IN THE EMPLOYMENT RELATIONS COURT
AT SUVA
APPELLATE JURISDICTION

ERCA No. 28 of 2018

BETWEEN : **TUCKERS EMPLOYEES AND STAFF UNION** (currently Manufacturing, Commerce and Allied Employees & Staff Union)

APPELLANT

AND : **GOODMAN FIELDER INTERNATIONAL (FIJI) LIMITED**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. D. Nair for the Appellant

: Mr. R. Singh for the Respondent

Date of Hearing : 29 May 2019

Date of Judgment : 4 October 2021

JUDGMENT

APPEAL: *Dismissal from employment – Misconduct – Burden of proof – Decision of original court based on facts – Role of appellate court – Whether disciplinary action excessive – Sections 30 & 33 (1) (b) Employment Relations Promulgation 2007*

The following cases are referred to in this judgment:

a. *Suva Private Hospital v Narayan [2018] FJHC 22; ERCA 4.2017 (26 January 2018)*
b. *Lal v Carpenters Fiji Ltd Lal v Carpenters Fiji Ltd [2018] FJHC 723; ERCC 15.2013 (10 August 2018)*
c. *Carpenters Fiji Ltd v Latianara [2011] FJHC 822; ERCA 07.2011 (8 September 2011)*
d. *Raviravi Sawmilling & Timber Merchants Co. Limited v Mohammed Imtiaz Ram [2020] FJHC 406; HBC 41.2017 (5 June 2020)*
e. *British Leyland UK Ltd. V Swift [1981] 1 IRLR 91*
f. *Charles Osenton & Co v Johnston [1941] 2 All ER 245*
g. *Benmax v Austin Motor Co. Ltd [1955] 1 All ER 326*

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1. This is an appeal against the decision of the Employment Relations Tribunal ("Tribunal") of Suva which adjudicated an employment dispute that was referred by the chief mediator. The dispute related to the dismissal of Mr. Kissun Deo, a long standing worker of the respondent, who was also the president of the appellant union. After inquiry, the Tribunal dismissed the appellant's application. This appeal is against that decision.

2. The worker, who was tasked with operating an equipment called a gram machine, which was used to make ice cream, was dismissed after he failed to comply with the roster in terms of which he was required to work till 7.30 pm on 10 July 2014 and clean the gram machine. Instead of staying back to clean the machine, the worker left the factory at 5 pm after informing another factory worker – a supervisor – that his brother was ill and hospitalized. However, the time at which he made this intimation was a matter of dispute between the parties. Disciplinary proceedings were initiated nearly three weeks later. An investigation meeting was conducted with the worker on 8 August 2014, which was followed by a further hearing, and, thereafter, the worker's services were

terminated by letter dated 9 September 2014, with the employer stating that the worker could no longer be trusted especially as it was engaged in the food business. The worker's dismissal resulted in the report of the dispute to the permanent secretary of the Ministry of Employment, Productivity and Industrial Relations by the appellant.

3. The Tribunal by order dated 19 October 2018 found that the termination of the worker was lawful and fair, and struck out the dispute. The union appealed the decision.

4. The appellant's grounds of appeal are reproduced below:

a. "That the learned Resident Magistrate erred in law and in fact in not upholding that the decision of the employer to terminate the employment of Kissun Deo for not working beyond his official hours of work was not justified and unfair;

b. That the learned Resident Magistrate erred in law and in fact when she determined that the dismissal was lawful and fair when the cause for summary dismissal was not established by the employer;

c. That the learned Resident Magistrate erred in law and in fact when she failed to take into account the relevant consideration being the principles established in the decision of Suva Private Hospital v Narayan [2018] FJHC 22; ERCA 4.2017 that imposed upon the employer the obligation to establish the reasons for dismissal during the hearing before the Tribunal which in this case was not established.

d. That the learned Resident Magistrate erred in law and in fact when she failed to uphold that the penalty of dismissal was manifestly excessive and disproportionate in the circumstances of the case.

e. That the learned Resident Magistrate erred in law and in fact by disregarding the fact that the worker had made prior arrangements for not working overtime".

5. Mr. Nair rightly submitted that the burden of proof rests on the employer to establish misconduct. Section 33 (1) of the Promulgation provides that no employer may dismiss a worker without notice except in the five circumstances set out under that section. Section 33 (1) (a) permits an employer to dismiss a worker without notice where a worker is guilty of gross misconduct; and 33 (1) (b) to do so for willful disobedience to lawful orders given by the employer.

Section 30 (1) provides that nothing in the Promulgation precludes either party from summarily terminating a contract of service for lawful cause.

6. Mr. Nair, on behalf of the worker, submitted that the respondent failed to establish gross misconduct in order to justify dismissal, and that the Tribunal had not considered the onus placed on the employer to prove the allegations against the worker. He relied on the decisions in *Lal v Carpenters Fiji Ltd*[1] and *Carpenters Fiji Ltd v Latianara*[2] in submitting that the burden lay on the respondent to justify the dismissal of the worker for misconduct.

7. This burden, however, is a shifting one. If the employer is able to establish the worker's alleged conduct, there is a shifting of the burden to the worker to explain and justify the circumstances in which he did not perform the work as directed by the management. The Tribunal will then be required to weigh the evidence given on behalf of the respective parties to make its findings, and in doing so it is competent for the Tribunal to form a view on the credibility of the witnesses.

8. The evidence given by the appellant was that he sought approval on the morning of 10 July to leave without staying behind to clean the machine after usual working hours as his brother was seriously ill and admitted to the intensive care unit of the hospital. The worker, who gave evidence on behalf of the appellant, said that he made arrangements with another worker to clean the machine before he left work, as his request to clean the machine after returning from the hospital was not allowed. He did not dispute that he was placed on a roster on the material day or that he left work without staying behind as required by the roster.

9. The respondent's evidence was that the roster system had been in implementation for more than five years. An employee was rostered during a week for 44 hours. The roster was made available on a weekly basis with shifts from 7.30 am to 7.30pm, and the one related to the incident was released on the preceding Wednesday. On that day, two senior employees had left by noon due

[1] Lal v Carpenters Fiji Ltd [2018] FJHC 723; ERCC 15.2013 (10 August 2018)
[2] [2011] FJHC 822; ERCA 07.2011 (8 September 2011)

to illness; one with conjunctivitis and the other had fever. Mr. Kissun Deo and another employee, Salendra, were informed of this but neither employee had asked for leave at that time. The two workers were required to clean the gram machine on that day. In practice, an employee who was unable to complete a shift in terms of the roster was required to inform the management early and in writing. The worker had not done so. He had informed his supervisor, Mr. Shanil Raj at 4.30 pm, and left work by 5 pm, without cleaning the gram machine, which is described as an equipment that makes and places ice cream on sticks. The machine is operational for a 12 hour duration, from 5 am until 5 pm, and it is cleaned at the end of its daily run. The machined had to be cleaned straightaway after it stopped operating to avoid food safety issues due to bacterial growth. On 10 July, the gram machine was cleaned by a factory worker who had been assigned duties in another unit, after the management found that Mr. Deo had left without cleaning the machine despite the direction given by the roster. This was the evidence of the respondent regarding the incident that led to the worker's dismissal. Two witnesses gave evidence on behalf of the respondent: Earl Hughes, the production manager and Jennifer Ali, the human resource advisor.

10. Mr. Hughes said in his testimony that at the disciplinary hearing held on 18 August 2014, the worker did not submit any evidence to show that his brother had taken seriously ill, though he was given the opportunity to do so. The respondent contended that the actions of the worker amounted to gross misconduct, and the employer could no longer trust the worker to perform his duties diligently. The witness told the Tribunal that the worker, whom he described as one of the respondent's more experienced and skillful operators, had acted in breach of company policy previously and was issued with a final warning letter.

11. The Magistrate made the finding that the worker's request for leave was refused, and that although the worker was instructed in advance to stay back and clean the gram machine, he left the work premises without attending to the given task. The Tribunal reasoned that the worker would have been aware that he was on roster to work beyond the usual times. The Magistrate seems to have seen this as a failure of an essential part of his work, and made the finding that the

respondent – being in the food industry – would have viewed the worker's neglect to clean the gram machine as a serious matter.

12. The Tribunal observed that the worker did not submit any evidence regarding the admission of his brother to hospital. Such evidence was also not provided to the employer at the internal hearing; this the omission could not have helped the worker's cause at the internal inquiry. The worker told the Tribunal that he did not have information concerning his brother's hospital admission. Without this evidence, the worker's explanation appears not to have carried sufficient weight before the Tribunal. Mr. Deo was also unable to say when his brother died, having initially claimed that this was a few weeks after the incident that resulted in the termination of his employment. The record makes no mention of when his brother was admitted to hospital or when he became of aware of his brother's admission. The evidence is also silent as to whether he was aware of two other workers leaving work by noon due to illness.

13. The Tribunal has noted that the worker was warned in the past for other acts of misconduct. Although the respondent claimed that several warnings were issued to Mr. Deo, only one such warning, titled, "Final Written Warning", signed by the plant manager, Mr. Stanley Raniga, issued on 14 March 2014, was tendered as evidence; the worker denied that he was issued such a warning and claimed that he was never warned for misconduct at any time during his more than 40 years of employment with the respondent. The warning letter produced before the Tribunal contained a statement dated 18 March 2014 that Mr. Deo declined to accept it. The Magistrate has accepted the evidence of the respondent on the matter.

14. The Tribunal observed that the supervisor, Shanil Raj, through whom the worker's verbal leave request was made, was not called by either party. His evidence would have been material, and assisted the Tribunal in adjudicating the dispute. However, the Tribunal made its decision with the available evidence. The Magistrate had the advantage of seeing and hearing the witnesses, and accepted the respondent's version of the incident, preferring it to the worker's evidence. The case turned on the factual circumstances and the credibility of the witnesses who testified on such facts. An observation made by the Tribunal is

that the worker was evasive during cross examination. The Tribunal concluded that the employer had lawful cause to terminate the worker's employment. The Tribunal made the further finding that the worker was accorded fairness during the investigative process and leading to the termination of his employment. Mr. Nair agreed that the internal disciplinary process was fair.

15. An appellate court would be slow to interfere with the factual findings of an original court, unless those findings are plainly wrong or where the court has drawn wrong inferences from primary facts. In this context, my observations in *Raviravi Sawmilling & Timber Merchants Co. Limited v Mohammed Imtiaz Ram*[3] - which was an action to recover damages for personal injury – are quite applicable to this case. An appellate court ought not to reverse a decision merely because the court is of the view that it would have exercised the original discretion in a different way[4]. In this matter, the Tribunal has not considered the respondent's disciplinary action to have been unreasonable. In forming that view, the Tribunal appears to have given due consideration to the matters in issue and the evidence on record. The appellant has not established that the decision of the Magistrate is unreasonable or against the weight of evidence. There is nothing to suggest that the Tribunal was plainly wrong in making this finding. In these circumstances, there is no reason to interfere with the decision of the Tribunal.

16. The appellant urged court that the penalty imposed on the worker was excessive. The question before the Tribunal was whether it was reasonable for the employer to have dismissed the worker. In deciding this question, it is not for the Tribunal to substitute its view for that of the employer. In identical circumstances, one employer may reasonably dismiss a worker, while another employer may reasonably retain him. This can be seen from the decision in *British Leyland UK Ltd. V Swift*[5], in which the Court of Appeal of England and Wales stated:

> "The first question that arises is whether the industrial tribunal applied the wrong test. We have had considerable argument about it. They said: '… a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate'. I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have

[3] HBC [2020] FJHC 406; 41.2017 (5 June 2020)
[4] Charles Osenton & Co v Johnston [1941] 2 All ER 245 and Benmax v Austin Motor Co. Ltd [1955] 1 All ER 326
[5] [1981] IRLR 91

> dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him."

In the same case, Lord Justice Ackner said this:

> "As has been frequently said in these cases, there may well be circumstances in which reasonable employers might react differently. An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as a special case."

17. A couple of matters contained in the record need attention. Leave applications are made by process workers to the production manager, Mr. Hughes, who gave evidence. The disciplinary process was initiated by Mr. Hughes, and, according to him, he is authorised to do so when worker misconduct is apprehended. He participated in the investigation meeting and in the disciplinary process. The letter of termination was issued by Mr. Hughes. The Magistrate queried the involvement of the production manager in the internal hearing and in the decision to terminate employment, having initiated the investigation. The matter bears some importance as the worker has functioned as the president of the appellant union since its inception, and there were suggestions at the Tribunal hearing that the production manager and the worker did not have a good enough working relationship. There was, however, no suggestion that the dismissal was connected to the worker's union activities.

18. Another matter is that the respondent took some time to react to the worker's conduct. The incident occurred on 10 July 2014. The worker was informed about the investigation on 6 August 2014; nearly four weeks after the incident and termination was by letter dated 9 September 2014. This raises the question whether the respondent considered the worker's conduct to be a serious breach of its food safety practices

19. These are matters that need to be considered along with the totality of the circumstances and in context. Before this court, however, the appellant did not make submissions on these matters. Nor are they grounds canvassed in appeal.

20. Mr. Nair also referred to the worker's constitutional right[6] to fair labour practices and submitted that forced labour[7] was against the law of the land. The question of forced labour does not arise when considering the facts of the case. It has also not figured before the Tribunal. There is no dispute that the worker was rostered to work on the day until 7.30 pm; the dispute came about after the worker chose not to abide by the roster without a reasonable explanation backed by evidence.

21. The respondent pointed out that the decision at page 420 of the Tribunal record related to another dispute (Dispute No.7 of 2015), and tendered the correct decision pertaining to this case. Upon perusal of the record, the respondent seems to be correct. The appellant has not objected to the respondent's submission on this matter or tendered a copy of the Tribunal's decision. A direction will be made to rectify the record.

ORDER

A. The appeal is dismissed.

B. The parties will bear their own costs.

C. The Chief Registrar is to take steps to rectify the case record by inserting the decision of the Employment Relations Tribunal pertaining to this appeal.

Delivered at Suva this 4th day of October**, 2021**

M. Javed Mansoor
Judge

[6] Section 20(1) of the Constitution of the Republic of Fiji
[7] Defined in section 4, and protection granted under section 6(1) of the Employment Relations Promulgation 2007