

IN THE HIGH COURT AT LAUTOKA
WESTERN DIVISION

Civil Action No HBC 86 of 2008

BETWEEN : **MOHAMMED SHAMSHER KHAN** son of Mohammed Sadiq
of Lovu, Lautoka, Unemployed.

Plaintiff

AND : **THE PERMANENT SECRETARY FOR WORKS AND**
ENERGY

1st Defendant

AND : **THE ATTORNEY GENERAL**

2nd Defendant

Appearance : Plaintiff in person
Mrs. Lee for the Defendants

JUDGEMENT

INTRODUCTION

1. For the record, there was a ruling by Master Udit in 2009 dismissing the defendants' application to strike out the claim as an abuse of process on account of the argument that it should have been brought at first instance before the Employment Relations Tribunal.
2. Mohammed Shamsheer Khan ("Khan") was employed at the Public Works Department ("PWD") in Lautoka from 1980 to 2005. Khan was always a non-permanent unestablished staff. He was engaged from time to time and his contract would terminate at the end of each project. In 2002, Khan's name was included in the nominal roll for unestablished staff. Usually, an unestablished employee whose name is put on the nominal roll becomes a permanent unestablished staff. Despite putting Khan's name on the roll, the Department would continue to engage him as a non-permanent unestablished staff. This, despite the fact that almost all the other staff on the roll was treated as permanent. In December 2005, Khan's employment was terminated at the end of a particular project (Tavua Project). He was not re-engaged on any new project thereafter.
3. Notably, Khan had been lobbying the Permanent Secretary For Works & Energy and even the Office of the Ombudsman in 2002-3 about why he was not being treated as a permanent staff despite his long years of

service. Khan would continue to lobby the PWD and the Ministry for Works after his termination and before re-engagement.

4. At some point in 2006, the Ministry wrote a particular letter to Khan offering to re-engage him as a non-permanent unestablished staff. Khan refused that¹. On 13 May 2008, Khan filed a writ of summons and statement of claim seeking damages for wrongful termination and also a declaration that the defendant, being a public authority, was, to quote from him, “*guilty of discriminatory practice in its selection of workers into the unestablished cadre of the Public Works Department*”. The defendants refute the allegations.

ISSUES

5. Khan was always engaged as a non-permanent unestablished employee, even after his name appeared on the nominal roll. In 2005, his contract automatically expired at the completion of the Tavua project. The basic issue is whether Khan deserved to be treated as a permanent unestablished employee? The answer to this question determines whether or not Khan was entitled to certain employment benefits, and ultimately, whether or not he was unlawfully terminated and therefore, entitled to damages for unlawful termination.

THE NOMINAL ROLL

6. At the period of time in question, workers within the civil service were classified as either established or unestablished. Established employees were commonly known as “civil servants” and they were all permanent employees. Unestablished employees were either permanent or non-permanent.
7. As Mr. Justice Scott said in **Raibili v Permanent Secretary, Ministry of Agriculture and Fisheries** [2003] FJHC 43; Hbj0054j.1999s (13 March 2003):

¹ George Tavo (DW1) is the current Divisional Engineer Western. He only became DEW in January 2015. That was some ten years or so after Khan was terminated. DW1 testified from PF JK 959 (Khan's personal records). According to the records, Khan had refused to take up an offer that was made to him.

....employees within the Public Service are either established or unestablished. The Plaintiffs were not established and were therefore unestablished. Unestablished workers may be permanent or non permanent. The Plaintiffs were not permanent and therefore they were non permanent.

8. Khan was always treated as a non-permanent unestablished employee despite having his name included on the nominal roll in 2002². In December 2005, his name was still on the roll. Does the fact that Khan's name was on the roll entitle him to some "permanency" in his employment status? Khan's witnesses appear to argue that a non-permanent unestablished employee becomes permanent when their name is entered on the nominal roll. **Sant Raj (PW1)**, Khan's first witness is a retiree who worked the entire thirty seven years of his working life at PWD. The last fifteen to twenty years of these were spent at the Personnel Section where **PW1** specifically looked after the personnel records for unestablished wage earners. **PW1** said that when the name of an unestablished employee appears on the nominal roll approved by the Department, the employee is counted as "permanent unestablished" and will work continuously until retirement. However, he said that some employees such as Hazrat Ali 630, T.K 455 Lalit Kumar, BM 313 Sheik Mira, 150 Kamal Jeet Singh, JL 567 Haroon Yasin Mohammed and Mohammed Iqbal were made permanent later well after the time when their names were included in the roll. Mike Brown (**PW3**) related the same account in Court. **PW1** did not know exactly when these officers became permanent. He knew they were permanent because "*they were not terminated at the end of each project period but kept on working*".
9. Under cross-examination, **PW1** said he would know when an unestablished worker has become permanent "*when the Personnel Officer tells us*". He does not know if there was ever an approved nominal roll.
10. **Mike Brown (PW3)**, also a retiree, was a leading hand for thirteen years. He was a delegate of the Public Employees Union ("**PEU**") for seven years. In that capacity, he was assigned specifically to look after the interests of employees in the building section. **PW3** worked with Khan in the Tavua

² A copy of the nominal roll which Khan obtained from PWD's head quarters in Suva was tendered by him.

project where he (**PW3**) was leading hand and Khan was storeman. They also worked together in the Estimate Section when Khan was Estimate Officer from 1986 to 2003. As far as PEU was concerned, **PW3** said the roll had some names which it should not have while it leaves out other names which should be in:

“there is a law/rule in our contract about the number of years a worker is working. The longer the service, the more they should be made permanent.

11. **PW3** knew of employees with twenty to twenty-five years consecutive service at PWD who were not in the roll. In contrast, a newcomer could be added onto the roll within a relatively short-time after joining PWD. He said the decision to add a name was often done at the whims of management including those in the personnel section who often acted in complete disregard of procedure. **PW3** thinks that the roll shown to him was an approved one.
12. **Mrs. Rokovada (DW2)** was Administrative Officer at PWD in Lautoka from 2008. Khan was no longer working at PWD at the time. **DW2** knew of Khan’s case as she would liaise with Suva about his ongoing grievance and also write letters to Khan in that regard. **DW2** understood there was no approved nominal roll³. She agreed though that permanent unestablished employees would receive certain benefits such as country allowance and yearly leave, but these were conferred under the terms and conditions of service rather than the nominal roll. **DW2** could not agree that an unestablished staff would not be entitled to benefits unless his name is on the roll.
13. **Pravindra Goundar (DW3)** was Executive Officer in the Human Resources Division in Suva from 1999 to 2008. His job entailed *inter alia* updating all files and records for the division. He said the nominal roll is supposed to be a record of all permanent government wage earners. The Divisional Engineer is the one who decided which names of unestablished employees is to be on the roll. If approved, the roll becomes a permanent nominal roll. There was a move to formalise the nominal roll at one stage. **DW3** was involved in that exercise. He had to interview the Divisional

³ DW2 maintained that:

“There was no approved nominal roll while I was there. It may have been approved after I left”

Engineers and some officers about the placing of names on the roll. He said there was a nominal roll for the Western Division, but it was yet to be approved by the Permanent Secretary. An approved nominal roll would have a stamp on it. **DW3** maintained under cross-examination that as far as he is aware, there is yet to be a permanent nominal roll to this day but this would have to be confirmed by the DEW (i.e. **DW4**). He did not know whether people derived benefits just by being on the roll. He said the “**first in last out**” policy only applies to redundancies.

RETIREED DIVISIONAL ENGINEER’S EVIDENCE (DW4)

14. **Isireli Temo Veitokiyaki (DW4)** was the DEW from 1996. He retired in 2011. He referred to an affidavit he swore on 02 July 2008. When **DW4** came to Lautoka in 1993, Khan was a casual worker in the Building and Construction Section. **DW4** does not know Khan personally. He said that Khan was terminated at the end of the Tavua Project in December 2005.
15. **DW4** said that the nominal roll kept at each division contains the names of people “**we feel we need to hold on to**”. He was not asked to explain the formalities by which he would identify the people “**we feel we need to hold on to**”. The Ministry, he said, actually budgets against the roll which came into effect in 1995 following a restructure of the Ministry. **DW4** said a nominal roll is approved through PSC through the PWD Head Quarters in Suva. Although the roll which contains Khan’s name is not the approved one, he uses it to manage the Division. The following is an extract of part of the record of cross-examination of **DW4**:

- Q.** *Goundar had said there was no approved nominal roll in the West. Yet people got permanent*
- A.** *Yes.*
- Q.** *My name on Roll?*
- A.** *Yes. I put it there.*
- Q.** *Why was I not then given permanent benefit? Because my name on permanent roll, I should have been permanent staff?*
- A.** *I do not know why he did not get benefits. That Roll was kept for management purposes. Roll kept in the Division. HQ notit.*
- Q.** *As you stated, I should be given benefit?*
- A.** *I said that – yes.*
- Q.** *2002 to 2005, I should have gotten permanent benefit in Division?*
- A.** *If you on roll permanent benefit means you do not get terminated at end of work. So in 2002, you replaced HD Singh, leading hand painter. We felt you good enough. So we put you on roll.*

Benefit means you do not get terminated.....only as long as name stays on the roll.

In 2005, leading hand absorbed, Paula, based on their report, you terminated.

Q. *But as your record, every year 2002 to 2004, I get letter.*

A. *I have not seen that.*

Q. *This is the Roll which shows the year redundancy was given and not benefit to continue work.*

A. *Shows you terminated 2002, 2003. It means that the Roll you refer to was there to manage the Department.*

Court *Does inclusion of one's name on the Roll entitle one to permanent benefit?*

A *Yes. HQ knows. Flexibility in system. I am allowed to keep people and not terminate. In 2005, a lot of people, more than 30, were kept out. It served purpose..... Mr. Khan weeded out. Leading Hand kept.*

Q. *Was it fair to write letter in 2005 on internal memo for PWD that my termination to beSince my termination, my services no longer needed. I put to you Ministry should have written letter to me.*

A. *We did not write to anyone regarding return. I spoke to everyone about returns.*

THE TERMINATION

16. **Mike Brown (PW3)** said Khan was experienced and had a very good work ethics and attitude. **PW3** was still employed at PWD when Khan was terminated. **PW3** said the supervisor then was one Sikeli Yavuta.

He did not tell us PEU delegates or leading hand about performance of Mohammed in the field

17. **PW3** said Khan's case was not handled properly and his termination took him by surprise. Why Khan was not elevated in PWD baffles him. As PEU representative, **PW3** said he should have been given an opportunity to make representations for Khan before management made any decision. Usually, no termination happens unless a meeting between management and PEU representatives has been held. But nothing of the sort ever happened in Khan's case:

Personnel section should have asked Divisional Engineer as all workers have records. They should have contacted D.E as details of all workers with Personnel. Mohammed was terminated without personnel section being clear about anything to us. The P.S (Permanent Secretary) should have informed us before termination letter.

18. **PW3** agreed under cross examination that he worked with Khan at the Tavua project and that all unestablished staff (except the permanent ones) were terminated and sent home for the Christmas break at completion. **PW3** maintained that he should have been consulted before management

took any decision. **PW3** still conceded that he was not necessarily consulted in every case of termination.

19. **Isireli Temo Veitokiyaki (DW4)** said Khan was terminated at the end of the Tavua Project in December 2005. There was a reform process going on and people were being terminated including Khan. He was not asked to elaborate in detail what the alleged reform entailed. Khan, he said, did not come back to work except on one occasion. It is normal for unestablished staff to be terminated at the end of each project. They are re-engaged later when a new project begins. As Divisional Engineer, **DW4** signed all terminations and engagements and re-engagements.

KHAN'S GRIEVANCE LETTERS

20. Khan had been aggrieved about management's treatment of him for quite some years well before his termination. On 18 December 2003 for example, he wrote a letter to the Permanent Secretary for Works and Energy (copied to Ombudsman's Office) to complain about why he was still being employed on a temporary basis despite having worked for 19 years as watchman, trade assistant, storeman, Painter, Assistant Painter, Carpentry "B" Clerk (Estimating).

It is pity to note that those who started work late have been confirmed permanently but to date I with more than 18 years service is still on temporary basis.

I wish to know from you that why I have not been made permanent when others with less years of service have been made permanent.

21. Khan's letter above was supported by letters by the General Secretary for the Public Employees Union in 2005 written after his termination.
22. For quite sometime after his termination in 2005, Khan would continue to wrangle about his termination and to assert his case. Pravindra Goundar (**DW3**) said at some point during his career, there was a move initiated by the PSC to establish within each government Ministry and Department a section to deal with all grievances. He was involved in that section that was set up within the Ministry of Works. He said Khan's grievance letter "**came down the line to me**". He identified three items of correspondence dated 03 January 2008, 13 February 2008, and 07 April 2008 respectively which he wrote in relation to Khan's letter of complaint

dated 12 December 2007. These letters were written based on DEW's (i.e. **DW4**) brief on Khan's case.

23. I reproduce below Khan's letter of 12 December 2007:

The Permanent Secretary for Works
Private Mail Bag
Suva

Dear Sir,

This letter is to advise you of the problems I am facing with PWD Building Section Lautoka. I started work with the Department in 1980. In the year 2002 my name appeared in the Department Nominal Roll Activity 2.4 but I was given casual work till year 2005. I brought my case to personnel section PWD Lautoka but they deny my right. I wrote letters to Union, Ombudsman Office, Fiji Human Right Commission and went to Labour Department Office (Lautoka) but nobody could solve my problems (letters attached). I have not been provided work since 2006 in PWD. From 1980 to 2005 my work record with PWD was good but after 2005 when I never work for the Department my record says otherwise (letters attached).

I am the only one left out of the 31 names in the roll. Please could you put my grievances to the Minister and help me to get back my rights and work.

Your kind assistance will be highly appreciated.

Yours faithfully.

Sgd. Mohd Shamsheer Khan (JK959)

24. **DW3** was aware of certain letters written by one Ioane R. (dated 01 November 2005) and one Apisai Y (dated 09 November 2005). These are annexed to the affidavit of Temo Veitokiyaki sworn on 02 July 2008. These letters allege that Khan was uncooperative in that he did not help in the loading or unloading of materials and did not mix well with the workmen.
25. The letters were not referred to **DW3** but were given to DEW to deal with.
26. Khan pointed out that **DW3's** brief to him recorded an allegation that Khan had refused "to go to Nadarivatu". **DW3** said he was not given a letter by Khan in which Khan had indicated his refusal to go to Nadarivatu. **DW3** cannot recall either if there was ever a letter by DEW alleging that Khan had refused to go to Nadarivatu. **DW3** said he had merely responded to Khan's letter on the basis of DEW's brief. Asked whether the DEW ever wrote a warning, **DW3** said he only wrote a brief.

WHY KHAN WAS NOT RE-ENGAGED?

27. Khan's case is footed on the argument that he should have been treated as a permanent unestablished employee.

28. Mrs. Rokovada (**DW2**) did write a letter dated 17 April 2008 to Khan which I reproduce below:

Mr. Mohammed Shamsheer Khan
P.O.Box 4364
Lautoka
Dear Sir,

Re: Grievances on Employment

.....
...your discussion with Clerical Officer Establishment (Mrs. Tima Bouwalu) was recorded well. The records indicated your intention that you do not anticipate returning to work immediately unless and until the allegations made against you were cleared.

29. As per the paragraph highlighted above, **DW2** said she was not satisfied with Ms. Bouwalu's report so she had written directly to Khan. She does not remember if Khan ever responded. Khan was aware of the Ministry's intention to re-engage him but had declined the offer until all allegations against him were cleared.
30. Mr. Veitokiyaki (**DW4**) said the re-engagement of casual workers is a very consultative process. Khan was asked in 2006/2007 to rejoin PWD in a temporary capacity as warranted his status at the time but had declined. **DW4** said that the "last in first out" policy does not apply to casual workers. Rather, it only applies whenever the Department is having to lay out workers on redundancy.

KHAN'S EMPLOYMENT RECORD

31. To add strength to his case, Khan examined and cross-examined his and the defendants' witnesses on his personal history card and employment record to show that his employment record was unblemished.
32. **Muni Nadan Goundar (PW2)** was employed at PWD from 1996 to 2009 and from 2010 to 2013. He left PWD after 2013. **PW2** worked with Khan in some PWD projects in 2004 and 2005 where Khan was the storeman. Their leading hand was one Jo Ratubua and then it was mostly one Paula Radeavu. **PW2** said Khan was a faithful, obedient, honest and a diligent worker. He said in every project over which Khan was storeman, there was always a lot of stock and materials left. Khan would account for these and return them to the Government Treasury.

33. Mike Brown (**PW3**) said no one ever queried him or any other leading hand with whom Khan had worked about Khan's performance on the field. He said Khan did not miss work and was good at managing and taking care of the store. Khan was adamant about ordering proper OHS-compliant gear for employees.
34. **PW3** was referred to a letter he wrote on 23 July 2008 wherein he had stated that the "**complaint about Khan from DEW was all false**". When put to **PW3** that no letter of complaint was ever written by DEW, he conceded. **PW3** said his opinion that Khan should have been made permanent is based on his experience as a leading hand on site. He agreed that DEW was the one who had the final say as to the confirmation of an employee.
35. Khan pointed out to Mr. Veitokiyaki (**DW4**) that his personal history card and record of service notates that his (Khan's) work and conduct were good. **DW4** said the handwritten notes were filled by the Clerical Officer in Human Resources based on the Personal History Card. He has never seen the card. If shown to him, he might agree or disagree with it. **DW4** agrees though that the Personnel Officer had authority to sign.
36. **DW4** was referred to an internal memorandum dated 28 March 2007 which is annexed to his affidavit. It was put to **DW4** that by that time, Khan was not working. **DW4** answered that the information in the memorandum was extracted from Khan's personnel records produced by some officer who had given him a performance rating.
37. It was put to **DW4** that in 2007, Khan was working for Kanta Construction in Sigatoka. **DW4** said he did not know of that fact. **DW4** said that the said correspondence was written in order to clear some grey areas as there had been constant letters written between Khan, HQ and the Human Rights Commission.
38. Referring to some reports and letters written which appear to give Khan a low performance rating in 2007, Khan asked **DW4** how an employee's record could become bad when the worker is no longer working in PWD. The letter in question apparently was written on behalf of **DW4** by a Supervisor/Engineer.

39. A letter by one R. Chand dated 28 March 2007 was brought up. The said letter said thus:

Since you are a permanent casual of our Department, Divisional Engineer Works Western has instructed that you be taken on board in the very first next lot of engagement for Buildings.

Taking into consideration, you are to improve on your attitude. There has been numerous complaints that you are not a team player and this reality affects your productivity and efficiency to work performance.

If your own attitude towards work does not change then your own attitude will decide on your future engagements to the department.

Sgd. Renu Chand.

40. It was again put to **DW4** that Khan had a good record of service based on the above letter. **DW4** said he did not know Renu Chand's letter existed.
41. **DW4** was then referred to a letter by leading hand Apisai Y to the Acting Construction Engineer. It was put to **DW4** that the said letter was false. **DW4** recalled the same leading hand was in charge of the same store that Khan was looking after at the time and was responsible for Khan as well as other storemen.
42. Khan put to **DW4** that he was not working under Apisai Y and that his leading hand were one Paula and one Joe. **DW4** answered that the first line leading hand were Apisai and Joe. He recalled at the time that Apisai was in charge of stores before he was sent out to the field. Apisai was not assigned to any group. He was assigned to ascertain matters.
43. When asked about what action he took on the letter, **DW4** said that the letter was written in response to HQ queries on Khan's performance. The report to HQ had come up through the leading hand to the construction engineer and to **DW4** and then eventually to HQ.
44. It was put to **DW4** that when a leading hand writes a letter, the Divisional Engineer should issue a warning letter. **DW4** said the letters written and statements made were based on Khan's performance on the field.
45. Khan put to **DW4** that he (Khan) did not receive any warning letter from the building foreman, nor was anything ever said against his conduct. **DW4** confirmed from Khan's personal history card that he had received three previous warnings. However, during **DW4's** time, no such letter or complaint was ever raised. **DW4** added that the personal history card does

not reflect the complete history of an employee's record. Warning letters may not be recorded. It was put to DW4 that there was no warning letter issued ever against Khan otherwise such a letter would have been in his affidavit. DW4 replied that the affidavit was prepared for him and he did not have any such warning letter.

MISSING FOLIO

46. From Khan's cross-examination of DW4, it emerged that some folio was missing from Khan's personal record. How it happened or who is responsible is not shown in evidence. DW4 appeared at first to suggest that the missing folio might have contained some adverse record. However, it would appear to me that he was decidedly being evasive.

- Q. So my record is good?*
A. Don't think so. That is why we did not take you back.
Q. Any record to show I was a bad worker?
A. Folder has folio missing I think. I do not think anyone can substantiate those things.
Q. Under law, everything written in black and white and kept for record.
A. Not if folios missing.
Q. If folio missing, the person in charge should have notified DEW.
A. I only came to know of missing folios 2 to 3 days ago because of movement of file.
Q. No letter was ever written to you?
A. No.
Q. So nothing against me.
A. We are here today because people thought you should not be at work. There is proof.
Q. People – by law, working letter needed.
A. For casual labourers, once terminated, not taken back. Supervisors are accountable. They are not employment agencies.
Q. Under your leadership (from 1996 to 2006, I worked in PWD. Did you ever give me any warning letter?
A. I do not recall. No records.
Q. There was a split in Ministry?
A. Reforms in the Ministry required the separation of Works, Water and Roads Departments. The reforms happened in 2005.
Q. You know my immediate supervisor in 2005 was Isikeli Yavita and Construction Engineer was Mr. (name not recorded clearly in Court records).
A. Yes
Q. Did they write letter to you against me?
A. Cannot recall.

OBSERVATIONS

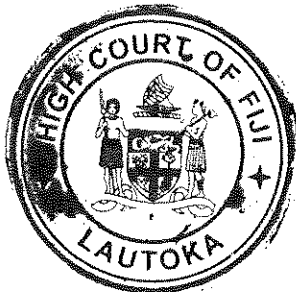
47. Khan was a non-permanent unestablished staff from 1980 to 2005, that is, twenty five years of service to PWD. In 2002, his name was included in the nominal roll for unestablished staff. The Divisional Engineer Western (**DW4**) was the one who made that decision to include Khan's name in the nominal roll. As **DW4** said in Court, such a decision is only made in respect of an employee who "*we feel we need to hold onto*".
48. In that light, the praise that Mike Brown **PW3** and Muni Nadan Goundar **PW2** had heaped upon Khan's performance and work attitude - would seem easier to accept.
49. The defendants' witnesses all say that the nominal roll was not an approved one, but then in the same breath, **DW4** said he relied on the roll to manage the Western Division. He even said that the Ministry actually budgets against it.
50. It is hard for me to accept that the nominal roll is of no consequence at all.
51. Most unestablished employees on the roll are treated as permanent, though they remain in the unestablished cadre. That entitles them to certain benefits. **DW4** said under cross-examination that Khan should have gotten permanent benefits (see paragraph 15 above). Khan however was always engaged as a temporary unestablished worker even after his name was entered on the roll. In other words, he continued to be engaged as a temporary staff whose employment was "**automatically expired**" at the end of each project and who would be re-engaged on a new contract if a new project comes up.
52. Khan pleads at paragraph 2 of his claim that there were "**official breaks**" in his employment. The defendants plead that Khan was only employed whenever there was an ongoing project and that Khan was always engaged on a "**temporary basis**".
53. The defendants' case is that Khan was an unestablished temporary staff who was hired and engaged for a limited purpose and period only. In other words, he was only engaged for a particular project. At the end of the project, his employment contract lapses. He would be re-engaged whenever a new project becomes available, if funds are available, and

according to the need for efficiency in the department, in which case, he would be re-signed on a fresh contract for the duration of the new project.

54. But did Khan deserve to be engaged on a single continuous contract?
55. In my view, the fact that unestablished employees on the roll normally did receive permanent benefits, and the concession to this fact by the defendants' witnesses, coupled with Khan's length of service and apparent unblemished employment record, logically, would all combine to shift the onus to the defendants to convince me that Khan was, notwithstanding, was not entitled to the same.
56. Again, the cross-examination evidence of DW4 in paragraph 15 above records a concession that this should have been the case. Accordingly, based on the cross-examination evidence of DW4 (in paragraph 15 above) and on Khan's length of service and good employment record at PWD, Khan was entitled to be treated as a permanent unestablished employee and be engaged on a single continuous contract from 2002.
57. It follows then that, if PWD had treated Khan properly as a permanent unestablished employee, then it should have given Khan notice and complied with the procedures set out under the JIC Agreement.

DAMAGES

58. Khan has not adduced any evidence to assist me in assessing what sort of damages and the quantum he should be awarded. He has taken on this case himself without counsel after his former lawyer, Haroon Ali Shah, was disbarred.
59. I will hear further submissions from the parties on this on a date to be fixed in Court today.



Anare Tuilevuka
JUDGE
28 September 2016