

IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 21 of 2015

BETWEEN: **FIJI NATIONAL UNIVERSITY**
APPELLANT

AND: **PARDEEP CHAND LAL**
RESPONDENT

Appearances: Ms. M. Rakai for the Appellant.

Mr. D. Nair for the Respondent.

Date/Place of Judgment: Monday 22 November 2021 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

A. Catchwords:

Employment Law – is the worker entitled to all costs related to his transfer imposed on him by the Staff Disciplinary Committee after being found guilty of sexually harassing a fellow female worker and when the transfer was not on the request of the employer – Should the worker have exhausted all internal grievance procedures - Conflict of Interest of the Vice Chancellor in the matter – the powers of the Staff Disciplinary Committee to impose the kind of penalties – whether the award for humiliation, loss of dignity and injury to the feelings of the worker justified – costs of the appeal.

B. Legislation:

1. *The Employment Relations Act 2007 (“ERA”): ss. 110(4).*

Cause and Background

1. The employer appeals against the decision of the Employment Relations Tribunal ("*Tribunal*") of 13 November 2015 on its findings that when the worker was transferred to Lautoka for 6 months pursuant to a disciplinary punishment imposed on him by the Staff Disciplinary Committee for harassing a fellow female worker, the employer ought to have paid to him all his transfer allowances and costs. The Tribunal ordered that the worker was entitled to \$126 per day in subsistence allowance for 6 months in the sum of \$22,680 which was ordered in his favour. Together with that a sum of \$10,000 was ordered to be paid as compensation for humiliation, loss of dignity and injury to the feelings of the worker.

2. The terms of reference before the Tribunal was outlined by the mediation unit as follows:

"The grievor claims that he was not suspended and he was paid for the suspended period and after the payment the employer then recovered all wages paid during the suspension period. The grievor claims that all monies paid during the suspension period be reimbursed to him. The grievor also claims that his transfer to Lautoka was an administrative decision and therefore he should be paid all allowances including subsistence allowance for the period he was required to work in Lautoka".

3. It is crucial to understand the backgrounds facts leadings to the incident of sexual harassment and the disciplinary sanctions imposed on the worker.

4. The worker was employed as a Lecturer II in the Labasa Campus since 2009. There was a complaint against him that he had sexually harassed one Fazila Gulnaaz Nisha who was employed by the University since 16 August 2012 as a Temporary Class Auditor. An investigation was launched and the worker was charged with two offences.

5. The Statement and Particulars of Offence were:

Statement of Offence

1. *It is alleged that you harassed Fazila Gulnaaz Nisha (“Fazila”), as defined in section 4. 1 of the FNU HR Policy No. 34; an act that constitutes major and/or gross misconduct as defined in the FNU HR Policy No. 29 (“Harassment Charge”).*
2. *It is further alleged that your conduct was such that it could and/or has had an adverse impact on the reputation and/or stature of the University which constitutes gross misconduct in terms of section 8.1.3 of FNU HR Policy No 29 (“Misconduct Charge”).*

Particulars of Offence

1. *On or about 29 August 2012 you harassed Fazila by passing remarks such as she was overweight and needed to reduce weight, comments that were found offensive and not welcome by Fazila;*
 2. *On or about 29 August 2012 you harassed Fazila by squatting beside a chair that Fazila was sitting on; an act that she found offensive;*
 3. *On or about 30 August 2012 you harassed Fazila by touching and/or twirling a lock of her hair, an act that she found offensive.*
6. Since the worker is the biological brother of the Vice Chancellor of the University, the Vice Chancellor did not deal with the matter. A Staff Disciplinary Committee (“SDC”) heard the charges on 2 October 2012 and found him guilty on both counts. The decision of the SDC was delivered on 25 October 2012. The offences constituted gross misconduct under the FNU HR Policy.
7. On 7 November 2012 the SDC after hearing the mitigation from the worker confirmed the following penalties:
1. *Subject to paragraph 2 below, Pardeep Chand Lal be reinstated immediately without any Back pay whatsoever.*

2. *Pardeep Chand Lal be transferred out of Fiji National University's ("FNU") Labasa Campus for 6 months minimum with a demotion in both rank and salary.*
3. *Pardeep Chand Lal's reinstatement/ promotion (if any) to his current position/rank at the end of the minimum 6 month period (as per paragraph 2 above) be at the absolute discretion of FNU.*
4. *Pardeep Chand Lal attends at least 6 hours of counselling sessions/workshops on Workplace Harassment and Workplace Relations at his costs within 3 months. The sessions/workshops to be approved by FNU prior to attendance.*
5. *Pardeep Chand Lal to formally apologize to Fazila Gulnaaz Nisha in writing. The contents of the letter to be approved by FNU prior to release to Fazila Gulnaaz Nisha.*
8. The worker was advised of the decision of the SDC. He was also advised that he could appeal the decision to the Staff Conducts Appeals Committee within 10 working days. The worker did not appeal the decision of the SDC.
9. The worker was advised that in terms of the of the SDC's decision which was accepted and endorsed by the University, he was transferred to Lautoka Campus and demoted to the position of an Assistant Lecturer. His salary was reduced to \$24,378 from \$30,798 per annum.
10. The employer had also sought from the SDC clarification on who should be responsible for all costs associated with the transfer of the worker. The SDC clarified by its majority ruling that's all costs directly and indirectly associated with the disciplinary transfer including passage and accommodation is to be borne entirely by the worker.
11. The worker did not appeal the decision on costs either. He however brought proceedings in the Tribunal to recover the costs associated with the transfer.

ERT's Findings

12. In arriving at its findings that the worker was disadvantaged by the unjustified and unlawful action of the University, the Tribunal gave four different reasons. The first was that under the HR Policy, the SDC is empowered to issue certain penalties authorized under clause 19.0. The Tribunal found that the authority given by the law does not allow or empower the SDC to order transfer at the worker's costs with no subsistence allowance. In ordering that the worker should bear all the costs associated with the transfer, the SDC exceeded its jurisdiction.
13. The Tribunal added that the worker was employed in Labasa Campus. When he was transferred, he ought to have been paid all the costs of transfer as he was not expected to lodge in a rundown motel. He needed proper accommodation to rest to have quality time with the students.
14. The second reason was that clause 19.0 does not permit the SDC to impose a disciplinary transfer.
15. The third reason for the finding was that Clauses 5 and 6 of the FNU HR Policy provides for lawful entitlements for transfer and subsistence allowance when one is required to perform duties outside his current place of employment. In this case the relocation was a temporary one for 6 months and the worker ought to have been paid the transfer and subsistence allowance.
16. The fourth reason was that there was no evidence that the Manager Human Resources was not delegated the power of the VC and in absence of the VC endorsing the decision of the SDC, the decision is unlawful and ultra vires.
17. The reason that the Tribunal found that the worker should be compensated for humiliation, loss of dignity and injury to his feelings was that the worker had to agree with the SDC's decision as he had no choice. It is ultimate humiliation for him as he was charged and found guilty and then being denied his legitimate entitlements being the transfer costs and subsistence allowance. The Tribunal found that the worker would have surely felt banished due to the treatment given to him.

Issues on Appeal

18. Rather than reiterating the extensive grounds of appeal, it is proper that I identify the issues that I am asked to look at on the appeal. They are as follows:

1. *Should the Tribunal have not heard the grievance as the worker had failed to appeal the decision of the SDC thereby failing to exhaust all the internal grievance procedures and breaching s. 110(4) of the ERA?*
2. *Did the Tribunal err in law and in fact in arriving at the finding that the SDC did not have any powers to order transfer of the worker on his own costs?*
3. *Should the Vice Chancellor have accepted and endorsed the decision of the SDC in light of the undisputed fact that the worker was the biological brother of the Vice Chancellor?*
4. *Is the award of \$126 per day for 6 months in subsistence allowance properly justified in absence of any pleading and evidence in light of clause 6.2.3 of the HR Policy No. 10 which was designed for allowances for short period of time within the budgetary limit of the University?*
5. *Was the compensation for humiliation, loss of dignity and injury to the feelings of the worker justified without any claim and evidence?*

Analysis

19. The first issue that needs consideration is whether the Tribunal should have not heard the grievance as the worker had failed to appeal the decision of the SDC thereby failing to exhaust all the internal grievance procedures and thereby breaching s. 110(4) of the ERA?

20. The Tribunal's reason for proceeding to hear the case was that although the employer had raised the issue with the Mediator, the mediator did not send the matter back for the worker to exhaust all the internal grievance procedures. The mediator proceeded to mediate. When the matter was not settled, the mediator referred the same to the Tribunal for hearing and

adjudication. The Tribunal found that since the matter was in the Tribunal, it was bound to hear the same as it is expected by the parties that the matter will be heard.

21. I find that the employer had raised the issue of the worker not exhausting the internal grievance procedure at the very first opportunity. S. 110(4) states that an internal appeal system must be exhausted before any grievance is referred to the Mediation Services. The worker had made a declaration in his Form ER1 that he had exhausted all the internal appeals procedure. He was not honest in making representations to the Mediation Unit. That is why the matter was accepted by the Mediation Unit. It would be different if a correct declaration was made.
22. However, when the issue was brought to the attention of the Mediator, the matter should have been stayed either by the Mediator or at least by the Tribunal as the employer had done its best to raise the issue at the first given opportunity.
23. The Tribunal ought to have regard to s. 110(4) as the provision is mandatory. It would be another matter if the issue was not raised by the employer at the first opportunity in which case it would be debatable whether the employer waived its right to have the internal grievance procedure exhausted by the worker.
24. The Tribunal's finding that the parties expected an adjudication and it was bound to hear the case is neither justified nor sound in light of the fact that the law required that a certain procedure be followed and that the employer did not expect the Tribunal to adjudicate the matter. It wanted that the matter be struck out for non-compliance of the law.
25. In light of false declaration by the worker that he had exhausted all the internal grievance procedure and in light of the objections by the employer at the first given opportunity, the Tribunal ought to have had regard to s. 110(4) of the ERA and proceeded to at least stay the proceedings until the worker exhausted the appeals procedure provided by the employer.
26. Now to the next issue, did the Tribunal err in law and in fact in arriving at the finding that the SDC did not have any powers to order transfer of the worker on his own costs? Clause 19. 2 of the Human Resource Policy of the University clearly authorizes the SDC to impose the penalty of transfer. I cannot fathom how the Tribunal found that that power does not exist in

light of the unambiguous provision in the policy. Not only that, the Tribunal also found that the SDC did not have power to transfer without the costs and subsistence allowance. The same clause I have identified gives the SDC a general power to issue any other penalty. It is therefore perfectly within the powers of the SDC to impose that the transfer and allowance costs will be borne by the worker.

27. The Tribunal chose not to give regard to the entire provision bestowing the SDC the powers to impose the penalties. It is ideal if I set it out here:

“19.2 Subject to any restrictions of this policy, the Committees may impose one or more of the following penalties;

19.2.1 Reprimand.

19.2.2 Demotion in rank and/or salary.

19.2.3 Dismissal.

19.2.4 Transfer, with or without demotion, to other duties, or to other locations.

19.2.5 Any other penalty considered suitable by the Committee”.

28. The finding of the Tribunal that the SDC acted ultra vires was wrong in law and in fact.

29. I will quickly deal with the issue of the Vice Chancellor who the Tribunal said should have accepted the decision of the SDC and recommended its implementation. The Tribunal had very conveniently overlooked the principle of *“conflict of interest”*. The worker in this case was the biological brother of the Vice Chancellor. It was of utmost necessity for reasons of transparency and independence that Vice Chancellor not get involved in anything to do with this worker. Any involvement would be improper and highly questionable. Knowing the close relationship of the worker, I am surprised that the tribunal still requires that the Vice Chancellor got involved in the process. No principle of fairness, work ethics and good faith was considered by the Tribunal. The decision is not only bad in law but designed to suit the worker.

30. Further, clause 20 of the Human Resource Policy only makes provision for the Vice Chancellor to deal with dismissals and not other penalties. The worker in this case was not being dismissed

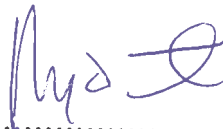
so the Vice Chancellor had no role to play. I am still of the view that given the relationship of the Vice Chancellor and the worker, if the issue concerned dismissal, someone else ought to have dealt with the matter in this case and not the Vice Chancellor.

31. I will now turn to the issue of the subsistence allowance ordered in the sum of \$126 per day for 6 months. There was no claim for the amount made nor was any evidence tendered on what the claim is. Further, the worker in this case was under a disciplinary transfer. He is the one who should bear the costs. It was not the University's request on which the worker was transferred. What is the point if the University is to suffer expenses for a gross misconduct of the employee? Why should his actions be a burden on the employer? If the University had transferred the worker under normal circumstances then the question of costs for transfer, meal, mileage, and subsistence kicks in.
32. The HR policy No. 10 on allowances makes it clear that the allowances are applicable when the University requests the transfer. In this case there was no request. There was a penalty and there is no provision in the contract for payment of allowances to an employee who is penalized by transfer.
33. On the final issue of the sum of \$10,000 award made by the Tribunal for humiliation, loss of dignity and injury to his feelings, I find the reasoning of the Tribunal preposterous. What humiliation did the worker suffer? He did not claim any. He did not give evidence of any such humiliation. In fact he was found guilty of causing embarrassment and disrepute to the University by conducting himself in a manner for which any other employer would have dismissed him. It is of utmost importance that every worker feels safe at work and not unduly made uncomfortable by fellow workers. In this case a senior employee is found guilty of sexually harassing a worker and he is satisfied with the decision imposed on him by the SDC. I say satisfied as he did not appeal. Having been found guilty, he was treated with dignity, allowed all the due procedures of hearing and a penalty imposed. What is humiliating about that? The Tribunal says that the non-payment of the costs of transfer and subsistence allowance is humiliating. That was part of the penalty. I do not find that the above sum had any basis on which it could be awarded.

34. I will now turn to the issue of costs. Normally imposing costs on workers who are dismissed becomes burdensome for the workers. However in this case, we have a worker who despite being found guilty of sexually harassing a fellow female worker is expecting the University to fund him to serve his penalty. He ought to know that this was not a normal transfer. Further he ought to have appealed the decision of the SDC if he was dissatisfied instead of bringing proceedings and making the employer spend its resources at the Tribunal and the Appeal Court. This worker ought to pay costs to the University.

Final Orders

35. In the final analysis, I allow the appeal and set aside the decision of the Tribunal wholly. The worker should pay to the employer costs in the sum of \$5,000.



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Hon. Madam Justice Anjala Wati

Judge

22. 11. 2021



To:

1. *Messes Sherani & Company for the Appellant.*
2. *Mr. D. Nair for the Respondent.*
3. *File: ERCC 21 of 2015.*