

**IN THE EMPLOYMENT COURT**  
**AT LABASA**  
**APPELLATE JURISDICTION**

**Civil Action No. 01 of 2019**  
[on Appeal from the  
Employment Relation  
Tribunal at Labasa in ERT  
Grievance No.75 of 2017]

**BETWEEN:**            **LAND TRANSPORT AUTHORITY** a statutory body established by  
the Land Transport Act 1998 having its registered office at Lot 1  
Daniva Road, Valelevu, Suva, Fiji Islands.

**APPELLANT**  
**(ORIGINAL EMPLOYER)**

**AND:**                    **KUNAL CHAND**

**APPELLANT**  
**(ORIGINAL GRIEVOR)**

**Counsel**                    : **Mr. A. Ram for Appellant**  
                                      : **Mr. A. Kholi for Respondent**  
**Date of Judgment**        : **10.08.2021**

**JUDGMENT**

**INTRODUCTION**

1. This is an appeal from the decision of Employment Tribunal where worker was reinstated in the former position or in a similar or higher position with compensation. The learned Magistrate held that Section 33(2) of Employment Relations Act 2007 (ERA) required the reason for summary dismissal to be given in writing at the time of dismissal. The decision of the Magistrate, dealt with each of the allegation separately in the said letter issued for justification for summary dismissal and held that those allegations were baseless and had given reason for such finding with analysis. Further, held that there was no formal complaint for investigation of the Griever - Respondent (Respondent) and there was no gross misconduct to warrant summary dismissal, hence held Employer-Appellant (the Appellant) had neglected to comply with the provisions of its own policies to Human

Resource (HR). Learned Magistrate had dealt with the investigating procedure and held that Appellant unlawfully terminated Respondent. Though there are sixteen grounds of appeal, none has merits to set aside the decision of the learned Magistrate's decision. The Appeal is dismissed and decision of the Magistrate affirmed.

## FACTS

2. Appellant had summarily dismissed Respondent and the reasons for summary dismissal were found in letter dated 1.3.2017. Learned Magistrate in his decision at paragraph twenty four had verbatim reproduced the same. I am not reproducing the same for repetition. There were five reasons given for summary dismissal.
3. The first reason was an allegation the Respondent had brought the Appellant to 'disrepute' by his conduct. The specific conduct that can be deduced from the alleged conduct accordingly, were
  - a. Overlooking a bus operator was already operating on the route.
  - b. Above conduct was deliberate and repetitive hence amounting delaying tactic.
  - c. As a result of the above, a rival bus company was allowed to take advantage of the delay resulting 'the interest of the few stakeholders before others.'
4. Second reason was connected to the above. It stated that failure to accept but operator's application by Respondent and later accepting a rival bus operator's application was discriminatory and corrupt.
5. Third reason for dismissal, relate to delay of bus operator's application which was subsequently lodged at central division.
6. Fourth reason stated in said summary dismissal amount to the alleged gross misconduct in terms of Appellant's HR Policy. This refers to lack of skill and qualification required based on 'habitual or substantial' neglect of the worker's duties.
7. Fifth reason for summary dismissal was that Appellant's Board had also received formal complaint against Respondent.
8. Learned Magistrate had stated the mandatory requirement found in Section 33 (2) of ERA and had analyzed each of the reasons stated by the Appellant as justification for summary dismissal separately with the evidence produced by parties at the Tribunal.
9. Decision of Magistrate had also dealt with the investigating procedure of the Appellant and held that the 'charges' or reasons given for summary dismissal were repetitive and does

not support the facts. It should be borne in mind though this was stated, evidence as well as procedure was analyzed by the Magistrate.

10. He had observed lack of any written complaint and or minutes of meeting with stake holders relating to the alleged complaint against the Respondent. According to evidence some audio recordings were considered, but none of these records or transcripts of those were submitted to the Employment Tribunal.
11. If the basis of the alleged complaint was an audio recording either it or its transcription should be available instead Employment Tribunal was kept in dark about the content or more specifically statements of the Respondents in the said recording.
12. Respondent had not accepted an application of a Bus Operator for a particular route. He had later lodged an application in Head Office and had also complained about the rejection of his application at Northern Regional Office of the Appellant, where Respondent was attached.
13. After an investigation Respondent was dismissed summarily contrary to the recommendation of the investigating officer's recommendation on 16.2.2017. On 1.3.2017 a letter was given to the Respondent indicating reasons for summary dismissal.
14. At the Employment Tribunal, his dismissal was held unlawful. Being aggrieved by said decision dated 22.3.2019 an appeal was lodged by the employer.
15. The Grounds of Appeal are as follows:
  1. The Learned Magistrate erred in Law and in Fact in holding that the Appellant unlawfully dismissed the Respondent, given the circumstance of the matter including the evidence at trial.
  2. The Learned Magistrate erred in law and in fact in failing to provide reasons for the unlawful dismissal finding.
  3. The Learned Magistrate erred in law and fact in failing to hold that the Respondent's refusal to accept Vishnu Holding Limited's application was tantamount to gross misconduct.
  4. The Learned Magistrate erred in law in fact in holding that there were no directives given to the Respondent not to accept an application for a route where there is an existing operator.

5. The Learned Magistrate erred in law and in fact in holding that there was no evidence that the delay was intentional.
6. The Learned Magistrate erred in law and in fact in holding that “the process dictates that the Respondent must accept the application of Dalip Chand’s, otherwise he would be in trouble yet does not find the non-acceptance of the Vishnu Holding Limited application as substantial neglect of the Respondent’s duties.
7. The Learned Magistrate erred in Law and in fact in holding that the Respondent was not at fault in not accepting the Vishnu Holding Limited application.
8. The Learned Magistrate erred in law and in fact in holding that the actions of the Respondent were not his hut that of his superiors.
9. The Learned Magistrate erred in law and in fact in holding that there was no delay on the Respondent’s part when the Respondent’s initial rejection set in train the lodgement in Suva and the subsequent delays.
10. The Learned Magistrate erred in law and in fact in holding that there was no evidence that the Respondent did not have the skills required for the post.
11. The Learned Magistrate erred in law and in fact in holding that there was no formal complaint against the Respondent when there was a complaint lodged by Vishnu Holdings Limited based on which an inquiry was conducted and evidence of such given in evidence.(sic)
12. The Learned Magistrate erred in law and in fact in holding there was as gross misconduct and relying on investigator’s recommendation when the power was with the Manager Human Resource together with the Board to determine the issuer of gross misconduct.
13. The Learned Magistrate erred in law and in fact in holding that the Appellant’s charges were bad for duplicity.
14. The Learned Magistrate erred in law and in fact in failing to take into account the result of effect to the Respondent’s misconduct such as duplicate application by the competitor being accepted, the complaints, the investigations, the public humiliation of the Land Transport Authority Board, the deferring of the application resulting in a nationwide deferral and the disrepute facted by the Appellant.

15. The Learned Magistrate erred in law and in fact in not holding that there was 53 days delay caused by the Respondent had been summarily dismissed for a serious misconduct after an interview.
16. The Learned Magistrate erred in law and in fact in holding that the Respondent was not given a chance to respond to the investigation when the Respondent had been summarily dismissed for a serious misconduct after an interview”

## ANALYSIS

16. Respondent was summarily dismissed on 16.2.2017 by a letter issued by Acting Chief Executive Officer of the Appellant. The said letter only stated Respondent’s “actions” amounted to “Gross Misconduct under HR Policy”.
17. Said letter did not specify what were the actions and what was the HR Policy which classified the undisclosed ‘actions’ that classified them as Gross Misconduct.
18. In my mind this letter of summary dismissal was contrary to the mandatory requirement in terms of Section 33(2) of ERA.
19. Subsequent to this, Appellant gave reason for summary dismissal on 1.3.2017. So the mandatory requirement under Section 33(2) of ERA was fulfilled on this day.
20. The burden shifts to the Appellant to justify summary dismissal, thorough evidence at the Employment Tribunal.
21. Not all types of mistakes or failures warrant summary dismissal. So the burden was with Appellant to prove ‘gross misconduct’ on the part of Respondent. Respondent’s HR Policy classify, actions that can amount to Gross Misconduct.
22. There are sixteen grounds of appeal and I will deal them below due to the nature of the grounds I have collectively dealt some where appropriate.

### Ground 1

This ground is more fully dealt finally due to vague nature of the said ground and wide scope. There is no circumstances of the matter that warranted the Tribunal to find dismissal was lawful. The burden was with the Appellant to prove that summary dismissal was justified in terms of the reasons given in the letter of 1.3.2017. If the reasons given in the letter cannot be justified then the dismissal was unjustified. The Employment Tribunal had not made an error on that.

## Ground 2

Learned Magistrate had given reasons for his finding they can be found from paragraph 19 of the decision.

## Ground 3

Respondent was not the decision making body regarding vetting process of the applications hence his refusal was on the basis of instructions that he received from his superior. So he had to obey such instructions once he had sought such directions. The investigation report stated that there were no “proper procedure in place to guide front line officers when receiving RRL application”. (page 10 of Record) .

## Ground 4

There was no evidence produced at the hearing of a written and or oral directive of Appellant regarding rival bus operators and their applications. In contrary there were justifications for refusal to accept application based on the advice given in evidence. (see page 78 of Record). Since there were undisputed evidence that there were no proper procedure laid for front line officers such as Respondent, seeking directives from superior and following them cannot be a fault on the part of Respondent.

## Ground 5

There was no evidence that delay of bus operator was intentional. The bus operator whose application was rejected later lodged the application in Central Division and it had remained at that office for nearly three weeks before it arrived at Northern Regional Office where Respondent worked. Though there was evidence of delay at the Northern Office another three weeks, this cannot be considered as intentional delay to the Respondent. One cannot look at the facts from a coloured glass.

## Grounds 6, 7 and 8

Said grounds deal with rejection of an application by a Bus Operator by the Respondent. This was according to the instructions hat Respondent received at that point of time from his superior who was away from the office. This related to specific application that was submitted for vetting. (see page 78 of Record). Respondent had stated that the application submitted was not accepted in consultation with his superiors including Regional Manager.

There were no reason given other that superior’s oral instruction. If the application also contained a space where reason for rejection needs to be stated in writing this type of rejection without reasons to applicant can be avoided. This is to make the process of application more transparent.

Any application received can be accepted subjected to vetting and if rejected at preliminary stage such reason can be stated in the application so that applicant can rectify the deficiency

so stated or challenge rejection in appropriate manner. Such a transparent process was not there at the relevant time.

When Respondent thought it was appropriate to receive instructions from his superior, he had sought and he had accepted. There was nothing wrong in such behavior. The rejected bus operator had lodged an application in Central Division. There was no evidence that the same application that was rejected was produced to Central Division Head Office of the Appellant. This fact was not elicited by Appellant at the Tribunal. On that failure alone the allegation against non-acceptance of an application fails. Apart from that Respondent could not have disobeyed his senior. Applications may be rejected on the face of it after consultation with Respondent's superior over the phone as he was out of the office attending official duty at that time. Due to lack of clarity in acceptance of such applications with Appellant cannot rely on conjecture to impute any sinister motive of the Respondent. Allegations needs to be supported with evidence.

The Report submitted to CEO of the Appellant, on this regard in the summary findings stated (pare 63 of Record) that front line officers such as Respondent were incapable of providing error free services to stake holders (including Bus Operators) and there was no procedure in place to guide front line officers when receiving an application to operate bus service in a particular route. This findings were accepted by Appellants. So the justification of the Respondent to seek directions from his senior officer.

#### Ground 9

There was evidence that it had taken nearly three weeks for the application lodged in Suva to reach Regional Office in North where Respondent worked. So, entire delay of 53 days cannot be attributed to Respondent's conduct. Respondent was had not contributed to nearly three week delay at head office Suva. A delay in an application can be due to many reasons and one cannot come to a conclusion that it was deliberate, without additional material. There was no evidence that Respondent kept or delayed the application he received from the head office. So the delay in the application cannot be held a deliberate act of Respondent.

#### Ground 10

There was evidence that Respondent's work was commended by the Appellant. There was no evidence of incompetency or lack of skills. A mistake of an employee, cannot conclude that he lacked the skills required for the post. If so why he worked such a long period with Appellant without any form of warning? Plaintiff had received a certificate for Best Staff in 2009. There is no merit in this ground. Respondent had the required skill for his post and had impeccable employment record with the Appellant.

#### Ground 11

There cannot be smoke without fire. There was a complaint, but how it related to the conduct of the Respondent and his dismissal needs to be considered. Lack of any form of interview or written complaint leaves much to be desired. Learned Magistrate had highlighted this vital issue. A dissatisfied customer (in this case a Bus Operator) may make a complaint orally but this needs to be reduced to writing at the time employer started an inquiry. Lack of such a vital information was an important deficiency in the investigation.

#### Ground 12

According to the Human Resource Policy of the Appellant, gross misconduct has to be dealt with 'consultation with staff board'. This was to consider whether the alleged conduct was 'major', 'minor' or 'gross misconduct' in terms of HR Policy. Learned Magistrate had quoted said Policy (E6) It is the Manager HR who needs to take the decision but 'consultation'. The 'Board' of Appellant had taken the decision to summary dismiss Respondent.

#### Ground 13

The reasons and or charges given in the letter dated 1.3.2017 were vague and repetitive. This was not a ground to reject the letter of 1.3.2017 in total, but it should be noted that this letter was a fulfillment of mandatory requirement in terms of Section 33(2) of ERA. So it should be concise and clear to recipient. If not the purpose of the mandatory requirement contained in section 33(2) of ERA is lost. The purpose of such mandatory requirement is to inform the gross misconduct, in a transparent manner. This was found wanting in the said letter.

#### Ground 14.

There was no evidence to support 'public humiliation' at all. In fact there was no written statements of the complainant or extracts of the interview to consider such a serious allegation.

#### Ground 15

This was dealt in ground 9.

#### Ground 16

Respondent was dismissed summarily on 16.2.2017 and letter for reasons for summary dismissal was given subsequently on 1.3.2017. This was an admitted fact and failure to provide reasons for dismissal at the time of summary dismissal was violation of Section 33(3) of ERA. Hence the proper summary dismissal was only on 1.3.2017 when reasons for dismissal were given in writing. Though initial dismissal was wrongful for the failure



to comply with mandatory provision, in my mind that error was cured by giving reasons for summary dismissal on 1.3.2017.

23. There were no special circumstances that warrant summary dismissal, unless the reasons given in the letter of 1.3.2017 were justified through evidence. This had not happened. There was total lack of evidence to support reasons given in the said letter of 1.3.2017 at the hearing, and Magistrate had correctly analyzed and correct conclusion reached.
24. Learned Magistrate had applied law correctly to the facts of the case. There is no reason to set aside the decision of the learned Magistrate as ground of appeal lacks merit. Learned Magistrate had correctly analysed the law and had applied it. Accordingly the decision of learned Magistrate is affirmed. Appeal is dismissed. Cost of this appeal is summarily assessed at \$8,000 considering circumstances of the case. Delay in this appeal is regretted.

### **FINAL ORDERS**

- a. Appeal dismissed. Decision of the learned Magistrate affirmed.
- b. Cost of this appeal is summarily assessed at \$8,000 to be paid within 21 days.

**Dated at Suva this 10<sup>th</sup> day of August, 2021.**



.....  
**Justice Deepthi Amaratunga**  
**High Court, Suva**