

IN THE EMPLOYMENT RELATIONS COURT AT SUVA
CENTRAL JURISDICTION
CIVIL JURISDICTION

ERCA: 06 of 2022

**(APPEAL FROM ERT GRIEVANCES NO. 122
OF 2020)**

BETWEEN: **FIJI SUGAR CORPORATION**

APPELLANT

AND: **ROHIT PRASAD**

RESPONDENT

Date of Hearing : **1 July 2024**
For the Appellant : **Ms. Devan S.**
For all Respondents : **Mr Nair D.**
Date of Decision : **14 November 2024**
Before : **Waqainabete-Levaci, SLTT. J**

J U D G M E N T

(APPEAL FROM EMPLOYMENT RELATIONS TRIBUNAL)

BACKGROUND

1. A sugar cane harvester broke down which was used on the Estate farm and there were welding works to be done to repair the harvester. Mohin the Estate officer was looking after the farm.
2. The welding works was undertaken by Mohin and was not approved by the Appellant.
3. When company, Chand Engineering later requested payment for \$2400, the Appellant conducted Investigation and confirmed that welding works were launched without prior approval of the Appellant.
4. The investigators asked the Respondent to reach out to an independent external company to inspect and value the works. The Respondent was instructed to call All Engineering Limited.
5. Mr Prasad, the Respondent, was employed by the Appellant as a Capital Budget Coordinator for the past 28 years without adverse reports.
6. He was later dismissed from employment for breaching the Code of Conduct when it was found that he had attempted to alter the quotation of All Engineering that was tendered to the Appellant by contacting him directly during the tender processes to forward another quotation for the same work.
7. He also colluded with one Mohammed Mohin Rafiq to provide the quotation for welding works for the Nadi Estate Harvester.
8. The Appellant called Mr Swamy of All Engineering as a witness who confirmed the phone call by Mr Prasad colluding to reduce the quotation previously forwarded for tender in order to gain a benefit by being awarded the welding works required.
9. Mr Prasad denied the allegations and admitted that although he previously called Mr Swamy, it was only to do with welding plates.
10. The Griever, Mr Prasad lodged a grievance with the mediator which was later transferred to the Tribunal.

DECISION OF THE TRIBUNAL

11. After Hearing, the Tribunal determined that Mr Prasad was denied procedural fairness in the manner in which his employment was terminated and that the Employer acted in bad faith in terminating him which was harsh and disproportionate and unfair. The Orders were as follows:

1. It is hereby ordered that the Griever application for reinstatement for unlawful dismissal is dismissed. It is further ordered that FSC to compensate Mr Rohit Prasad 5 months wages for unfair termination.
2. Under Section 230 (1) © (i) of the Act, the Employer to compensate Mr Rohit Prasad for a further 1 month compensation for humility, loss of dignity and injury to feelings and
3. The Employer compensate the Griever a total of 6 months wages within 21 days of this decision.

GROUND OF APPEAL

12. Not satisfied with the decision of the Tribunal, the Appellant have appealed on the following grounds:

- [1] That the Learned Tribunal erred in law and in fact by holding that the Appellant acted in bad faith by scheduling a meeting at the Third Party's premises;
- [2] That the Learned Tribunal erred in law in failing to give judicial reasons for holding that the Appellant acted in bad faith;
- [3] That the Learned Tribunal erred in fact and in law by failing to consider that the meeting held at the Third Party's premises was part of the ongoing investigation into the allegations against the Respondent;
- [4] That the Learned Tribunal erred in fact and in law by holding that the Appellant acted in bad faith when:
 - [1] the Respondent was duly represented at the meeting held at the Third Party's residence;

[2] neither the Respondent nor the Respondent's representative objected to the meeting being held at the Third Party's premises;

[3] There was no evidence led by the Respondent that by holding a meeting at the Third Party's premises, the Respondent was unfairly treated, prejudiced or dealt with insensitively by the Appellant.

[5] That the Learned Tribunal erred in law in failing to give sufficient weight to the evidence of Krishna Swamy;

[6] That the Learned Tribunal erred in law and in fact by holding that the Appellant had not given a valid reason for Respondents termination;

[7] That the Learned Tribunal erred in law and in fact in awarding the Respondent Compensation when there was no evidence that established that the Appellants treatment of the Respondent during the course of the dismissal caused him humiliation, loss of dignity and injury to feelings;

[8] That the Learned Tribunal erred in law and fact in awarding the Respondent five (5) months wages for unfair termination.

Law on Appeal

13. Section 220 (1) of the Employment Relations Act 2007 stipulates that –

‘220 (1) The Employment Relations Court has jurisdiction –

(a) To hear and determine appeals conferred upon it under this Promulgation and any other written law.’

14. Section 225 of the Employment Relations Act 2007 stipulates that an Appeal to the Employment Relations Court is as of right from a decision of the first instance of the ERT.

15. An Appellate court will be slow to interfere with the factual findings of an original court unless they are plainly wrong or drew wrong inferences from the facts and the Appellate court need not exercise jurisdiction to interfere with the Tribunal's decision only because it exercised its discretion in another way (see Tuckers Employees and Staff Union -v- Goodman Fielder International (Fiji) Limited ERCA No. 28 of 2018). The Appellate Court will review a decision where from the face of the record the

Court finds that the Tribunal has blatantly erred in facts or law and has acted in ultra vires or has failed to consider a pertinent issue raised before the Tribunal.

16. The Appellate Court will not overturn a decision of the Tribunal unless the above factors have been met. Consideration is made to the observations of Lord Reid in Benmax -v- Austin Motors Co Ltd [1955] ALL ER 376 at 329 :

‘I think the whole passage, refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. That be right, I see no reason to doubt anything said by Lord Thankerton. But in cases where there is no question the credibility or reliability of any witness, and in cases where the point in dispute is the proper inferences to be drawn from proved facts, an appeal court is generally in as good a position in evaluating the evidences as the trial judge, and ought not to shrink from that task, though it ought of course to give weight to his opinion....’ (underlining my emphasis).

ANALYSIS

Grounds 1, 2, 3 and 4

17. In their argument, the Appellant submitted that they had relied upon the Respondent to carry out his duties with integrity as he had the knowledge and expertise to assist the Appellant to determine whether to source the works internally or externally. The decision of the Tribunal hinged on the meeting at All Engineering premises. The Respondent was present with the Krishna Swamy as well as the union representative. At the meeting the allegations were put to the Respondent and he responded. A Notice to Show Cause was also issued to the Respondent and he was given time to respond. At the management meeting he was again invited to respond to clarifications from the management.
18. The Appellant alleges that the Tribunal was erred in law and fact in holding that the Appellant had acted in bad faith in holding the meeting between them and the Respondent at All Engineering worksite and also at terminating the Respondent’s employment contract. The Appellant also argues that the Tribunal erred in fact and law in finding that the Appellant had acted unfairly and without procedural fairness when it arrived at the decision to terminate the contract of the Respondent without a proper hearing conducted.

19. Reference was made to the cases of National Union of Hospitality Catering & Tourism Industries Employees -v- Tradewinds Hotel and Convention Centre ERT No. 54 of 2018 and citation from Wallace -v- United Grain Growers Ltd [1997] 3 SCR 701 on the meaning of 'bad faith' which was also discussed in Apimeleki Uruca Soqonakalou -v- Shop and Save Supermarkets ERT Cr No 3 of 2021.
20. The Respondent argues that the Tribunal found that when the appellant conducted the disciplinary hearing at the workplace for the complainant, they acted in bad faith by failing to maintain the independence of the disciplinary process and failing to properly weigh out the complainant's evidence as opposed to the Respondent's statements. The actions of the Appellant were contrary to Article 4 and Article 7 of the International Labour Convention No 158 of 1992. Reference was made to Central Manufacturing Company Limited -v- Yashni Kant CBV 0010 of 2002 that there is an implied duty in the context of dismissal to treat the employee with fairness and with appropriate respect and dignity when carrying out the dismissal.
21. In Permanent Secretary for Public Service Commission -v- Matea CBV 0009 of 1998S where Sir Casey, Savage and Dillion JJA held that:

“These cases may thus be summarized broadly speaking as follows: The requirement that a person be given a fair opportunity to be heard before a body determines a matter that affects him adversely is so fundamental to any civilized legal system that it is to be presumed that the legislative body intended that a failure to observe it would render the decision null and void. If there are no words in the instrument setting up the deciding body requiring that such a person be heard the common law will supply the omission. It will imply the right to be given a fair opportunity to be heard. While the legislative body may exclude, limit or displace the rule it must be done clearly and expressly by words of plain intention. The intention must be made unambiguously clear. Finally we add that what is a fair hearing will depend upon the circumstances of each case; it does not mean that in every case a right of personal appearance must be given.”
22. The Respondents thereafter submitted that there was no fair hearing in accordance with the rules of natural justice under common law and hence the Tribunal correctly held that the termination was unlawful.

23. The Tribunal's decision was as follows:

“According to the witness Mr Davendra Prasad the meeting was organized by the Employer (FSC) in the All Engineering Limited sites. The Employer did not provide any reason why the same meeting was organized at the All Engineering Limited conference room than in FSC own Conference Room (Exhibit 13). The Tribunal finds that the employer had acted in bad faith to organize the meeting at the third parties premises rather than its own premises. As such reasonable employer could have made necessary arrangements within its own premises to conduct such a meeting.

As such the Tribunal finds that there was no valid reason given by the Employer to terminate the Grievors employment. AS the evidence adduced before the Tribunal, I find there was no valid reason for termination of employment.

The Tribunal had concluded that the Employer had acted in bad faith whilst terminating the Griever employment. The termination was harsh and disproportionate. The termination was also unfair in the sense that the Griever was no afforded procedural fairness. It is evidence from the evidence, that the Griever did not gain any financial benefit or otherwise from the alleged conversation with Mr Swamy. Furthermore there was no evidence that the employer had suffered any financial loss arising from the purported conversation.”

24. The facts not contested at hearing by both parties is that a voluntary statement was obtained from the Respondent before a further meeting was conducted. From the meeting, a notice to show cause was issued to Respondent who wrote a letter in reply. Thereafter another meeting was held together with the Complainant at the Complainants workplace after which a termination letter was issued.
25. The Tribunal had arrived at its determination on the basis that the meeting held at the complainant's conference room was not done in good faith and was not fair to the Respondent.
26. In addition the Tribunal did not find any benefit the Respondent gained as a result of the mobile contact with the Complainant. Also there was no loss suffered by the Appellant from the alleged alteration to the quotation which would corroborate the statement by the complainant Mr Swamy.

27. The altered invoice was also not tabled before the Court to confirm the act of influence to the complainant. In the Tribunal records, Mr Samy gave evidence he refuse to be influence by the Respondent and gave an independent quotation.
28. Having weighed out the evidences before it, the Tribunal arrived at the decision that the summary dismissal was unfair and unlawful because there was no evidence to prove that the Respondent had acted in breach of trust of the Appellant, the very basis for which the Appellant had terminated the Respondent.
29. When the Court takes into consideration the meaning of bad faith, the Court considered the reasons for Tribunals decision.
30. Tribunal considered that because the meeting was to collect further evidence, the meeting should have been organized in the conference room of the Appellant rather than the conference room of the complainant.
31. The meeting place for which the conduct of investigation is conducted must be independent and remain neutral.
32. There was nothing to show that there was any interference or complaints by the union rep or the Respondent during the meeting about the meeting room itself.
33. Hence the Court must consider whether the meeting proper was conducted in bad faith. There were questions put to the complainant who gave their statement and the Respondent was also asked to clarify on the veracity of the complainant's statement.
34. There was no evidence of threats made to the Respondent nor any abuse both physical or mental nor any form of act or conduct by the Appellants to show that the Respondents had been prejudiced in the manner in which the meeting was conducted.
35. The Tribunal in their decision, did not clearly articulate the reason for finding that the meeting held in the complainants conference room was of bad faith.
36. As per the meaning of bad faith when failing to discuss allegations with the greivor prior to suspending the greivor in Niranjan Autopart Ltd -v- Kumar [2023] FJCA 41; AB U00116.2019 (24 February 2023) Basnayake, Lecamwasam and Jameel JJA held that:

“51] The Respondent ought to have been at least initially confronted and informed that there was concern about matters relating to his work. None of the concerns of the Appellant were even discussed with

the Respondent prior to the issue of the Letter of Suspension. In this case, the manner in which it was done was not only inappropriate as the High Court correctly found. In my view, it was done in bad faith and a manner that is unacceptable by any civil standard and was clearly unfair, degrading and humiliating. In addition, the contents of the Letter of Suspension reflected conclusions of guilt, rather than suspicion of conduct amounting to a breach of the terms of employment, or criminal liability. In other words, the Respondent had been basically suspected and convicted with no chance of defending himself.

[72] In holding that the termination was lawful, the court had to be satisfied that there was *'just cause'*. In arriving at this conclusion, the court was required to consider the weightage to be given to the evidence of both sides. This was necessary because, the allegations upon which the termination eventually rested, were never put to the Respondent , nor was he ever given a right to be heard, either orally or in writing, prior to issuing either the Letter of Suspension or the Letter of Termination. Therefore, the burden was on the Appellant to establish by cogent and unequivocal evidence that the grounds of termination were justified. In the Judgment, His Lordship set out the evidence of the witnesses on behalf of the Respondent and concluded that the suspension, and termination of the Respondent, were both lawful. The Appellant relied on *"gross misconduct"* (paragraph 5 of its Statement of Defence) as the reason for termination.

[73] The burden was on the Appellant to prove the alleged acts of misconduct. In my view, it did not fulfil its burden, and it was therefore not for the Respondent to prove a negative. Although the Appellant said it was investigating the allegation, no evidence of the findings was produced.

[74] Whilst the contractual freedom of the employer to terminate is not to be interfered with, the employer cannot be said to have an

unbridled freedom to escape from the duty to establish the evidence it relies upon for its decision to terminate the relationship of employer and employee, if the employer relies on gross misconduct. In this case, the Appellant admitted the suspension and the termination, but in its defence, pleaded that it was on grounds of gross misconduct. Since the Appellant did not put the allegations to the Respondent prior to the termination, it was incumbent on it to establish it in trial. The only witness for the Appellant was Bob Niranjana, and his evidence did not establish the grounds alleged for termination or provide evidence of justification for the termination. Ground 8 of the Respondent's Notice of Appeal is allowed in favour of the Respondent."

37. The Appellants facts are similar to Niranjana Autoparts Ltd (Supra) but the principles can be distinguished. The Respondent attended an interview and later met with the complainant at a meeting to thrash out the evidence of the complainant. Furthermore he was again given the opportunity to show cause for his actions.
38. It was after investigations that the Appellants thereafter determined that the Respondent be terminated and allowed him time to mitigate. Which he failed to do as he was adamant he did not breach the Code of Conduct for FSC workers.
39. I find that the meeting conducted at the Complainants premises where the Respondent was given an opportunity to be heard together with the complainants version was not an act of bad faith. The complainant and Respondent gave their version of events. There was nothing to show that the Respondent was influenced or abused or put in a position that there were taken advantage of during the meeting. The complainant also did not show any dismay or refusal to attend the meeting together with his union representative.
40. Therefore I find that the Tribunal erred in law and in facts in failing to provide cogent reasons to find that the Appellant acted in bad faith by holding the meeting at the complainants" office.

Grounds 5, 6 and 7

41. The Court considered the Tribunal decision:

"The termination was unfair in the sense that the Grievor was not afforded procedural fairness. It is evident from the evidence, that the Grievor, was not afforded procedural fairness. It is evident from the evidence, that the Greivor did not gain any financial benefit or otherwise from the alleged

conversation with Mr Swamy. Furthermore there was no evidence that the employer had suffered financial loss arising from the purported conversation.”

42. From the Tribunal decision, it is clear that the Tribunal weighed the evidence of Mr Swamy and found that there was some conversation between the Respondent and Mr Swamy.
43. There were documentary evidences of invoices by All Engineering issued a day after the field check by Mr Swamy and also phone call statements showing contacts between the Respondent and Mr Swamy. In actual fact, the invoice by All Engineering showed quotations that were competitive to Charles Engineering, contrary to the purported instructions by the Respondent.
44. However the Tribunal found that the conversations did not bring about any financial benefit to the Respondent as there was no further documentary evidences by way of the altered invoice nor of any further documents to show that the Respondent had benefited from breach in trust. I am mindful that the finding of the Tribunal was based on the criminal liability where the standard was higher.
45. The matter before this Court is a civil matter and the standard is that of a balance of probabilities. The only question that the Tribunal need answer is whether the conduct of the Respondent was in breach of the code of conduct?
46. The Appellant argued that according to Bulu -v- Housing Authority ABU 57 of 2003, even if there was no loss to the Authority, the misconduct is in itself a justification for dismissal. Reference was made to Sinclair -v- Neighbor 1967 2QB 279 where it was held that:

“It was sufficient for the employer if he could, in all circumstances, regard what the manager did as being something which was seriously inconsistent – incompatible - with his duty as the manager in the business in which he was engaged.”
47. The evidence of the phone contacts, the discussion which were confirmed by Mr Swamy and the quotations gave sufficient circumstantial evidences of the Respondents intention, as Capital Budget Coordinator to enter into arrangements contrary with requirements of his Job Description to make sure that capital budgets are properly accounted for and transparent.

48. I therefore find that the Tribunal erred in law in finding that there was no loss sustained by the Appellant nor did the Respondent gain from the arrangement to hold that the dismissal was unlawful and unjustified.
49. Because I have found that the Tribunal erred in law, I must substitute with my own findings.
50. Having considered the evidences in the Tribunal records pertaining to the Appellant and that of the Respondents.
51. I am mindful that evidence will be weighed down on the evidence of one against the other.
52. The documentary evidences of the call being made is circumstantial as it establishes contact between Mr Swamy and the Respondent on those particular days. The invoice a day later was a quotation for Mr Swamy valuation of the works.
53. In his evidence which was not contradicted, Mr Swamy admitted the phone call was made to him giving him directions on how to prepare the quotation. The phone call and the name given to him matched the phone number of the Respondent.
54. Mr Swamy admitted sometimes there were calls from Respondent on plates but at that particular time, when he received a phone call from Rohit, there was no jobs carried out by All Engineering regarding roller plates and hence no reason for Rohit to call him regarding the plates.
55. Based on the evidences the Court finds that there was sufficient circumstantial evidences, on a balance of probabilities, to find that the Respondent had acted dishonestly and without integrity in contacting Mr Swamy and attempting to influence him in the preparation of the quotation.
56. I therefore find that the letter of summary dismissal was correct in that it stated at the bottom of the letter that as a result the conduct of the Respondent was contrary to the principles of honesty and integrity given the type of work he was employed in, that a summary dismissal be justified.
57. I also find that all the procedures adopted by the Appellant were correct and fair as they enabled the Respondent an opportunity to be heard during investigations and prior to issuance of a Termination letter as well as giving time for Mitigation.
58. I therefore find that the Tribunal erred in law and facts in finding that the Appellant was unlawful and unjustified in summarily dismissing the Respondent. I find that they acted within the ambit of the law provided in section 33 (1) (a) and (b) of the

Employment Relations Act when the Respondent was terminated as he was given all his benefits and salary up until the date of termination.

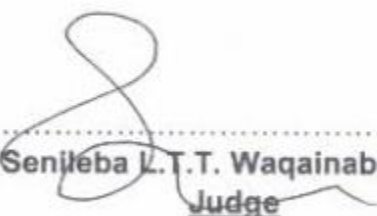
59. For the purposes of Ground 7, the Court finds that there was no evidence to show that the Respondent suffered hardship and sufferings from the summary dismissal and hence the Tribunal erred in fact and law in awarding the Respondent.
60. For the purposes of Ground 8, I therefore find that the Tribunal erred in law and fact in awarding the Respondent when the termination letter was justified and lawful.

Orders of the Court

61. **The Court finds that :**

- (i) That Grounds (1), (2), (3), (4), (5), (6) (7) and (8) of the Appeal is upheld;**
- (ii) The decision of the Learned Tribunal is hereby quashed;**
- (iii) That the stay orders dissolved;**
- (iv) Costs to the Appellant for \$800.00 by the Respondent payable in 30 days.**




Mrs Senileba L.T.T. Waqainabete-Levaci
Judge