

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 04 OF 2018

BETWEEN: **FIJI NATIONAL UNIVERSITY**

APPELLANT

AND: **RUPENI WAQABACA**

RESPONDENT

Appearances: Mr. B. Singh for the Appellant.

Ms. Raitivi for the Respondent.

Date/Place of Judgment: Tuesday 28 January 2020 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

A. Catchwords:

EMPLOYMENT LAW – summary dismissal of the employee – whether dismissal lawful- duty of ERT to examine all the reasons used by the employer to terminate the employment of the worker to assess whether the cause for the termination was valid, without which a finding of unlawful dismissal cannot be justified –shouting at a staff and throwing a book at her which lands on her chest is serious misconduct which can entitle the employer to invoke summary dismissal.

Cause and Background

1. The employer appeals against the decision of the Employment Relations Tribunal ("***ERT***") of 29 December 2017 wherein it held that the termination of the employee Mr. Rupeni Waqabaca was unlawful and therefore the employer should pay to the employee a sum of 3 months' pay as damages.

2. Mr. Waqabaca was employed by the University as Lecturer II at the Ba Campus. He had been teaching since 1988. His contract was effective from 3 May 2015 for a period of 1 year which was terminated on 8 January 2016 for three specific reasons:
 - a. *For failing to enter his time in the attendance register when he reported off duty on 10 December 2015.*

 - b. *For colluding with a Security Office namely Maloni Basudra which resulted in his time being altered in the security log book.*

 - c. *For acting unprofessionally on 11 December 2015 by yelling at one staff named Renu and then scribbling on the attendance register, tearing and throwing the same which landed on her chest.*

3. The letter of dismissal reads as follows:

"It has been alleged that you failed to enter your time in the attendance register when you reported on 10 December, 2015.

It is also noted that you colluded with the Security Officer Maloni Basudra which resulted in your time being altered in the Security log book.

It is further noted that you acted unprofessionally on 11th December, 2015 by yelling at Renu and then scribbled, tore and threw the attendance register which landed on her chest.

Please note that the above are serious breaches of HR policy in that you have grossly neglected your duties and also colluded with Maloni Basudra. It is noted with concern that as a senior employee you have failed to abide by FNU HR Policy 29 which inter alia states in Clause 27. 2 (a) - where a worker is guilty of gross misconduct; 27.2(d) – for habitual or substantial neglect of the worker’s duties and clauses 8.5 (c) – manipulating and/or doctoring of documents and/or records that are crucial for the smooth functioning of the University, including manipulating or attempt to manipulate records or minutes of meetings.

This is a very serious breach in itself when you are supposed to show good example to the staff in Ba campus.

Given the above and in our considered view we are inclined to believe that your failure to adhere to the rules and policies of FNU was deliberate, intentional and not as a result of circumstances beyond your control. It also has the potential to give negative signal to other staff and we cannot condone such laxity.

Therefore, and pursuant to section 33(1) (a) and (d) of ERP and section 8.1.5 (c), 27.2, 27.2 (a) and 27.2 (d) of the FNU HR Policy 29 your employment is summarily terminated with immediate effect.

You are required to duly complete the Exit Form and hand over the HOS, together with all FNU property in your possession”.

4. Mr. Rupeni Waqabaca filed a claim for unlawful and unfair dismissal. The matter could not be mediated successfully and was tried by the Tribunal.

ERT's Findings

5. There were 3 allegations or reasons for which Mr. Waqabaca was terminated. The ERT only analysed one reason and said that Mr. Waqabaca had acted unethically when he threw the time register at Renu. However it went on to find that the actions of the employee were on the spur of the moment and were not directed to end his relationship with the employer.

6. The ERT found that such an act on the spur of the moment did not justify the termination. Instead a stern warning letter was sufficient in the situation. The termination was therefore unlawful and a sum of 6 months' wages was considered sufficient but reduced by 3 months in light of the actions of the employee.
7. The ERT clearly failed in its duty to make a finding on the two other allegations which also constituted as reasons for the termination. I will discuss this later.

Grounds of Appeal and Analysis

8. The gist of the appeal is that employer had 3 reasons identified in the letter of dismissal as to why the termination took place but the ERT only opted to analyse one and in doing so did not have regard to the policy of the University which prohibits unethical behavior.
9. The employer contends that unethical behaviour includes behaving rudely with another staff and this was a deliberate act on Mr. Waqabaca's part which warrants summary dismissal.
10. The employer avers that the finding of unlawful dismissal was wrong and any award of the remedy is not justified on the facts of the case.
11. I repeat that when the University had put forward 3 reasons for the dismissal of the employee, all the 3 reasons ought to have been analyzed and a finding made whether the reasons were justified to invoke summary dismissal.
12. There is no analysis of the allegation that the employee failed to enter his time out in the time register as part of the instructions of the employer. There is also lack of analysis of whether the employee manipulated the security officer to change the time in his book kept at the main security gate.
13. Without analyzing the other two reasons for the termination, it was an error of fact to come to the conclusion that the employer had unlawfully dismissed the employee.

14. When the evidence was tendered, the ERT had the benefit of hearing the witnesses and examining the original records to form a view of whether there was any tempering of the records at the instance of the employee. I do not have the same advantage to make a concrete finding on this aspect.
15. However, what is clear from the evidence is that Mr. Waqabaca had not recorded his time off on 10 December 2015 when he knocked off. He therefore acted in contravention of the University's HR Policy Number 32. The Policy requires in its mandatory form that the employees shall immediately sign in and out upon completion of the duty. It is due to this failure that Ms. Renu had to fill in the time the next morning upon consulting the Security Officer from the main gate.
16. It was Ms. Renu's duty to update the time register daily and due to that she acted swiftly to complete the register to send a daily report to the HR which department was to send the report to Suva for the processing of the pay for all staff.
17. Mr. Waqabaca is a very senior officer of the University and he ought to know the requirements of signing the time sheet. How else was he to have his pay processed? On 11 December 2015, when he realized that he had not acted according to the Policy, he should have acted calmly and be grateful to Ms. Renu for updating the record. Alternatively, if he was not happy with Ms. Renu's actions, he could have raised a formal complaint to the Campus Coordinator.
18. Instead he yelled at Ms. Renu, scribbled in the time book which resulted in the corner of the page being torn and then threw the same at her. The book landed on her chest and hurt her. She was also affected by this action for months as she was a new staff and she expected co-operation from all others.
19. I therefore do not endorse the ERT's finding that throwing time register at a staff and hurting the staff can be taken easily and ignored. Mr. Waqabaca's rash actions cannot be condoned. His actions in fact are criminal in nature too. He could have been charged for assaulting Ms. Renu.

20. Clause 8.1.5 of the University's Professional & Personal Conduct Policies makes it very clear that actual physical violence is gross misconduct. The University's HR Policy 29 also makes it clear that an employee has to behave ethically towards another and that acts such as being impolite, behaving rudely and causing stress to others were unethical behavior and classed as misconduct.
21. The employee ought to have been aware that such acts constitute gross misconduct under the policy of the University and that both the policy and the law permits summary dismissal if such acts occur.
22. I am viewing the act of Mr. Waqabaca holistically and the manner in which he behaved to assess whether summary dismissal was warranted. I find that when he did not sign off the time register, he ought to have acted in a more dignified manner and not humiliated another staff for doing what he ought to have done in the first place. His subsequent actions at Ms. Renu was serious and cannot be justified by saying that it is an isolated incident.
23. Workplaces are meant to be safe and free of intimidation. No one has a right to endanger another person's safety at work and to affect a person mentally with his or her behavior. In this instance, condoning such acts from senior staff will send a wrong message to them to use their power and authority to suppress new and young workers.
24. I do not find that Mr. Waqabaca's actions in the circumstances which he created can be justified or trivialized. Some conduct cannot be ignored by warning letters because it affects safety of workers. It is a constitutional right of a person to have a safe and sound working environment. This right cannot be ignored.

Final Orders

25. In the final analysis, I find that the summary dismissal was lawful. I therefore allow the appeal and set aside the decision of the ERT.

26. I order that each party bears their own cost of the appeal proceedings.



Hon. Madam Justice Anjala Wati

Judge – High Court Suva

28.01. 2020

To:

1. *FNU In - House Legal Department for the Appellant.*
2. *Ministry of Employment, Productivity and Employment Relations for the Respondent.*
3. *ERCA 04 of 2018.*