

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:

ERCA 15 of 2013

BETWEEN:

FIJI NATIONAL UNIVERSITY

APPELLANT

AND:

SHANTI RAM

RESPONDENT

Appearances:

Mr. V. Kapadia for the Appellant.

No Appearance of the Respondent.

Date/Place of Judgment:

Tuesday 15 December 2015 at Suva.

Coram:

Hon. Madam Justice A. Wati.

JUDGMENT

Catchwords:

Employment Law – Appeal – summary dismissal under s. 33 of the ERP: Cause and Proper Procedure has to be established – statutory requirement on procedure to terminate in cases of summary dismissal.

Legislation:

1. *The Employment Relations Promulgation 2007 (“ERP”): ss. 33 and 34.*

Cause and Background

1. The appeal arises out of the decision of the Employment Relations Tribunal (“ERT”) of 6 September 2013 wherein it found that the employee Mr. Shanti Ram’s demotion by the

employer from the position of property supervisor on a salary of \$28,614 to the position of maintenance clerk on the salary of \$10,978 was unjustified as the employee was not awarded the due process of answering the allegation and being represented.

2. On that basis the ERT ordered that there be:

(i) *reinstatement of Mr. Ram to his former position or position no less advantageous to the worker;*

(ii) *reimbursement to Mr. Ram of wages lost as a result of the grievance; and*

(iii) *costs to Mr. Ram in the sum of \$250.00*

3. The cause before the ERT was a claim by the employee that the procedure invoked by the employer to arrive at a decision was not proper as provided for by the Human Resources Policy and the penalty was harsh and excessive.

4. The employee did not ever challenge the lawfulness of the cause for demotion.

5. Since the employee has now retired from employment from 31 December 2013, there is no question of reinstatement. The only issue before the Court is whether he should be paid the salary difference from the date of demotion until he retired. This will definitely be allowed if the appeal is dismissed.

6. Mr. Shanti Ram started working as a property supervisor at the Fiji Institute of Technology. He continued his employment when Fiji National University took over all the institutions.

7. The incident which gave rise to the demotion happened on 18 September 2011. The respondent was then a maintenance supervisor at the Samabula Campus. He was

responsible for maintenance and purchase of relevant goods and services for the Samabula Campus which included purchase of fuel for the backup generator that supported the centralized computer services situated at the Samabula Campus.

8. On 10 June 2011, the employee raised an IRO for the purchase of fuel for the backup generator at the Samabula Campus.
9. The employee received a purchase order number PO 2529 of 10 June 2011 to purchase 100 liters' of fuel from Pacific Energy.
10. The employee was instructed by the Deputy Manager Facilities Mr. Pradeep Kumar to arrange for the purchase of the fuel. The fuel was not purchased for 3 months.
11. On 18 September 2011, the Fiji Electricity Authority switched off power at the employer's Samabula Campus.
12. The backup generator did not start because it did not have fuel which led to the shutdown of the employer's centralized computer servers situated at the Samabula Campus. This led to a Fiji wide shutdown of all IT Services of the employer leading to massive disruption for 3 to 4 days of the computer systems, training programs, emails, online courses and like.
13. The University claims that the estimated loss from the disruption was in the vicinity of about \$300,000.
14. On 19 September 2011, the employee was asked to provide his explanation in writing as to why he did not purchase the fuel pursuant to the Purchase Order that he had sought and obtained on 10 June 2011.
15. On the same day the employee provided his explanation in writing. He said that he had requested an electrician to get the fuel. He said he gave the Purchase Order to him. He

also mentioned in the letter that he later found out that the electrician Amitesh Chand could not carry out the assigned task.

16. Amitesh Chand also gave a statement on 20 September 2011. He stated that he had serviced the generator at the B Block on 7 September 2011 at 10.00am. At that time he had noticed that there was no fuel in the generator. He said he had handed over his service report to the Deputy Manager Facilities, Mr. Pradeep Kumar.
17. In his evidence at the ERT, Anitesh Chand said that the employee never asked him or gave him the Purchase Order to buy the fuel.
18. The service report which was tendered in evidence showed that Amitesh Chand had explicitly stated in writing that there was no fuel in the generator and the Deputy Manager Facilities Mr. Pradeep Kumar had endorsed on the service sheet his dissatisfaction to the effect ***“dissatisfied with purchasing that the fuel is not arranged till today”***.
19. On 2 November 2011, the employee was again asked why he did not purchase the fuel and he repeated what he had said earlier.
20. The Deputy Manager Facilities Mr. Kumar had stated in his explanation that the employee was a senior officer and therefore he was assigned the duties to organize and fuel up the generator. He sat with the Purchase Order for 3 months without handing it over to anyone to do it. He reiterated the same in his second letter to the employer.
21. After the investigation by the Human Resources Department, the employee and his supervisor Mr. Pradeep Kumar were found guilty of gross misconduct. The subject employee was also found guilty of substantially neglecting his duties to purchase or arrange for the purchase of fuel.

22. They were given an opportunity to mitigate and show cause why they should not be summarily dismissed from employment. The employee provided his mitigation on 9 November 2011.
23. On 22 November 2011, the Manager Human Resources made a recommendation to the Director Human Resources that the employee's employment be terminated for gross misconduct and substantial neglect of his duties.
24. The Vice Chancellor in his powers under section 30(3) of the FNU Decree and Clause 26.1 of the FNU Policy No. 30 demoted the employee instead of terminating him.
25. The employee was demoted from his position and advised of this by a letter of 8 December 2011.

ERT's Findings

26. After the trial, the ERT found that the employer had established the cause in that there was gross misconduct on the part of the employee for which he was terminated. However the ERT found that the procedure to dismiss the employee was not followed in that:
 - (i) *The employee was not provided with the various reports based on which the decision was made and an opportunity to comment on the allegations;*
 - (ii) *The Human Resources Policy makes it clear by clause 12.10 that the employer is under an obligation to make its employees aware of their entitlements to representation and to make reasonable attempts to ensure that the employee is properly represented at all times. If the employee had good legal advice, he would not have said or done what he did at the investigation stage.*
 - (iii) *A fair and reasonable employer would not take such an action of demoting him.*

27. Having made the above findings, the ERT ordered that the employee be reinstated to his former position or a position no less advantageous to him and reimbursement of all lost wages as a result of the grievance.

Appeal

28. Aggrieved at the decision the employer appealed on the grounds that the ERT erred in law and in fact:
1. *In holding that the appellant had made out a case of gross misconduct without exhausting its own procedures in the appellant's human resources policies. The Chief Tribunal failed to take into account that gross misconduct by the employees is determined and handled by the Vice Chancellor in his discretion. The ERT failed to apply the law on the rights of the employer where gross misconduct is alleged.*
 2. *In holding that the employer had failed to meet its fair process standards and that it relied upon its failure to make findings against the employee without representation and advice provided to the employee when there was no obligation on the appellant where gross misconduct is alleged for the appellant to provide to the employee representation and advice save for providing the employee with an opportunity to respond to the allegations.*
 3. *In holding that the employer did in this case what a fair and reasonable employer would not have done in that it disadvantaged the respondent by unjustified action of the appellant in demoting him when there was no evidence of this available to make such a finding.*
 4. *When it failed to take into account that the employer had provided to the employee an opportunity to respond to the allegations made against him. The allegations put to the employee was that he failed to arrange for fuel backup for the generators for*

about 3 months when he was expressly instructed by the superior to arrange for fuel and as a senior superior, even if he delegated the task it was his responsibility to see that the task is completed.

5. When it failed to take into account that the employee being a senior supervisor should not need supervision and that when a task is delegated to him that he would be responsible to see to the completion of the task and cannot rely on an excuse that he delegated the task to a junior person who failed to do that task.
6. In not taking into account the evidence of Amitesh Chand who was an independent person and had no interest in the matter who gave unequivocal evidence that he at no stage was instructed by the employee nor was he ever given the LPO by him to purchase the fuel.
7. In not taking into account that Amitesh Chand prepared a report for his supervisor Pradeep Kumar on 7 September 2011 in which he noted that there was no fuel in the backup generator. The ERT took into account that Amitesh Chand prepared this report which did not make any reference to Amitesh Chand being requested by the employee to fetch the fuel for the backup generator as the employee had not instructed Amitesh Chand at any time to purchase the fuel. The LPO was found to be on the respondent's desk on 16 September 2013.
8. In holding that the substantive decision made by the employer that the employee was guilty of gross misconduct was unjustifiable when all facts when looked at by a fair and reasonable employer point to gross misconduct by a senior employee in not attending to the purchase of fuel for about 3 months which task the employee was given and had taken responsibility.

9. *In holding that there was procedural unfairness in that it did not follow the human resources policies when at all times the appellant had provided to the employee to respond to the allegations and thereafter mitigation before demoting the employee.*
10. *In relying on the appellant's human resource policy clause 12.0 which was not relevant to the circumstances of the case with the respondent.*
11. *In holding that the employer should have given the employee an opportunity to be accompanied by a representative and provide a full hearing to the employee and/or legal advice prior to making its determination when there is no such requirement imposed on the employer by contract or law.*
12. *In not giving weight to the employees own evidence where he admitted that he had obtained the LPO and it was with him for about three months. It should have been held that as a senior supervisor he was ultimately responsible for a task delegated to him and cannot rely on an excuse that a junior employee tasked by him had failed to follow his instructions.*
13. *In holding that the employee was disadvantaged by the unjustifiable action of the employer in demoting him from property supervisor to maintenance clerk when that decision was clearly within the powers and the discretion of the employer.*
14. *In ordering the reinstatement of the employee as well as reimbursement of his wages.*

Submissions

29. In respect of ground 1, Mr. Kapadia argued that Clause 26.1 of the FNU Policy states that "nothing in this policy prevents the University in dealing with cases of gross misconduct as the Vice Chancellor deems fit". The Vice Chancellor exercised his discretion not to terminate the employee but to demote him. This was done after the employee was given

the opportunity to explain his position and also to mitigate. He was accorded all natural justice.

30. There in fact is, argued Mr. Kapadia, no requirement for a hearing when it comes to summary dismissal. Once clear facts are established to the reasonable satisfaction of the employer and grounds for misconduct are made out, the employer is free to proceed with summary dismissal.
31. In this case more than necessary due process was allowed and despite that the ERT holds that the procedure to terminate was not followed which finding is wrong in law and fact.
32. In respect of ground 2 it was argued that clause 12.0 of the Human resource Policy states that the employees have a right to be accompanied at a staff Conduct Committee or Staff Disciplinary Committee hearing by a representative who is an employee at the University. That clause is directed at a disciplinary committee hearing and in this case there was no disciplinary committee hearing. The ERT was therefore wrong in relying on this provision of the policy.
33. The employer is under no obligation to provide a representative to the employee. Without a disciplinary hearing, the employee was given a right to explain his side of the story to establish the facts. There was no need under s. 33 of the ERP to hold an enquiry.
34. Under ground 3 it was submitted that there was nothing unjustified in the actions of the employer. Any other would have terminated the employee but in this case after providing him the due process the employer proceeded to demote him.
35. Grounds 4, 5, 11 and 12 were argued together. It was averred that at all times the employee was responsible for the task of purchasing the fuel. Even if he delegated this task to someone else which on the evidence he did not, he was still responsible to

oversee that work had been done. On the evidence substantial neglect of duties was established.

36. Grounds 6 and 7 were argued together. It was submitted that the evidence of Mr. Amitesh Chand was not analysed at all. The ERT stated that it reluctantly and on the balance of probability accepted the evidence of the employee but given the entire tenor of evidence and the documents, Amitesh's evidence had more weight. He denied being asked to fuel up the generator. He was only an electrician. He was not in the field of purchasing. He was asked to prepare a maintenance report on the generator which he did on 7 September 2011. He noted that the generator did not have the fuel. If he was asked to purchase the fuel, he would have done so by that date instead of reporting on his own flaws. He provided the report to the Deputy Manager Mr. Pradeep Kumar who noted his dissatisfaction on there being no fuel purchased for the generator. The Deputy Manager asked Mr. Anitesh to check where the order was and Amitesh found it sitting on the employee's desk. He reported the same to the Deputy Manager who confirms in his report of 19 September 2011 that he reminded the employee to purchase the fuel.
37. The employee had very vaguely given evidence that he asked the electrician to purchase the fuel. No specifics were given as to when the request was made and when he found out that Amitesh had not purchased the fuel.
38. Given all the evidence, Anitesh's evidence should have been accepted because he was not related to that issue and he was an independent witness.
39. Under ground 8, it was submitted that the ERT's finding that gross misconduct was not established is wrong in law and fact. There was clear act of neglect of duties and misconduct. An employee cannot expect to continually neglect work as major as this for a period of 3 months. This carries an impact on the desired output.

40. In relation to grounds 9 and 10 it was submitted that as found by the ERT, there was no need for a disciplinary hearing. On the facts before it, the employer was satisfied that there was gross misconduct so it proceeded to carry out the penalty.
41. In relation to ground 13 it was argued that the Vice Chancellor had the powers to make a decision when there was gross misconduct.
42. In respect of the final ground 14 it was submitted that the employee deserves the penalty so any award of remedies to him is unjustified.
43. The FPSA filed a brief submission on behalf of the employee. It stated that the employee retired from employment on 31 December 2012. The employee wrote the requisition for the fuel. The purchase of materials was under the supervision of the Deputy Manager Mr. Pradeep Kumar. The employee had asked Mr. Pradeep Kumar to get the fuel but he did not.
44. The employee was initially interviewed by one Prem Sushil from the Human Resources Department. During that interview, Prem Sushil told him that Amitesh had admitted to him that he had received the order. Amitesh however had lied under oath.
45. It was also argued that a disciplinary committee should have been constituted as it happens in other cases. It was a double standard on the part of the Vice Chancellor not to constitute the disciplinary committee for this employee. This is a standard procedure that ought to be given to all the employees.
46. Before the breakdown incident, the email was down from 8 August to 13 August 2012. This was due to negligence of IT Staff and no one was taken to task. On 4 November 2012 again, the email was down when the power supply was isolated by FEA. No one from the IT department was on standby. Again no one was taken to task. This incident was treated seriously when same kinds of incidents were not given any attention at all.

Law and Analysis

47. The grounds of appeal are not only verbose, but repetitive. It also contains arguments as well. This must be avoided.
48. I will deal with the appeal holistically as the grounds are repetitive and one cannot be isolated from the other.
49. The ERT found that the gross misconduct was established. There is no appeal against that finding.
50. It was held that the correct procedure was not followed in demoting the employee.
51. The demotion was carried out under clause 26.1 of the FNU Policy and s. 33 of the ERP. Under the FNU Policy, the Vice Chancellor has the discretion to deal with misconduct in the way it deems fit.
52. Under s. 33 of the ERP, there is no requirement of hearing from the employee. If on the investigation conducted by the employer, it is convinced that there is a reason for summary termination, it can proceed to terminate the employee without notice.
53. If the employee feels that the cause is unjustified then the employee can file an action for unlawful dismissal and the tribunal or the court will then make a finding of whether the cause is established.
54. The procedure that the employee is entitled to under the law is that he or she be provided with written reasons for dismissal and up-to date pay: **s. 33(2) and s. 34**. There was uncontradicted evidence that this procedure was complied with.
55. The issue is whether the contract allowed any procedure for hearing. The ERT found that clause 12.0 allows that the employee be represented in a hearing.

56. Clause 12.0 is only applicable if the employee undergoes in-house disciplinary proceedings. It does not apply to matters of summary dismissal or where there is gross misconduct. The ERT was not correct in finding that the clause 12.0 procedures applied to this employee as well.
57. There is also no procedure provided for in the contract that ought to be followed. The Vice Chancellor has the discretion to determine how the employee is to be dealt with.
58. One must not forget that in this case summary dismissal was recommended and the Vice Chancellor overturned that decision and substituted it with the decision to demote. Since there was gross misconduct, the Vice Chancellor having decided to demote, approved the procedure that was carried out against the employee. Contractually therefore, the employee was not denied any procedure.
59. In law, since this was a case of summary dismissal, all that was required was followed. I have said this earlier as well.
60. Be that as it may, this employer did provide the employee an opportunity to respond to all the allegations and also an opportunity to mitigate. He took advantage of all that opportunity. There was no denial of any natural justice.
61. The ERT found that if the employee was accorded legal representation, he may not have said or done something that he did. However the employee maintained that he was assigned the task of buying the fuel from 10 June 2013. He says that he delegated the task and up until 16 September there was no fuel.
62. The employee's supervisor had delegated a task to him. He in return delegated it to someone else. It was therefore incumbent on him that he ensures that the task is complete. He cannot be exonerated by just saying that he delegated the task. He is

responsible for the mishap which caused the University substantial financial loss and inconvenience to staff and students to which it provides service.

63. I am surprised that employee having said that he delegated the duty did not even or ever care to check that the work as important as this was done. He says that the person Amitesh Chand to whom he had delegated the duty had left the LPO at his desk. If that was so, it shows how the employee does not even care to see what was on his desk for so many days. It shows on his part how he neglects his duty.

64. He could have at least called for a report on the purchase of the fuel. He neglected his duty not for a short span of time but for 3 months until the University suffered the loss. I find that the actions of the employee warranted dismissal but the employer was more than justified in giving a lesser penalty.

65. The employee's claim that the employer did not follow the correct procedure in dismissing him is not established and therefore he does not succeed in his claim.

Final Orders

66. In the final analysis, I find that the employer had established that there was gross misconduct and substantial neglect of duties on the part of the employee warranting the employer to take action against him and that he was properly imposed with a penalty of demotion which could under s. 33 be harsher than what he received.

67. I further find that the employer has provided all due process required under the law in carrying out the demotion.

68. I therefore allow the appeal and set aside the orders of the ERT in whole.

69. The employee is not entitled to any remedy as a result.

70. Each party shall bear their own cost of the appeal proceeding.


Anjala Wati

Judge

15.12.2015



To:

1. *Sherani & Company for the appellant.*
2. *Respondent.*
3. *ERCA 15 of 2013.*