail Home Finance Manager, on 15th May 2015, he was assigned with the task of looking after the accounts in relation to the Investment Property Loan facility of \$27,000.00 that had been given by the Respondent Bank to its Customers, namely, **Richard**

Francis and Rita Fara Juria (Husband & Wife) for which purpose they had Mortgaged their property in ITLTB Lease No-29567 with the Respondent Bank.

9. As the said Customers had paid and settled their Loan on 19th February 2019, they wrote to the Appellant on 22nd Mach 2019 stating that they have agreed to sell their property to the Appellant and his wife **Astika Devi**, after which the said “Customers” became the prospective “**Vendors**” and the Appellant and his Wife became the prospective “**buyers**” of the property that was under Mortgage with the Respondent Bank.
10. On 26th March 2018, the Appellant obtained the indicative sale price from a Real Estate Agent, who informed that the price would be in the range of \$130,000.00 to \$150,000.00. on the same day Sales & Purchase Agreement was signed for the subject property to be purchased from the Vendors , who were yet customers of the Respondent Bank.
11. The Report containing the actual valuation of the subject property as \$130,000.00, obtained by the Respondent Bank from “Westgate Consultants” on 1st May 2018, was held in the Appellant’s Loan file with the Respondent Bank and this was not disclosed to the vendors.
12. The Appellant bought the property for \$61,000.00, which was less than half of the actual price, from the Vendors who were the Respondent’s customers, and were not aware of the true value.
13. After due process of interviewing the Appellant and Vendors and the internal investigation the respondent Bank found that ;
 - a. There was no documentary evidence adduced by the Appellant that he had provided a detailed disclosure on the critical facts of the transaction to his reporting head Mr. Solomon.
 - b. The Appellant , as the Relationship Manager, did not fully carry out his duty of care towards the Vendors, so that the they , as the customers of the Respondent Bank, had the necessary information to make an informed decision on the sale of their property.
 - c. The Appellant withheld the information from the Vendors for his personal gain.
 - d. The Appellant’s conduct constituted serious and wilful breach of the COC.
14. Thereafter, on 10th July 2019 , the Respondent , after duly following all the procedural formalities, terminated the Appellant’s service by determining that the allegation of misconduct on his part had been substantiated and he had breached the COC , particularly, by **not**;
 - a. Managing conflict of interest responsibly,

- b. Respecting confidentiality and misusing information.
- c. Doing the right thing by Westpac's customers.
- d. Acting with honesty, integrity and due skill, care and diligence.
- e. Complying with the law and policies , and
- f. Valuing and maintaining professionalism.

15. The matter being brought to the ERT , at the end of the hearing , the learned Tribunal Magistrate , by his impugned determination dated 2nd February 2021, having found that the Appellant breached the COC By not doing the right thing by the customer and by not disclosing the material interest in the relevant transaction to people leader , decided that the dismissal of the Appellant was the appropriate sanction and finally dismissed the employment grievance .
16. It is against the above dismissal, the Appellant is before this forum by relying on the, purported, grounds of Appeal.

D. **DISCUSSION:**

Ground (A)

17. As far as this ground is concerned, the Appellant's position is that he purchased the property in his personal capacity pursuant to a Sale & Purchase Agreement, and nor was it a requirement as per the Respondent's policy for him to disclose the purchase of his personal property and if he was required to do so, it would be an interference with his fundamental right.
18. The pertinent question that arises, on perusal of the first ground here is, would the Appellant have purchased the subject property for a price less than half of its actual value disclosed by the Valuation Report, hadn't he been in the position of "Retail Home Finance Manager" of the Respondent Bank and served the Vendors, who were, undisputedly, the Respondent's customers.
19. The Appellant, being the officer who handled the Vendors' file at the Respondent Bank in relation to their Mortgage and financing, having failed in his fiduciary duty of disclosing vital information to the Vendors and to his reporting officer, cannot now be heard to say that such a requirement to disclose, when he was buying his property, is an interference with his fundamental right.
20. Undoubtedly, through this process of purchasing, with the suppression of material facts as to the actual price of the property, the Appellant not only deprived the Vendors a fair price for their property and their right of independent decision making, but also left the Respondent Bank at the receiving end as its affairs are concerned.

21. In ***Bristol and West Building Society v Mothew [1996] EWCA Civ 533*** is a leading English fiduciary law and professional negligence case, wherein the Court of Appeal explained the nature of fiduciary duties. The case is globally cited for its definition of a fiduciary and the circumstances in which a fiduciary relationship arises.

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary”.

22. The Appellant, being a responsible officer (Retail Home Finance Manager) of the Respondent Bank, was representing and acting for and on behalf of the Respondent Bank at the time material, while the Vendors, as the customer of the Respondent Bank, had fully relied on the Appellant’s advice, instruction and other necessary information in relation to the subject property.

23. His conflict of interest was obvious when the Appellant went through this transaction of purchasing his house from a customer of his employer Bank, by making use of the confidential information that was available in the customer file, when the principles of the COC , inter alia, had clearly stated in the following words;

“We manage conflict of interest responsibility

- a. Not using funds, property or information belong to the Westpac Group or our customers for our personal benefits, nor helping others to do so.*
- b. Not disclosing any material interest you have in a customer’s or supplier’s business to your people Leader.”*

24. The Appellant, who was bound to abide by the principles of COC of the Respondent Bank, should not have allowed any of his personal interest to have an impact on the customer – Bank relationship that existed between the Vendor and the Bank. His commitment to uphold the principles of COC, as a Respondent Bank’s Officer, is expected of him to the utmost level.

25. He cannot escape from his duty of care towards the Respondent Bank’s customers and his responsibility of keeping his senior officer (Mr. Solomon) duly informed and updated on the material information of the matter he was dealing with, by simply saying that purchasing a

hose for him is his private transaction. He gathered all relevant and confidential information through the vendors' file at the Bank and directly from the Customers during his engagement with them at the Respondent Bank. I don't find this ground of Appeal to be with any merits.

26. Surely, the Respondent Bank need not have interfered with the Appellant's right of purchasing a house, as long as it had not affected the Respondent's interest. With the redeeming of the Mortgage, the relationship between the Respondent Bank and the vendors need not necessarily become severed. It may remain for the benefit of both the Bank and its customer. The Appellant, through purchasing of his house in this manner, has got enriched himself at the expenses of the Respondent Bank, in terms of its good-will, customer relationship, reputation in the industry, which may finally lead to undesired consequences.
27. Purchasing of a property, by employing deceitful method/s, cannot be termed and considered as an exercise of one's fundamental right, which is always subject to limitations that follows as provisos to the very provision that grants the right.

Ground- (B)

28. I find that the learned Magistrate has arrived at a well-informed decision that the Appellant had withheld material information from the Vendors when he was purchasing this property at such a low price. As a fiduciary, when the Appellant did so, his conscience should have stopped him from doing so and/or at least prompted him to divulge this to his senior officer Mr. Harry Solomon.
29. It was stated by Lord Thankerton in the privy Council in ***Brickenden v London Loans and Saving Co [1934] 3 DLR 465 as follows;***

“when a party holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the Transaction, he cannot be heard maintain that disclosure would not have altered the decision to proceed with the Transaction, because the constituent action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant” (emphasis added).

30. As a fiduciary, the Appellant was duty-bound to disclose all the information, including the fact that the property was valued at \$130,000.00, which, if he did, would have immensely assisted the vendors in their decision making in the process of selling their property. The Appellant knew very well that the vendors were disposing the property to finance the education of their Son. He should not have taken advantage out of disadvantaged position they were in, by disregarding the principles enshrined in the COC that he was expected to uphold.

31. He should have left the Vendors at liberty of deciding the price, seeking the independent legal advice & services and acted transparently with honesty and integrity by sharing all vital information and putting the customers' need first. The proceedings before the Tribunal shows that the Magistrate had before him required evidence when he arrived at the impugned decision. The evidence shows that the Appellant himself had obtained the indicative sale price from Mr. Hitesh Naidu, which happened to be \$130,000.00 to \$150,000.00. In addition to it, there was a valuation report from Westgate Consultants showing the price as \$130,000.00 and this was in the Appellant's loan file. So the actual price was within the knowledge of the Appellant, who could have informed the vendors. This ground, in my view, is clearly devoid of merits.

Ground- (C)

32. As far as this ground is concerned, on careful perusal of the proceedings before the tribunal, I find that there was overwhelming evidence before the learned Tribunal Magistrate, after due consideration of which he has arrived at the impugned determination that the Appellant had breached the Trust and Confidence that had been placed in him.

33. It is the Trust and Confidence that the employers place in their employees and proper preservation of it by the latter only assist the smooth and steady operation of the establishment and drive it towards success in securing and retaining its customers.

34. The duty of mutual trust and confidence is a term implied in employment contracts. The House of Lords in **Malik v Bank of Credit ; Mohamed v Bank of Credit [1997] UKHL 23** held that;

"If conduct objectively considered is likely to cause damage to the relationship between the employer and employee a breach of the implied obligation may arise"

35. The Appellant as an employee of the Respondent Bank was bound to conduct himself in the manner expected of him in terms of his contract of employment, failure of which may bring in adverse impacts. When a term thereof is breached beyond redemption, due to the employees own commissions or omissions, the employer will have no alternative but to deliver him/her in turn what is destined for them as per the contract of employment. A Contract of employment is the key instrument that ensures the healthy and steady employment/ employee relationship.

36. Justice Richardson in the Court of appeal in Telecom South Ltd v Post office Union [1992] 1 NZLR 275 said that;

"The contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing".

37. The Fiji Court of Appeal recognised the duty of mutual Trust and Confidence in **National Union of Hospitality catering and Tourism Employees v Mataka [2011] FJCA 46** when it said , at paragraph 36

“A contract of employment contains implied terms by law namely that parties will act fairly and reasonably with mutual trust and confidence and any procedure leading to termination must be consistent with fairness; Stuart v. Armourguard Security Ltd [1996] 1 NZLR 484”

38. The Respondent had adduced convincing evidence before the tribunal that the Appellant had taken undue advantage of Respondent’s customers by misusing his position as Retail Home Finance Manager and finally gained financial advantage.

39. I find that Ms. Rita’s (Vender’s) evidence before the Tribunal, particularly, with regard to the self-centered role played by the Appellant during their (vendors’) decision making process , has had significant impact in arriving at the determination by the learned Tribunal .

40. When it was established through the Respondent’s internal investigation process that the Appellant had acted dishonestly, the Respondent could no longer trust him to act in the best interest of its customers, which warranted nothing but his dismissal. I find that the case of **State Bank of India v Bela Bagchi (2005) 7 SCC 4354** , which is very much relevant to the case in hand , has correctly guided the learned Tribunal Magistrate in arriving at his determination. Thus, the ground hereof does not warrant further consideration.

Ground- (D)

41. Here, it is alleged that the learned Magistrate erred in law and fact when he held that the Appellant was dishonest in his conduct, in the absence of any credible evidence tendered to support the element of breach of trust and confidence or fiduciary duty.

42. Though, the Appellant claimed that he had disclosed some of the details, which is true, he failed to disclose the following key information that;

- i. He was the vendors’ account manager;
- ii. He was the one who first suggested that the vendors’ sell the property to him , and
- iii. He had key information about the value of the property which not only used to obtain the property at a “good price” , but failed to provide these details to the vendors for them to make an informed financial decision about their property.

43. It is clear that it was the Appellant, who found out from the vendors about the possible sale, Obtained estimates of the value (which he did not disclosed to the vendors), Directly negotiated the price with the vendors, Knew that the vendors were financially

unsophisticated and they trusted him, finally managed to influence the vendors to obtain such a low price for him to buy the property.

44. It is also clear that the Appellant put his interest above those of the vendors, failed to disclose the vital details of the transaction to the Respondent's Senior Management, and particularly, made the vendors to pay for a valuation that was no of assistance to them but was needed to support his (buyers') Mortgage Application.
45. When all the commissions and omissions on the part of the Appellant, as highlighted in paragraph 43 & 44 above, were directly pointing the finger at the Appellant's culpability, the only conclusion that the learned Tribunal Magistrate could have arrived at was that the Appellant had in deed breached his Contract of employment, which duly warranted the dismissal. Accordingly, I am convinced that the ground of Appeal hereof has to, necessarily, fail.

Ground-(E)

46. The learned Tribunal Magistrate from paragraphs 16 to 20 of the impugned decision, has discussed in detail about the manner in which the investigation was conducted by the Respondent and has come to a finding that it was a fair and a reasonable investigation into the incident.
47. Finally, the Tribunal Magistrate, having considered about the lawfulness of the termination from paragraph 56 onward, in paragraph 60 thereof satisfied himself that "**Griever *has failed to act with honesty and strict integrity. He has breached the COC by not doing the right thing by the customers and by not disclosing the material interest in the relevant transaction to the people leader***" and accordingly, in paragraph 62 thereof concluded that the breaches of COC affect the root of the employment contract between the Griever and Westpac , and therefore dismissal is the appropriate sanction.
48. I don't find any reason to interfere with the above conclusion of the Tribunal Magistrate. As such, this Ground of Appeal also fails.

Ground-(F)

49. True enough that the Appellant had not concealed from the Respondent Westpac that he was buying a property. This he had to divulge since the loan he was seeking from the Respondent was to buy a House. Respondent is not in issue on this with the Appellant. But, he had not disclosed the crucial fact in his loan documents to the Westpac that the vendor was a customer of the Westpac under his portfolio. What he had stated in his loan Application was that he was getting a good deal because he knew the vendor.
50. He did not mention his relationship to the vendors and how he came to know about the property through his role as their Bank Manager. He knew that there was a conflict of interest and had he revealed these facts in his Application, it would have become

detrimental to his loan Application. I find that Mr. Mohamed Yasin (Staff lending Manager), who testified for the Westpac, has confirmed the above non-disclosure and clearly told that he would not have processed the Loan, if he had known that there was a potential conflict, which the Appellant had failed to disclose.

51. Mr. Solomon, People Leader , also testified that he was not given all details, specifically that ; the vendors were Mr. Andrew's (Appellant's) customers, they were facing financial hardships, they had discharged their Mortgage, the Appellant was privy to the valuation report and the purchase price was only \$61,000.00 despite the property being valued at \$130,000.00.

52. In ***Carpenters Fiji Ltd V Dilio [2014] FJHC 70 in paragraphs 41*** to 45 Hon. Anjala Wati- J stated as follows

[41]. I find dishonesty to be a gross misconduct. Some may tolerate it but objectively it is an offence which no employer can tolerate.

[42]. If anyone says that it is alright to be dishonest I can only say that I am alarmed.

[43]. In a case of dishonesty no procedure is required except instant termination, written reasons for termination and up to date pay. See. s. 33 of the ERP.

[44]. However the employee was being investigated. He was been given a chance to explain himself. He admitted the allegations. The employer was not left with any choice but to carry out the termination.

[45]. A termination letter was issued with reasons for termination given. The termination was carried out with respect and dignity. I find that the termination was justified and fair.

53. I find that the Tribunal Magistrate, after considering overall evidence, particularly that of the aforesaid 2 witnesses for the Respondent Bank, has arrived at a justifiable decision on this aspect in the impugned determination. Thus, this Court's interference is not warranted with this decision. I am satisfied that the Appellant had acted dishonestly by not disclosing all material facts in his loan Application and vital information related to his conflict of interest to his People Leader Mr. Solomon. In view of the above, with no doubt, I conclude that the ground of Appeal is with no merit.

Ground (G)

54. The email dated 22nd March 2018 was not available for consideration during the investigation by the Respondent Bank. Thus, it had not played any role when the decision was taken to dismiss the Appellant. The ERT cannot be found fault with for disallowing it in the exercise of its discretion. Accordingly, this ground also has to fail.

Ground (H)

55. No new grounds of Appeal adduced at the hearing.

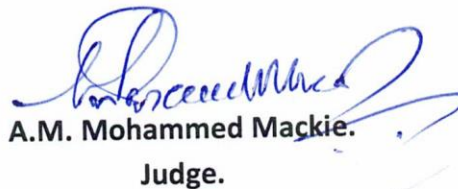
E. CONCLUSION:

56. Accordingly, for the reasons discussed above, I conclude that the Grounds of Appeal adduced by the Appellant hereof are with no merits and will not salvage the Appellant. Considering the circumstances, the Appellant is ordered to pay the Respondent a summarily assessed cost of \$2,000.00 within 28 days from the date of this judgment. The determination of the ERT shall remain intact.

F. FINAL ORDERS:

57. For the reasons discussed above, this Court has no alternative but to dismiss the Appeal by making the following orders ;

- a. The Appeal by the Appellants fails.
- b. The Appeal filed on 11th February 2021 is hereby dismissed.
- c. The decision of the ERT delivered on 2nd February 2021 is hereby affirmed.
- d. The Appellant shall pay the Respondent \$2,000.00 within 28 days from today being the summarily assessed costs.
- e. Copy of this judgment shall be dispatched to the ERT Lautoka forthwith.


A.M. Mohammed Mackie.
Judge.



On this 9th day of October 2024 at the (ERC) High Court of Lautoka.

APPEARANCE:

For the Appellant- Messrs. S. Nand Lawyers, Barristers & Solicitors.
For the Respondent- Messrs. MUNRO LEYS- Barristers & Solicitors*