



- (iii) An Order that the Appellant be reinstated to his employment without loss of salary, benefits and entitlements from the date of his dismissal until the determination of this Court.
- (iv) Any further orders or relief that this Court deems appropriate and expedient in the prevailing circumstances.

2. The Grounds of Appeal filed by the Applicant is as follows :

1. *That the learned Resident Magistrate erred in law and fact by usurping the role of the employer in justifying the cause for the dismissal when the onus was upon the employer to prove that the dismissal was justified, lawful and fair in all aspects.*
2. *That the learned Resident Magistrate erred in law and fact in holding the dismissal as lawful when the dismissal letter dated 6<sup>th</sup> September, 2018 did not contain particulars of when the alleged gross misconduct occurred and the name of the child upon whom the corporal punishment was inflicted.*
3. *That the learned Resident Magistrate acted unfairly and unreasonably in holding that the Tribunal is not bound by the strict rules of evidence (paragraph 77 of the ruling) and in the process denied the appellant his right to natural justice and disregarded his evidence in its entirety.*
4. *That the learned Resident Magistrate erred in law and fact in holding the summary dismissal as fair when the evidence clearly proved that the Respondent had contravened the procedures contained in the Public Service (Discipline) Regulations 2009 and the Civil Service Discipline Guidelines, 2017.*
5. *That the learned Resident Magistrate erred in law and fact in holding the allegation against the appellant as gross misconduct in the absence of any conclusive finding in the investigation report and the express approval for dismissal by the relevant authorities.*
6. *That the learned Resident Magistrate erred in law and fact when he failed to consider all relevant evidence that proved that the appellant did not contravene the Civil Service Code of Conduct that is contained in the Civil Service Act and Regulations, 1999.*
7. *That the learned Resident Magistrate erred in law and fact in holding that the respondent/employer had the right to invoke summary dismissal without first determining whether the appellant had committed corporal punishment through relevant evidence/witnesses.*

8. *That the learned Resident Magistrate erred in law and fact when he failed to take into account that the respondent/employer was required by law to provide valid reasons for summary dismissal and a certificate of service pursuant to sections 30(6), 33(2) and 114 of the ERA.*
9. *That the learned Resident Magistrate erred in law and fact when he dismissed the grievance of the appellant on the basis of bias, preconceived and erroneous facts.*
10. *That the appellant reserves the right to add further grounds of appeal upon receipt of the Employment Relations Tribunal records.*

### **Background**

3. The Applicant was employed as a secondary school teacher with the Ministry of Education since 2<sup>nd</sup> September 1996. On 19 August 2017 he was offered a contract as a Secondary School Teacher on salary band F effective from 13 August 2017 till 2<sup>nd</sup> November 2021.
4. On 13 June 2018 there were allegations of assault on a Year 9 student with a text book and on 18 June 2018 he was later suspended from duties as a Teacher pending full investigation.
5. Upon conducting investigations the report was forwarded to the Permanent Secretary of Education and on 6 September 2018 a termination letter was issued to the Applicant for inflicting corporal punishment on the student.
6. The Applicant filed for mediation which was later transferred to the Tribunal.
7. At the Tribunal, the Appellant argued that he was unlawfully and unfairly terminated and sort compensation for his remainder of the contract as well as reinstatement.
8. The Tribunal held that the Termination was lawful in accordance with the laws and policies adopted by the Respondent.

### **Law on Appeals**

9. Section 220 (1) of the Employment Relations Act 2007 stipulates that –  

‘220 (1) The Employment Relations Court has jurisdiction –

- (a) To hear and determine appeals conferred upon it under this Promulgation and any other written law.’

10. Section 242 (2) (4) and (7) of the Employment Relations Act 2007 states –

‘(2) An appeal to the court must be made in the prescribed manner within 28 days from the date of the decision of the tribunal.

(4) Subject to subsection (2) an appeal lies as of right to the Employment Relations Court –

- (a) From any first instance decision of the tribunal; or
- (b) Where any ground of appeal from any appellate jurisdiction of the tribunal involves a question of law.

(7) When hearing or determining an appeal the court may-

- (8) Confirm, modify, or reverse the decision or a part of the decision of the tribunal or set aside the decision of the tribunal and substitute its own decision; or
- (9) Refer the matter with or without any direction to the tribunal to reconsider, either generally or in respect of specified matters, the whole or part of the matter to which the appeal relates.”

11. An Appellate court will be slow to interfere with the factual findings of an original court unless they are plainly wrong or drew wrong inferences from the facts and the Appellate court need not exercise jurisdiction to interfere with the Tribunal’s decision only because it exercised its discretion in another way (see Tuckers Employees and Staff Union –v- Goodman Fielder International (Fiji) Limited ERCA No. 28 of 2018). The Appellate Court will review a decision where-

- (i) From the face of the record the Court finds that the Tribunal has blatantly erred in facts or law and
- (ii) Has acted in ultra vires or has failed to consider a pertinent issue raised before the Tribunal.

12. The Appellate Court will not overturn a decision of the Tribunal unless the above factors have been met. Consideration is made to the observations of Lord Reid in Benmax -v- Austin Motors Co Ltd [1955] ALL ER 376 at 329 :

‘I think the whole passage, refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. That be right, I see no reason to doubt anything said by Lord Thankerton. But

in cases where there is no question the credibility or reliability of any witness, and in cases where the point in dispute is the proper inferences to be drawn from proved facts, an appeal court is generally in as good a position in evaluating the evidences as the trial judge, and ought not to shrink from that task, though it ought of course to give weight to his opinion....' (underlining my emphasis).

## **Analysis**

13. The Applicant's argument stems from the decision of the Learned Tribunal in paragraphs [23] and [24] of the copy records which states –

*'[23] summary dismissal is allowed under clause 10 of the employment contract É1 (a)' which provides that if after reasonable inquiries the Permanent Secretary is satisfied that the officer is guilty of misconduct or a breach under this contract.*

*[24] The regulatory framework on child protection of our country, mentioned earlier, require corporal punishment to be treated as serious misconduct. Hence it was reasonable to terminate the employment contract of the Griever who is guilty of serious misconduct.'*

14. The Court found that the Tribunal had considered the context in which summary dismissal was made for the Permanent Secretary to arrive at his decision.
15. Before deliberating on whether the Tribunal was correct or otherwise, the Court must consider the powers for which the Permanent Secretary exercised his discretion.
16. Section 127 (7) of the Constitution states –
- 'The Permanent Secretary of each ministry shall have the authority to appoint, remove and institute disciplinary action against all staff of the ministry, with agreement of the Minister responsible for the ministry.'
17. It is not contested, from the copy records, that the Appellant underwent disciplinary proceedings from the Ministry and was suspended from 18 June 2018 pending the outcome of the proceedings.
18. It is also not contested, from the evidences given as expressed in the copy records that he was allowed to give his statement during the investigation.

19. The Appellant contests however, that despite the investigation panel determining that there was no corporal punishment, the Permanent Secretary issued him a termination letter of summary dismissal on 6 September 2018 with immediate effect.
20. In section 2 (a) of the Appellants contracts stipulates that –
- ‘The Officer must:
- (d) comply with and is subject to the civil service guidelines as issued by the Public Service Commission, the General Orders, Government policies, departmental instructions and the laws of the Republic of Fiji as consolidated, amended, re-enacted or replaced from time to time.’
21. Hence the Fijian Civil Service Discipline Guideline (‘FCSDG’) in clause 6 provides that where there is a confirmed disciplinary case to answer, as in this case, an investigation is conducted by a 3 member panel and a report filed with the Permanent Secretary who has 10 days to determine the panel’s recommendation.
22. Clause 8 and Clause 9 of the same FCSDG also stipulates the procedure for disciplinary guidelines:
- (i) *Where the investigation recommends no immediate penalty be applied but that the employee be formally notified of the need to change their behavior or performance, the Permanent Secretary may issue a formal warning to the employee.*
- (ii) *Formal warning will be in writing and include:*
- 8.2.1 Confirmation of the circumstances leading up to the warning;*  
*8.2.2 The nature of the behavior or performance that is to be amended;*  
*8.2.3 The consequences of not improving or repeating the behavior or performance that is to be amended.*
- 8.3 Where a warning is not appropriate, but where the case does not warrant removal of the employee, the Permanent Secretary will package relevant information and send to the PSDT for information.*

## **9. Removal an Employee**

*9.1 Where the Permanent Secretary, in agreement with their Minister, may remove any contracted employee in accordance with the terms of the contract and having complied with the principles of Natural Justice and confirmed a case to answer in accordance with Section Six of this guideline.*

23. In light of these procedures, did the Permanent Secretary act lawfully?
24. Having taken into consideration these procedures, the Court considers the termination letter dated 6 September 2018.
25. The letter stated that -

‘By virtue of the power vested in me under Section 127 (7) of the 2013 Constitution of the Republic of Fiji and in agreement with the Honorable Minister of Education, Heritage and Arts, I wish to advise that your contract has been terminated with effect from 6<sup>th</sup> September 2018 as a result of you inflicting corporal punishment on a student.

The Government has zero tolerance approach to corporal punishment and your actions are in breach of the Code of Conduct and terms of employment contract.’

26. The termination letter did not provide the names of the child victim nor the stipulated dates and the period in which did the alleged offence take place and the type of offence. There was insufficient facts in the Notice to establish the reason for the dismissal. This is rendered unfair against the Respondent. In Prasad –v- Ministry of Education, Heritage and Arts [2021] FJHC 137; ERCC 23 of 1998 (1 March 2021) Wati J held that it was rendered unfair where –

’29.The letter of termination and the affidavit does not clearly show the correct position taken by MOE. What is it that the MOE is saying? Is it 1 or 6 students affected by corporal punishment? The investigation against Shandil was for inflicting corporal punishment on 6 students but he was terminated for inflicting corporal punishment on only 1 student.

30. Shandil is therefore entitled to know the precise reason for which he was terminated. Shandil was entitled to know from the termination letter as to which student out of the 6 he was found to have inflicted corporal punishment on.

31. In my finding, given the allegation against Shandil, it was not fair to omit the name of the student against whom the MOE found the allegation be established. Who is that student that the MOE is referring to? Why could the letter of termination not be transparent and specific in that regard? Why should Shandil be kept in the dark?’

27. According to the Investigation report which was tendered as evidence in the copy records, the Report’s recommendation was that the allegations were not founded and recommend that the Permanent Secretary institute appropriate disciplinary action by way of a warning. The provisions that the investigating panel found were not established in the Public Service Act Code of Conduct (Part 2 Section 6) included –

*‘6. (2) An employee must act with care and diligence in the course of employment in the Public Service;*

*6 (3) An employee, when acting in the course of employment in the Public Service must treat everyone with respect and courtesy, and without coercion of harassment of any kind, including sexual harassment, or discrimination.*

*6(4) An employee when acting in the course of employment in the Public Service must comply with all applicable acts and subordinate legislation.*

*6 (12) An employee must at all times behave in a way that upholds the Public Service Values and the integrity and reputation of the Public Service.’*

28. The investigating panel also referred to the Child Protection in Schools Policy, Customer Service Policy and Child Welfare Decree when conducting their investigations.

29. In the Child Protection in Schools policy, physical abuse is defined in clause 4.13 as -

*‘ where children are physically hurt or injured – hitting, pinching, spitting, shaking, throwing, smacking, punching, kicking, shoving, poisoning, burning, biting, scalding, suffocating and drowning.’*

30. According to the investigations and the evidence in the copy records by the Appellant, he admitted to having ‘tapped’ the child but denied ‘smacking or hitting’ the child.

31. The Court considered the evidences. One of the three children’s statement saw the child being slapped on the face with a book. Contradictory to this, were two other



statements of child witnesses who saw the Respondent tap the victim with the book on the face and not slap him. The statements from the Principal and the Teachers only reported on what was told to them.

32. The Tribunal held that the Respondent had struck the child with the book and not tap him. He drew an inference from the students' behavior as a result of the incident. He did not give any weight to the direct evidences before him that stated that the student was "tapped" as well as the evidence of all the witnesses that day.
33. In essence the witness from the Ministry admitted to the Respondent tapping the child and concluded in his recommendation that a tap was still corporal punishment, hence the reason why they recommended his summary dismissal.
34. The Court finds that on a balance of probabilities, this evidence was not properly weighed out by the Tribunal in light of the investigation report made available to him and the evidences put to the Tribunal that day.
35. The Court therefore finds that the Tribunal erred in fact and law in determining outright the reason for the termination which was never submitted in facts or in law by the Respondent.
36. The Court will therefore find that Grounds 1,2,4,5,6,7,8 have been established and will quash the decision of the Tribunal and substitute with the decision of the Court that that the decision to terminate was unfounded and therefore unlawful.
37. The Court finds for ground 3, there is no relevancy in this argument as the law speaks for itself.

***Section 33 (1) of the Employment Relations Act***

38. The Court is also mindful of section 33 (1) (b) of the Employment Relations Act. The provision states that an employer may dismiss a worker with or without notice for willful disobedience to lawful orders given by the employer.
39. In the current case, reasons were given to the Respondent for his dismissal. The reasons explained that he had breached the guidelines and policy on no corporal punishment. The reasons were not properly explained and were contrary to the findings of the investigation report.
40. Furthermore, the Permanent Secretary is empowered to summarily dismissal an officer. Clause 10 of the Employment Contract allows the Permanent Secretary the powers to dismiss under the contract if –

*'If there are reasonable enquiries the Permanent Secretary is satisfied that the Officer is guilty of misconduct or a breach under this contract. Upon such dismissal, all rights and privileges accrued to the Officer under this contract will be forfeited with the exception of the rights and privileges established under the General Orders.'*

41. In the letter of summary dismissal, there was no mention of any guilt of misconduct. The allegation was of act of corporal punishment which was contrary to the corporal punishment policy.
42. It can be inferred that the dismissal pertained to the Appellant breaching the provisions of the Contract regarding full compliance with laws and policies.
43. However the disciplinary investigation report determined otherwise. The investigation report found there was no corporal punishment and that there was no breach of the policies and laws pertaining to the conduct of the Appellant.
44. The Court therefore finds that the Tribunal, failed to consider the evidences in order to determine properly whether the Respondent acted lawfully or not in terminating the contract of the Appellant summarily without considering the evidences before him.
45. The Court also found that the Tribunal concluded its findings on matters of facts and law that were already considered prior to the investigating panel forwarding their recommendations.
46. That in the event the permanent secretary intended to summary dismiss an employee that the written reasons were not in accordance with the terms of contract nor in accordance with section 33 of the Employment Relations Act for dismissals.

### **Award**

47. On this basis, the Court will thus find that the Appellant is entitled to the benefit of the left-over of his contract, from when he was terminated to the period in which his contract ended and should be compensated his salaries and benefits up until the date of completion of his contract.

### **Orders of the Court:**

48. **The Court orders as follows:**

- (i) ***That the Tribunal's decision is quashed and Grounds 1,2,4,5,6,7 are successful;***
- (ii) ***That the Court replaces the decision as follows –***
- (a) ***That the Appellant was unlawfully and unfairly dismissed;***
  - (b) ***That the Appellant's contract ended on 2 November 2021;***
  - (c) ***That the Appellant is entitled to benefit of his left over term of the contract including his benefits, salaries and entitlements.***
- (iii) ***Costs awarded to the Appellant to the sum of \$500.***



High Court – Suva

23 October, 2023

  
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Mrs Senileba LWTT Levaci  
Acting Puisne Judge