

IN THE EMPLOYMENT RELATIONS COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER: ERCA 17 of 2017

BETWEEN: **FIJI NATIONAL UNIVERSITY**

APPELLANT

AND: **DILPREET KAUR**

RESPONDENT

Appearances: Mr. B. Singh for the Appellant.

Mr. Lomaloma for the Respondent.

Date/Place of Judgment: Tuesday 27 February 2024 at Suva.

Coram: Hon. Madam Justice Anjala Wati.

JUDGMENT

Catchwords:

Employment Law – Appeal –unlawful and unfair termination of employment- worker transferred to another jurisdiction without consultation – she challenges her transfer with the employer – employer forces her to take up the transfer and raise grievance later – worker brings a claim in the tribunal – employer subsequently terminates her from work- employer’s actions unjustified substantially- action unjustified procedurally when termination backdated and the worker not given reasons for the transfer on the day of termination together with a certificate of service- worker also treated unfairly when the employer refuses to pay her when she was still at work- this amounted to forcing her to obey the unlawful directions of the employer.

Cause

1. The employer appeals against the tribunal’s decision wherein it found that the worker Dilpreet Kaur was unlawfully and unfairly terminated from her work by the employer.
2. The tribunal ordered the employer to pay to the worker 6 month’s wages for unlawful dismissal and 6 month’s wages as compensation for unfair dismissal.

Background

3. The worker's employment background and how the dispute arose between the parties to the employment relationship is well outlined by the tribunal in its judgment. I will reproduce that here to reflect on the conflict between the parties.
4. The employment grievance initially arose over the employer's decision to transfer the worker to Lautoka Campus at Natabua. The grievance was referred to the Mediation Unit on 15 February 2013.
5. Before the grievance could be mediated upon, the worker was informed by the employer on 27 February 2013 that she was being summarily dismissed and that her dismissal was to take effect retrospectively from 31 January 2013.
6. The worker Ms. Kaur was employed by FNU as a Lecturer Grade II in the Department of Environmental Science pursuant to her second contract from 16/03/12 to 15/03/15.
7. On 17 December 2012, she proceeded on 17 working days leave without pay. She was to resume duties on 28 January 2013 before the commencement of the teaching year.
8. Prior to proceeding on leave, the worker's teaching load for the first trimester of 2013 had been agreed with her Head of Department and outlined in the School of Applied Science, Department of Biology and Environment Science teaching load sheets. She received further confirmation of her Trimester I teaching allocation while still away on leave on 11 January 2013.
9. Towards the end of her leave, the worker fell ill and advised her department head that she would be applying for two days' sick leave and return to duties on 31 January 2013.
10. While the worker was away on leave, the employer apparently made a decision to transfer her to Lautoka without any prior consultation. On arrival at work on 31 January 2013, the worker received a letter dated 21 January 2013 from the Human Resources Manager advising her that she had been transferred to Lautoka on that day and that Finance had been advised to pay her \$250 being the transfer allowance.

11. The worker immediately discussed the matter with her Supervisor, the Dean of the College of Engineering, Science and Technology, and also wrote to him protesting the employer's actions and advising of her personal circumstances that prevented her transfer without reasonable notice.
12. She did not receive any satisfactory or sympathetic response. Over the next month, she attempted to raise her grievance variously with the Human Resources Manager, her Dean and the FNU's Vice Chancellor using the employer's grievance procedures.
13. Whilst attempting to seek redress with her superiors seeking an understanding of her problems, the employer acted viciously and ceased payment of her salary due on 01 February 2013 advising her that she would only be paid if she reported at Lautoka.
14. The worker then reported a grievance on 15 February 2013. She claimed unlawful and unfair dismissal when it became clear to her that she was being frustrated in her employment. Her internal grievance was not being heard and she was not being paid.
15. The worker continued to report at the Suva campus and was allocated normal duties to perform but had not been paid for the month of February 2013.
16. She continued to receive conflicting advices from management regarding her employment status. On 22 February 2013, the Vice Chancellor advised her that her position was being made redundant.
17. On 26 February 2013, while attempting to have her performance appraisal concluded, the Vice Chancellor advised her that she was deemed to have resigned.
18. Finally, she was called by one Mr. Sanjay Kumar in the Human Resources Department for a meeting to discuss her transfer grievance. Upon arriving for the meeting, she was simply handed a letter advising that she had been summarily dismissed retrospectively from 31 January 2013.
19. The worker was dismissed for being guilty of gross misconduct and for disobedience of lawful orders by the employer.
20. The letter of termination reads:

***“Ms. Dilpreet Kaur, P.O. Box 272,
Nabua.***

27 February, 2013.

Dear Ms. **Dilpreet Kaur**,

Re: Summary Termination

You have abstained from work and continuously remained absent from 31st January, 2013 till to date from your work station in Lautoka Campus.

By an internal memo dated 21st January, 2013 you were informed that you are being transferred to Lautoka Campus effective from 21st January, 2013.

You objected to the transfer by emails dated 1/2/2013, 4/2/2013, and 6/2/2013. In response you were informed by Manager Human Resources on 4/2/2013 to report for duty at your new work station and raise the issue as a grievance. On 6/2/2013 the Dean for College of Engineering Science and Technology also told you via an email to follow the transfer order.

It is noted with much concern that as a responsible employee you have failed to abide by the Fiji National University (FNU) HR Policy. FNU HR Policy No. 28 on Unauthorized Absence Policy inter alia states:

- 2.3 *An employee who is absent from his or her assigned work location or schedule without official leave shall be considered to be absent from work.*
- 2.4 *All such absences shall be treated as unauthorized leave without pay. Employees who take unauthorized leave for a total of two working days shall be deemed to have committed misconduct. Employees, who take unauthorized leave for a total of five working days per year, shall be deemed to have committed gross misconduct.*

Moreover, FNU HR Policy No. 29 under clause 27 on Gross Misconduct and Summary Dismissal inter alia states:

- 27.2 *The University retains the right of summary dismissal under the following circumstances:*
- 27.2.1 *where a worker is guilty of gross misconduct;*
- 27.2.2 *for willful disobedience to lawful orders given by the employer;*

Your failure to comply with the HR Policy on Unauthorized Absence has the potential to give negative signal to other staff and we cannot condone such laxity.

Given the above and in our considered view your conduct falls under section 33(1) (a) and (b) of the ERP 2007 and Section 27 of the FNU HR Policy No. 29 which conduct is classified as Gross Misconduct and the penalty is summary termination of employment.

Therefore, as of 31st January, 2013 you are summarily dismissed.

You are required to duly complete the Exit Form and Exit Questionnaire and hand over to the Dean of College of Engineering, Science and Technology, all FNU property under your possession.

Yours Sincerely,

.....

Narendra Prasad

Director Human Resources”

The Appeal

21. The Appeal requires me to find whether the tribunal had correctly arrived at a finding that the worker had been unlawfully and unfairly dismissed.

The Tribunal's Findings

22. I will reflect on the tribunal's findings on how it came to a conclusion that the termination was unlawful. Its reasons for finding that the termination was unfair will be discussed under my findings later.
23. In a nutshell, the tribunal found that the worker could not have been transferred without consultation. It also found that when she raised an internal grievance with the employer, that ought to have been considered. However, the employer did not do that but instead asked her to report to Lautoka and then raise a grievance. This was an unfair and unjustified act of the employer as it was bound by the policies to hear the internal grievances of its workers fairly and efficiently.
24. The tribunal also found that when she was working, it was unfair to have stopped her from being paid as the internal grievance by the worker was still on foot. It also found that the final improper act of the employer was to have terminated the worker when her grievance was lodged and pending for determination.

Analysis

25. I will deal with the issue of unlawful dismissal first. The question that I must ask is whether the employer had based the termination on justifiable grounds? The first reason for termination was gross misconduct and the second reason was willful disobedience of lawful orders.

26. I will examine the complaint of wilful disobedience of lawful orders first. Were the orders for transfer lawful in the first place?

27. Clause 6.1 of the employment contract provides that the Vice Chancellor can transfer the worker anytime for the entire duration of the contract or for periods of time under the contract. It reads:

“The employee shall be employed at the Fiji National University. The main office of the University is at Nasinu in Suva, Fiji. The employee, however, may be required to work at any location where the FNU has campuses, centres, offices, operations or activities, as the Vice Chancellor directs, either for the entire duration of this contract, or for periods of time under this contract.”

28. Clause 6.1 cannot be read in isolation. I agree with the tribunal that it was to be read in line with clause 4 of the worker’s job description which states that a role, job or position of a worker may change from time to time and such alteration shall not be deemed to be a variation in the employment contract or the terms and conditions of the same. It further notes that changes shall be discussed with the staff concerned and shall not be implemented without consultation with the staff. Clause 4 reads:

“It is acknowledged and agreed that evolving needs or emphasis of the University may require a role/job/position to change from time to time but such alteration shall not be deemed to be a variation in the Employment Contract/Terms and Conditions of Employment or a breach of the same provided that the substantial nature of the employment remains consistent with the parties intentions at the time of the offer of the job and acceptance of the offer. Changes shall be discussed with the staff concerned and shall not be implemented without consultation with the staff.”

29. Asking the worker to teach a different set of students in a different jurisdiction is a change in her role. This is a change that required discussion and consultation. That did not happen and the worker could not have been transferred in the first place without discussion and consultation. The whole process of transfer was erroneous. The order for transfer was therefore unlawful and there could not any breach as asserted by the employer to cause the termination on this ground.

30. Further the transfer letter was not under the hands of the Vice Chancellor as required under clause 6.1 of the employment contract. The order for transfer was once again not lawful as it was not authorized by a proper personnel.

31. On the issue of gross misconduct, particulars of which are that the worker did not report to work for 2 days, I find that this ground cannot be established by the employer. The transfer letter was made

retrospective. The worker started work on 31 January 2013. Her transfer was effective from 21 January 2013. How could she be transferred 10 days before, without being informed?

32. By the employer's standard used to terminate the worker (*being absent from work for 2 days without authorization*), she was already in breach of the directions of the employer. This breach occurred at the hands of the employer. The worker could not have reported to work in Lautoka within 2 days of 21 January 2013.
33. The employer's position may be that 2 days was to be counted from 31 January 2013. Even that is unjustified. How could she go to Lautoka within 2 days of 31 January 2013 and start work there? The employer expected the worker to start work in Lautoka on 31 January 2013 that is why it backdated the termination letter to 31 January 2013 for not starting work within 2 days of that day. Even a month's time to move from one place to another could be too short. What is a reasonable time frame can only be worked out with discussion and consultation with the worker.
34. Any reasonable employer must consult and discuss the issue with the affected worker and determine whether it is prudent to transfer and the amount of time that is necessary for the worker to move to another jurisdiction. In this case, it was a requirement that it be so done. That did not happen in this case.
35. A worker who is transferred cannot just pack and leave home. He or she would have commitments to clear, arrangements to be made at home and at the new station to be able to leave for the new place. How can this employer be so ignorant of all this practical aspects? The timeframe of 2 days to move to Lautoka was outrageous.
36. It is not the worker that breached the lawful orders but the employer who did so. The employer's direction was that the worker should report to Lautoka and that her grievance will only be heard when she has followed the directives. This is highly absurd and most unreasonable a demand by an employer.
37. The employer's action is a classic example of power imbalance where an employer fails to follow its own policies and procedures. It was bound by clauses 1.0 and 2.0 of the HR Policy No. 40. This requires that when an aggrieved worker is raising a complaint on a particular practice, he or she cannot be forced to comply with that practice unless his or her grievance has been heard. The employer had to hear the grievance as soon as it was raised.
38. Clauses 1.0 and 2.0 of the FNU HR Policy No.40 states:

“ 1.0 **Policy Statement**

1.1.1 *University employees have the right to get all their employment related concerns fairly and efficiently addressed.*

2.0 **Procedures**

2.1 *The procedures contained in this policy are intended to give effect to the objective of this policy. By signing their employment contracts, employees are deemed to agree to the grievance procedures contained in this policy.*

2.2 *An employee, who considers that he/she has grounds for an employment grievance, may submit the grievance to the University as per the procedures contained in this policy.*

2.3 *In all cases of employment grievances, the employee is entitled to have a third party present at any meeting between the employee and the University discussing the grievance(s).*

2.4 *The grievance must be submitted within a period of six months beginning with the date on which the action alleged to amount to an employment grievance has occurred or has come to the notice of the employee, whichever is later, to enable the University to remedy the grievance rapidly and as near as possible to the point of origin. If the grievance is not submitted within this period, the University is not obliged to consider the employee's grievance.*

2.5 *When the grievance is submitted to the University, the University shall accord the employee a fair hearing by allowing the worker an opportunity to be heard, and in the presence of a third party if requested by the employee”*

39. After failing to follow its own policies, it then precludes the worker from getting a fair determination by an independent body by terminating her when she lodged a grievance against the employer. This employer is adamant on imposing its views and policies on workers and does not have any regard to the good faith principle enshrined in the employment law and the constitutional right of the worker for fair labour practices. The employer genuinely needs to look into its conduct and re-align its practice and procedures to reflect fairness and objectivity.

40. I now turn to the procedure for carrying out the termination. When a worker is summarily dismissed, he or she is entitled to written reasons for termination on the same day, up to date pay and a certificate of service. The termination was effective from 31 January 2013. It is on this day that the worker was entitled to a termination letter and not on 27 February 2013. She was also entitled to a certificate of service which was not given to her. There is evidence that she had not been paid even when she worked in Suva. All these acts make the termination procedurally wrong.

41. I now turn to the issue of unfair dismissal. The manner in which the worker was terminated was also improper. At paragraphs 75 and 76 of its judgment, the tribunal found how the termination was unfair. It stated:

“[75] The Grievor ...was humiliated by the action of Mr. Sanjay Kumar in the Human Resources Department who called Ms. Kaur to his office on the pretext of discussing her transfer grievance but gave her the termination letter dated 27/02/13 to be effective from 31/01/13.

[76] It was really humiliating, as without progressing her grievance the FNU turned around and terminated her and to make matters worse one of the staff of the Human Resources Department had to lie to Ms. Kaur to attract her to the office and to serve her with the termination letter. ...when dismissing an employee, the employer must treat the employee fairly with appropriate respect and dignity.”

42. I do not have any evidentiary basis to interfere with the findings of the Tribunal. I find that this employer had conducted itself in a manner which demeaned the employee and questioned her self-worth. She was treated unfairly without dignity and respect. She was told to start work in a different city the same day, not heard at all on her concerns, forced to obey the directions, not paid even when she worked and prevented from having the issue of transfer being heard by an independent tribunal. She was humiliated by a co-worker when she was shown that her transfer would be discussed but then what transpired was that she was terminated. All that is very disturbing to an employee. If that is not humiliating, what else is?

43. I do not have any basis to interfere with the findings of the Tribunal.

Final Orders

44. In the final analysis, I dismiss the appeal and order the employer to comply with the orders of the tribunal within 14 days if not complied with already.

45. If payments have not been already made, then the worker should be paid post judgment interest at the rate of 4%, for one year, which I so order.

46. The worker shall have costs of the proceedings in the sum of \$5,500 to be paid within 21 days.



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Hon. Madam Justice Anjala Wati

27.02.2024

To:

1. *Fiji National University for the Appellant.*
2. *Nilesh Sharma Lawyers for the Respondent.*
3. *File: Suva ERCA 17 of 2017.*