

JUDGMENT

EMPLOYMENT Appeal – Dismissal – Alleged violation of procedures – Charges not proved before tribunal – Reimbursement of wages – Compensation for unfair dismissal – Reinstatement – Appropriateness of reinstatement

1. This is an appeal against the decision of the Employment Relations Tribunal delivered on 26 September 2017 by which the appellant was ordered to reinstate the four respondents and reimburse lost wages for six months. They were also awarded compensation equivalent to six months' salary for humiliation, loss of dignity and injury to feelings.
2. The main allegation against the respondents was that they failed to follow stipulated procedures in processing transactions of expired taxi permits issued by the appellant. Following an internal inquiry their services were terminated with effect from 25 November 2014. Their employment grievances were lodged with mediation services and later referred to the chief tribunal for adjudication.
3. The appellant's grounds of appeal are these:
 - a. "That the learned Chief Tribunal erred in law and fact in determining that the Employer had no lawful and fair cause to terminate the Grievor under the provisions of the Contracts of Service (or the Collective Agreement) and the ERP 2007 as per the Decision and Orders of the Tribunal.
 - b. That the learned Chief Tribunal erred in law and in fact in determining that the employer to reimburse the six (6) months wages lost by the greivor, another six (6) months compensation for humiliation, loss of dignity and injury to feelings and the reinstatement of greivor to the position suitable by the Employer as per the Decision and Orders of the Tribunal".
4. At the hearing before this court, the appellant submitted that the respondents had processed transactions for public service vehicles with expired permits. By doing so, the appellant submitted, the respondents violated section 62 (1), (2) & (4) of the Land Transport Act. The appellant was justified, therefore, in terminating the

employment of the respondents, and it did so after charges against them were communicated and they were given an opportunity to respond. In those circumstances, the appellant says, the tribunal erred in finding the terminations to be unjust.

5. The appellant stated that it has been exposed to legal claims for breach of statutory duty in instances when its employees have violated statutory provisions as in this case. Therefore, it was submitted, the appellant has to take disciplinary measures against staff when procedures are violated. Citing an example, the appellant submitted that in *Land Transport Authority v Begg*¹, the Supreme Court upheld the decision of the High Court which awarded the plaintiff \$130,000.00 when one of its employees acted in breach of duty. Another instance was the Supreme Court decision in *Land Transport Authority v Lal*² in which the appellant was ordered to pay the claimant a sum of \$877,272.00.
6. The respondents submitted that there was no finding by the staff board that inquired into the allegations that the respondents colluded with any customer to process public service vehicle permits upon application for renewal. They submitted that revenue due to the appellant was recovered, and there was no financial loss as a result. The respondents said they followed verbal directions given by their respective managers, and collected the amounts due except for the permit renewal fee, which they were not entitled to collect at the time.

The evidence and the chief tribunal's determination

7. The transcript of the evidence given on behalf of the respondents is not available except for the testimony of a witness they summoned, Viliame Matanatabu. The tribunal registry's response sent through the deputy registrar on 30 October 2020 is that the audio recording of the workers' evidence cannot be located. The appellant has in its submissions moved court to order a fresh hearing as part of the transcript is not available. This will not be necessary. The record, except for the respondents' evidence, is available. The appellant's testimony and the chief

¹ [2019] FJSC 7; CBV 0004.2018 (26 April 2019)

² [2012] FJSC 23; CBV 0019.2008 (23 October 2012)

tribunal's decision are available. A direction for a fresh hearing, especially as the workers lost their jobs in 2014, may not serve the interests of justice.

8. The record of the chief tribunal shows the respondents were issued a memorandum dated 30 September 2014 for failure to follow procedures when processing public service vehicle (PSV) transactions and that income due to the land transport authority was not collected. Collusion with external parties to defraud the appellant was also alleged. The document was signed by Paulini Tora, acting regional manager, central eastern. The respondents responded to the allegations on 7 October 2014, and attended a disciplinary inquiry on 24 October 2014. They were suspended without pay on 27 October 2014 and terminated from employment on 25 November 2014.
9. The manager human resources, Tomasi Radkua, the regional manager, Paulini Tora and the manager audit, Miliana Vulakauvaki gave evidence on behalf of the appellant when the tribunal inquired into the matter. They were all members of the staff board inquiry committee that went into the allegations against the respondents.
10. The regional manager, Paulini Tora, said the allegation concerned the renewal of wheel tax on vehicles. She said the appellant came to know that several vehicles were running with valid wheel tax although their permits had expired. In the case of a public service vehicle, an application for renewal of a permit must be submitted within the prescribed time. When this is not adhered to, certain procedures have to be followed in order to issue permits. She said that the respondents had claimed they were acting on verbal instructions in not following the correct procedure. Ms. Tora said that although the charges did not refer to wheel tax, the workers were aware that the matter was connected to the collection of wheel tax.
11. The chief tribunal was not impressed with the evidence given by Ms. Paulini Tora, and described it as incredible to believe. It was Ms. Tora who issued the memorandum dated 30 September 2014 to the respondents alleging failure to follow procedures when processing transactions with expired permits.

12. Miliana Vulakauvaki is the appellant's manager audit. She carried out investigations concerning expired taxi permits. She said the respondents were accepting wheel tax payments although the taxi permits had expired. She said officers of the authority have created a dishonest culture by allowing vehicles to engage in public transportation by accepting wheel tax payments, though their permits had expired.
13. The audit manager told the chief tribunal that the allegations against the workers was about letting the use of expired public service permits with wheel tax stickers. The tribunal noted that her evidence was not consistent with the charges served on the respondents. She agreed that the respondents were not aware of the contents of the investigation reports at the time of the staff board meeting. She also admitted that according to the staff board meeting minutes revenue in all the cases in which the respondents were under investigation have been collected.
14. The chief tribunal summarised the evidence given by Ms. Ana Daunivalu, which is not before the court. The respondent denied the charges and said that expired permits were renewed according to the norms followed by previous PSV officers. There was no proper guidelines or training given to officers. The staff board committee pointed out that two officers of the appellant advised her on the issue of renewing expired permits, but the worker continued to repeat her mistakes. She apologised to the committee and requested training for all PSV officers.
15. Ms. Daunivalu's position is confirmed by the human resources manager, Tomasi Radakua. He said that in his investigations he was unable to find any written records on the process to be followed for public service vehicles. Most communications within the institution was done verbally. He also agreed that the staff board did not find any collusion by the respondents with outside parties.
16. The staff board inquiry committee found that the four respondents were in breach of provisions of the collective agreement. The tribunal noted that the committee considered the individual circumstances of each worker in making its assessment. The committee found that although revenue was collected in all cases, the regulated process was not followed. The committee made a finding that the

officers were guilty of gross misconduct, and recommended that Elina Ledua, Amelia Waqavuki and Desiree Kassim be summarily dismissed. Ana Daunivalu was to have been demoted as she was a first time offender. However, the appellant's chief executive officer decided to terminate the employment of all respondents.

17. The chief tribunal's finding is that the respondents acted on the instructions of their managers. The tribunal noted that the appellant was not defrauded of its regulated revenue. The chief tribunal stated that there is no evidence to say that the respondents colluded with customers in order to process permit renewal applications.
18. The chief tribunal determined that there was no attempt by the appellant to go after the managers who gave directions to the respondents to perform their tasks in the way they were carried out. The chief tribunal held there was no evidence of collusion with external parties to defraud the appellant, and concluded that the dismissal of the respondents was unjust and unfair.
19. The chief tribunal made these findings by evaluating the available evidence. The chief tribunal heard the witnesses and was in a position to assess their evidence having regard to the totality of the circumstances. The appellant has not shown that there is anything plainly wrong with the findings or that they are not based on evidence. Therefore, court sees no reason to interfere with the chief tribunal's findings.

Reinstatement

20. The chief tribunal ordered the respondents to be reinstated individually to a suitable position to be determined by the employer. The appellant submitted that reinstatement, in particular, would be inappropriate as the employer has lost trust and confidence in the respondents.
21. The order for reinstatement is to a suitable position determined by the employer, and not to their former positions. The direction leaves room for uncertainty. The respondents were dismissed on 25 November 2014. Nine years have passed since

dismissal. The court may have to consider possible operational and organisational changes that could have taken place over time within the institution. Such information is not available. The factors to be considered when determining reinstatement as a remedy will vary from case to case.

22. The employer submitted that it has lost confidence in the workers as its regulatory procedures were not followed. Court takes this concern into account. The chief tribunal's finding that the respondents contributed to the situation that gave rise to the employment grievance is relevant. On this reasoning, in granting remedies, the chief tribunal reduced the reimbursement of wages from 12 months to 6 months. Although a clear basis for the reduction is not provided, having evaluated the evidence, the chief tribunal would have had reason to do so. An order for reinstatement in the overall circumstances may not be appropriate.
23. There is another factor to be considered. The appellant filed a summons in this court on 12 June 2018 and sought a stay of the chief tribunal's decision. On 10 July 2018, Wati J granted a stay *inter alia* on condition the appellant pays the wages of the respondents from 26 September 2017 until 10 July 2018. The sums ordered to be paid were not refundable irrespective of the outcome of the appeal.
24. The appellant says the following sums were paid pursuant to the order made on 18 July 2018:

(a) Ana Daunivalu	\$11,185.47
(b) Elina Ledua	\$11,185.47
(c) Amelia Waqavuki	\$22,519.68
(d) Desiree Kasim	\$12,639.09
25. These sums were not ordered to be paid by the chief tribunal. However, the respondents have benefitted by these payments. They need not be refunded to the appellant, but the sums are sufficient compensation, in all the circumstances, in lieu of reinstatement.

26. The appeal is dismissed with costs and subject to the variation of the orders made by the chief tribunal.

ORDER

- A. The appeal is dismissed subject to the variation of the tribunal's decision as stated below.
- B. The order for reinstatement of the respondents is set aside.
- C. Reimbursement of wages and compensation ordered by the tribunal must be paid to the respondents.
- D. The appellant is to pay costs summarily assessed in the sum of \$2,000.00 to the respondents within 21 days.

Delivered at **Suva** this 31st day of **October, 2023**.



A handwritten signature in blue ink, appearing to read "M. Javed Mansoor".

M. Javed Mansoor
Judge