IN THE EMPLOYMENT RELATIONS COURT

AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	**ERCA No. 03 of 2017**
BETWEEN:	**TOLL CONSTRUCTION AND JOINERY FIJI LIMITED**
	APPELLANT
AND:	**NATIONAL UNION OF WORKERS**
	RESPONDENT
Appearances:	*Ms. N. Tikoisuva for the Appellant.*
	Mr. F. Anthony for the Respondent.
Date/Place of Judgment:	*Friday 15 September 2023 at Suva.*
Coram:	*Hon. Madam Justice Anjala Wati.*

JUDGMENT

A. *Catchwords:*

Employment Law – Appeal - Summary Dismissal – Whether the Tribunal has come to a correct and proper conclusion that the worker was unlawfully and unfairly terminated from work – whether the remedy of reinstatement is proper.

Cause

1. The employer has filed an appeal against the decision of the Employment Relations Tribunal ***("Tribunal")*** wherein it found that the dismissal of the employee Mr. Manueli Yawayawa from his employment on 12 April 2016 was unlawful and unfair.

2. The Tribunal ordered the employer to reinstate the employee to his former position or to a one which was no less advantageous to him. The employer was also ordered to

reimburse the employee all lost wages from 12 March 2016 being the time he was told to leave the island where he worked to the date of the hearing of the matter in the Tribunal being 29 July 2016.

3. The remedy for unfair dismissal was that the employer pays to the employee 4 month's wages. That sum was specifically awarded for the humiliation, loss of dignity and injury to the feelings of the employee.

Background

4. Mr. Manueli Yawayawa was employed as a Senior Carpenter with the employer for 8 months. On 12 March 2016, at Vunabaka worksite, on Malolo Island, he was asked by one Varesa, the employer's representative, whether he was recruiting fellow workers to join the Union. The worker answered in the affirmative.

5. Varesa and one Sami, the timekeeper, then asked him to pack his belongings and leave the island. The worker left the island on the same day as instructed.

6. On 14 March 2016, the worker reported the matter to the Union. On 22 March 2016, the General Manager of the employer Mr. Luke Mataika called the worker into his office and gave him the suspension letter. The suspension letter was dated 21 March 2016. He was advised that he was suspended for one week with pay.

7. Mr. Mataika asked the worker to sign the suspension letter acknowledging receipt and resume work on 29 March 2016. He did not sign but requested time to consult before signing as he did not agree with the contents of the warning letter which was in the following terms:

"Further to your supervisors and site management and committee reports, we hereby write to suspend you for one week with pay for the following disciplinary offences:

- *Use of abusive language at our client's representative architect – Mr. Dhiraj Lal.*
- *Use of abusive language at fellow work mates including your foreman Mr. Ifran Ali.*
- *Conduct that is disruptive to company business:*

- *Distribution of unauthorized forms during working hours while on developer's property.*
- *Collecting warning letters and pay slips from current staff for unknown use.*
- *Encouraging fellow workers to take longer and more frequent breaks to slow down work (reported by staff).*

- *Neglecting company policies:*

  - *Starting a union recruitment without informing the Committee which you are a member of.*
  - *Bypassing management for the above recruitment process.*

Note that subsequent discussions on Thursday March 17th 2016 in my office have been deemed as your show cause to some of the above allegations and deemed positive as a way forward. However, the behavioral issues stated i.e. us e of abusive language towards fellow senior staff and client representatives are excusable. This type of compartment from here on will not be tolerated. You shall commence work on Tuesday 29th March 2016.

As a member of the committee selected to represent the workers, your actions have caused distrust, separation and seriously undermined the responsibilities of designated roles on the Island. As discussed, I am not against your intentions or that of the union you represent to attain members, however there are procedures to follow while on employment duties and on private property. There was no collective agreement, no prior consultation and no prior representation by the subject union to Toll Construction to formally inform us of their intentions.

Hence, your secretive recruitment drive actually undermines the union and the respected principle it stands for. Future intentions such as these are to be professionally and formally presented to validate all relative functions and objectives. Your removal from the Island on Saturday 12th March 2016 was in the best interest of all to avoid further confrontation.

Management has responsibility to all employees regardless of exterior associations etc. to provide a professional, cohesive and effective working environment to deliver our services. I hope you understand the issues highlighted above and encourage you to improve your conduct and performance as an employee for the benefit of all involved.

Signed
General Manager
Luke Mataika"

8. On 29 March 2016, the worker reported at the Marina to travel to the island to resume his work but was stopped from boarding the boat and told to go to the office and sign the suspension letter, as he had refused to sign the letter saying the contents were incorrect. In particular he was referring to the use of abusive language which he denied outright and of disrupting the employer's business, as he was distributing the forms after work.

9. On the same day, the worker and the Union got together with the worker in Nadi at 11.00 am to discuss his case and other matters. Mr. Mataika advised the Union that the worker would remain suspended until he signed the warning letter. The parties also agreed to have a further meeting on 05 April 2016 but that did not eventuate due to flooding.

10. On 30 March 2016 Mr. Mataika texted Mr. Yawayawa to go to the office and sign the warning letter before his one week's pay was released. The worker informed the Tribunal that on the same afternoon, Mr. Mataika sent a text message to him advising that he had been terminated and to go to the office to collect and sign the letter. The worker did not respond to the message but referred the matter to the Union.

11. On 05 April 2016, the General Secretary of the Union sent an email to Mr. Mataika raising concern at the delay and pointing out that Management actions were discriminatory and in violation of sections 6(2) and 6(6) of the Employment Relations Act.

12. On 08 April 2016, the General Secretary of the Union called Mr. Mataika and urged him to resolve the matter without delay and followed that up with an email confirming that discussion.

13. On 11 April 2016, Mr. Mataika emailed the Union and advised that Management would:

(i) *Not enter into any negotiations with the Union on a Collective Agreement;*

(ii) *Would not deduct any Union subscriptions despite authorities given by the members; and*

(iii) *Would not discuss with the Union, the worker's case but with him directly.*

14. The Union then reported a trade dispute on 14 April 2016. At the hearing of the dispute, it was the employer's position that the Union had based their whole case of unlawful and unfair dismissal on assumptions that the worker was terminated. It stated that the worker had not even collected his termination letter.

15. The employer's position was that on 12 March 2016, the worker was asked to leave the Island to avoid possible confrontation at work site. It was alleged that a report had gone to Mr. Mataika and he instructed the workers for a meeting to discuss the issues reported to management. This worker did not show up and instead reported the matter to the Mediation Unit.

16. A referral to Mediation dated 17 March 2016 was then issued to Mr. Mataika based on the worker's removal from the Island. That was withdrawn upon clarification that he was still employed pending investigations. That according to Mr. Mataika demonstrated to him that the Union based its actions on assumptions without consultations, clarifications or even gathering proper grounds.

17. The employer stated that further investigations against the worker led to one week suspension for issues detailed in the worker's suspension letter dated 21 March 2016 and received by him on 22 March 2016 although he refused to sign to accept responsibility of his actions and complete the suspension process.

The Tribunal's Findings

18. The Tribunal found that the employer through Mr. Mataika revealed its position in an email dated 11 April 2016 sent to the Union that it did not wish to engage in collective bargaining with the Union. That, The Tribunal found was in breach of section 20(4) of

the Constitution which says that *"...trade unions and employers have the right to bargain collectively"*.

19. The Tribunal said that the employer had refused to deduct union subscriptions despite the authorities given by the members and that is another breach of the law, as the employer had frustrated the rights of the worker to join a union of his own choice. That right, the Tribunal reflected, is safeguarded by ILO Conventions Numbers 87 and 98. The Tribunal stated that both are core Conventions and ratified by Fiji as a Member State of the ILO. The Tribunal stated that the action of the employer also breached s. 20(2) of the Constitution which provides *"...that every worker has the right to form or join a trade union and participate in its activities and programmes"*.

20. It said that the employer's refusal to deduct union dues is also a breach of section 163(1) of the Employment Relations Act which states as follows:

"A collective agreement is to be treated as if it contains a provision that requires am employer that is a party to the agreement to deduct, with the consent of a union member, the member's union fee from the member's salary or wages on a regular basis during the year".

21. The Tribunal went onto emphasize that the employer has a role to encourage the right of the workers to join a trade union. It was reflected by the Tribunal that if the employer argues that there was no collective agreement at the time then s. 149 of the Employment Relations Act comes in operation as it provides for the following:

"(1). The duty of good faith requires a union and an employer bargaining for a collective agreement to do, at least, the following things –

(a) The union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner;

(b) The union and the employer must meet each other, from time to time, for the purposes of bargaining;

(c) The union and the employer must consider and respond to proposals made by each other;

(d) The union and the employer –

(i) Must recognize the role and authority of any person chosen by each to be its representative or advocate;

(ii) Must not directly or indirectly bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union or the employer agree otherwise; and

(iii) Must not undermine or do anything that is likely to undermine the bargaining or authority of the other in the bargaining; and

(e) The union and the employer must provide each other, on request and in accordance with section 151, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining".

22. The Tribunal stated that it had embarked on a detailed layout of s. 149, as it dealt with good faith bargaining for collective agreement. It said that from the evidence tendered during the hearing, reinforced by the contents of the email of 11 April 2016 from Mr. Mataika, it had no doubts that this employer lacked the good faith to engage in collective bargaining with the Union.

23. Whilst that is a breach of Section 20(4) of the Constitution, the actions of the employer went against the very essence of employer and union relationship which is collective bargaining, as set out at Part 16 of the Employment Relations Act and in particular sections 149, 150 and 151.

24. The Tribunal said that this employer refused to engage with the Union and it believed that the worker was with the party that served a log of claims to the employer, which

meant that the Union had taken first steps to initiate bargaining. According to the Tribunal, the wordings of s. 149 (1) (a-e) were designed to compel the parties during the collective bargaining process to adhere and strictly follow the Code of Good Faith in Collective Bargaining, as stipulated in section 152(2) of the Employment Relations Act. The fact that there was no collective bargaining is another breach.

25. The Tribunal found that the employer refused to acknowledge the presence of the Union on the Island which is the work site and the fact that some workers had become members of the Union. That prompted Mr. Mataika to mention in his email of 11 April 2016 that he would not discuss the worker's case with the Union but deal directly with him. That was again a breach of Section 149(d) of the Act which says that the employer must recognize the role and authority of the Union in matters relating to terms and conditions of employment.

26. Mr. Yawayawa, the Tribunal found, was both a worker on the Island and in charge of recruiting workers to join the Union. He admitted to that, and that was the reason why he was terminated and told to leave the Island by the two workers representing management. Under s. 145 of the Employment relations Act:

"A representative of a registered trade union, authorized in writing by the trade union and with the consent of the employer which shall not be withheld unreasonably, has the right to enter a workplace for the purpose related to the union's business without disrupting the work arrangement of the employer –

(a) To discuss union business with the union members;

(b) To recruit workers as union members; and

(c) To provide information on the union and union membership to any worker on the premises"

27. The Tribunal stated that the Union in its closing submissions stated that it was aware of the employer's attitude toward unions through the numerous complaints it referred to the Ministry of Employment, Productivity and Industrial Relations for investigations. This employer according to the Union refused to engage on any Union matters and it

was for that very reason that it did not seek the consent of the employer for the worker to conduct Union matters specified under Section 145 of the ERA.

28. The Tribunal believed that the employer had the misconception that there should be some kind of recognition in place before it can engage with the Union. The Tribunal said that that used to be the practice in the early nineteen seventies under the repealed law.

29. The Tribunal indicated that it raised the *"recognition issue"* to show the difficulty of engaging in collective bargaining before the coming into force of the Employment Relations Act.

30. The Tribunal stated that it did not put a lot of weight on the allegation of false accusations reported to the media by the worker as to do so would jeopardize its independence as he had been cited for gross misconduct but there was no summary dismissal provided for in the employment contract.

31. The Tribunal stated that the worker's termination was due to his union membership and associated activities as the employer could not prove otherwise during the hearing, as required under s. 77(3) of the ERA. It found that the termination of the worker was unlawful, unfair and unjustified, as the employer's action breached the Constitution and the ERA in particular the good faith provisions and those guaranteeing the rights of the Union and the workers under ILO Conventions 87 and 98, dealing with Freedom of Association and the Right to Organize for the Purposes of Collective Bargaining, respectively.

32. The Tribunal stated that it has arrived at that decision notwithstanding the fact that the worker was doing the recruitment on the Island without the employer's consent, as required under s.145 of the ERA due to two reasons. The first being that the worker was doing the recruitment after working hours without disruption and second, the Union had raised the anti-union activities of this employer with the Registrar of Trade Unions and the Ministry of Employment, Productivity and Industrial Relations. That was

mainly the reason why the employer's consent was not sought, as it would not have been given.

33. The Tribunal found that the worker was championing workers' rights on the worksite and to be terminated and removed from the Island was humiliating and led to loss of dignity and in that regard the termination was unfair.

Grounds of Appeal

34. The employer raised that the Tribunal has erred in law and in fact:

1. *In considering and determining irrelevant issues and matter such as draft collective agreement and purported deductions of union subscription which was not related to the termination of the worker and was not an issue for determination by the Tribunal.*

2. *In failing to consider the evidence before the Tribunal that the employer-employee relationship was irretrievable taking into account the circumstances of this case and therefore an order of reinstatement of the employee should not have been made.*

3. *In failing to take into consideration the principles of common law for reinstatement before making the order for reinstatement.*

4. *In failing to take into consideration the employment contract between the employer and employee in determination of the termination of the employee.*

5. *In failing to consider the evidence before the Tribunal that the employee was guilty of gross misconduct of falsification and misrepresentation to fellow employees in that LMCC had agreed and directed all workers to join the Union and bringing the company into disrepute by falsely reporting damaging accusations to the media on his termination.*

6. *In not considering that the Union had failed to argue its case on unfair dismissal based on the reasons of termination outlined in the termination letter.*

7. *In failing to consider that the employment contract of the employee provided for gross misconduct offences which warrants summary dismissal.*

8. *In failing to consider that the union had reported the termination as a dispute to the Tribunal on unfair dismissal without ascertaining the reasons for termination in the termination letter.*

9. *In arriving at a conjecture that the employer would not have granted access to the Union to carry out its activities pursuant to s. 145 of the Employment Relations Act when there was no evidence before the Tribunal to form such an opinion.*

10. *In coming to a decision which is wholly unreasonable and cannot be supported having regard to the evidence as a whole.*

Law and Determination

35. In arguing ground 1 of the appeal, the counsel for the employer stated that the Tribunal in its judgment had discussed the facts and evidence in relation to the termination of the worker and then instead of discussing the law on unfair dismissal proceeded to set out the law on collective bargaining and Union subscription deduction.

36. It was contended by the employer's counsel that the Tribunal misunderstood that the issue before it was to determine whether the worker was unfairly dismissed and not whether the employer was not negotiating with the Union on collective bargaining and deducting Union subscription. The counsel argued that the issue for determination only concerned the terminated worker and not the other Union members.

37. I do not agree with the counsel for the employer that the issue of collective bargaining and Union subscription was an irrelevant issue for consideration. The worker was terminated from work for recruiting workers of Toll Construction Limited for Union membership. That disturbed the employer as there was unwillingness on its part to accept the fact that the workers had a right to belong to a Union and that the Union had the right to collective bargaining. For that the Tribunal had to examine whether what

the worker did could constitute gross misconduct. To do that it had to examine the right of the workers to join a trade union, have their membership subscription deducted from their pay and then the Union to carry out the process of collective bargaining.

38. If what the worker did was to promote the constitutional and statutory rights of other workers then could his actions be deemed misconduct? This concern required the Tribunal to examine the constitutional and other rights of the workers and the attitude of the employer in relations to these rights. To that end it needed to examine the employer's conduct in not wanting to enter into the collective agreement and not wanting to deduct the union membership fees. These were all inter-related events which reflected on the real reason why the worker was terminated from work. I do not find that the Tribunal erred in looking at the conduct of the employer in arriving at a decision regarding the lawfulness of the termination.

39. The counsel for the employer addressed grounds 2 and 3 collectively. It was argued that two witnesses of the employer being the colleagues of the worker gave evidence against him. Their evidence was that the worker had prefilled the forms by misleading them and lying to the employees that their wages will increase. This was the cause of the ensuing conflict between the worker and the other employees which led to the management intervening and escorting the worker away from the Island for his safety and putting him on suspension.

40. The counsel for the employer also argued that the worker had also, prior to his termination, brought the employer's reputation into disrepute when he and his Union caused the publication of a newspaper article in the Fiji Times on 23rd March 2016. This amounted to gross misconduct as per clause 11.0.3 of the employment contract and the worker was summarily dismissed.

41. The employer's counsel contended that the evidence was before the Tribunal which the Tribunal ignored. The evidence established beyond doubt that the relationship between

the parties was strained and reinstatement should not be granted as the employer did not have trust and confidence in the worker.

42. I am not convinced that there was any convincing evidence before the Tribunal of a turmoil between the workers as such that the remedy of reinstatement could not be considered. Indeed, the employer was unhappy because the worker was recruiting other workers for union membership and the employer did not accept this. Sooner or later it has to accept the fact that the workers have this right and that it has to promote that right. This aggrieved worker was doing his part. If he is not reinstated then the spirit of the constitution and the employment law will be easily stomped upon by the employer. The employer is a company and it has many workers. This worker can easily fit in and start his work. All the employer needs to do is to start re-looking at its conduct in light of the law outlined by the Tribunal in its finding which I have summarized in this judgment.

43. I am convinced that the employer is attempting to use the other employees to indicate that the worker had betrayed them by making false promises. All the employees are entitled to know the benefits of joining a trade union and the trade union can give a general reflection of the type of work they do. If the worker had made any indications about what the trade union does, I cannot see why the other workers would be so aggrieved to the extent that the presence of this affected worker on the site became so dangerous that his removal was required. This establishes the Tribunals findings that the employer does not want anyone to make any representations to its employees about the benefits of joining a trade union. It is using the other workers as a shield.

44. In arguing grounds 4, 5 and 7 the counsel for the employer submitted that the employment contract was adduced in evidence by employer. The employment contract provided for summary dismissal for gross misconduct and it also contained the offences. The worker was property terminated for gross misconduct of falsification and misrepresentation to fellow employees and bringing disrepute by falsely reporting damaging accusations to the media on his termination.

45. The contract of employment did provide for summary dismissal. That may have been overlooked by the Tribunal. However, the important issue to dissect was to ascertain the main reason for the termination which the Tribunal did and it found that the main reason was its unhappiness that the worker was recruiting other workers for union membership. That angered the employer. That was not the proper reason to terminate the work of the worker. The other reasons were of course put forward to camouflage the main reason and it was not difficult for the Tribunal to ascertain that after the hearing.

46. I have already indicated that the workers cannot be said to be misled if they are told the benefits of joining a trade union for example that a union can raise issues of pay rise. If the other workers are aggrieved, then so be it. Why should this worker be affected for advocating for their rights? This worker did not need authority from anyone to advance the rights of the workers. As for media reports and damaging accusations, there was no evidence provided to this effect during the hearing.

47. Grounds 6 and 8 were argued together. Ground 6 is meaningless. Reasons for dismissal has nothing to do with unfair dismissal. It is something that affects the lawfulness of the dismissal. The Union brought to the attention of the Tribunal the core reasons why the worker was terminated and it argued its case with all evidence to establish that the main reason for the termination of the worker was that he was recruiting fellow workers for union membership. It was for the employer to show that that was not the reason and to establish other causes in the termination letter which it could not do through the evidence it tendered in court.

48. I also cannot fathom why the employer is raising that the Union had initially reported a dispute and later withdrew it. The act of withdrawing the first claim does not affect the finding of Tribunal that the worker was unlawfully and unfairly terminated from work. There is no dispute that the worker was terminated from work and that a termination letter was not given to him. That in itself is a breach of procedure in terminating a worker for summary dismissal.

49. In respect of ground 9 the employer argued that the Tribunal formed an opinion without any evidence that the employer would not have provided access to the Union to conduct Union activities. The employer argued that this was not an issue to be determined or for discussion by the Tribunal and was irrelevant to the issue of unfair dismissal.

50. The evidence was very clear that the employer did not want to have anything to do with the Union. Mr. Mataika's email to the General Secretary of the Union indicating that the employer will not deal with the Union in any way leaves no doubt that the employer was aggrieved about the worker advancing the rights of the other workers to join a trade union. That email is in itself evidence of the fact that the employer did not want the Union at its premises. It was therefore open to the Tribunal to use this evidence to come to a finding about the actual reason behind the worker's termination.

Final Orders

51. In the final analysis, I do not find any merits in the appeal. I therefore dismiss the same and make the following orders:

   a. ***The employer must comply with the judgment of the Tribunal within 21 days from the date of this judgment.***

   b. ***The employer must pay to the worker all lost wages and benefits from date of the Tribunal's judgment till the time the reinstatement takes effect.***

52. The worker shall have costs of the proceedings in the sum of $3,000.00.

HIGH COURT OF FIJI SUVA

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Hon. Madam Justice Anjala Wati

Judge

15. 09.2023

To:

1. ***Messrs Krishna & Company for the Appellant.***
2. ***National Union of Workers for the Respondent.***
3. ***File: ERCA 03 of 2017.***