

**IN THE EMPLOYMENT RELATIONS COURT AT SUVA**  
**CENTRAL JURISDICTION**  
**CIVIL JURISDICTION**

ERCA: 08 of 2022

**BETWEEN:**                    **TRADE PLUS (FIJI) PTE LIMITED**

**APPELLANT**

**AND:**                            **EDWIN NAND SHARMA**

**RESPONDENT**

Date of Hearing                :        12 December 2023  
For the Appellant            :        Ms. Ali. A.  
For all Respondents        :        Not Present  
Date of Decision             :        28 March 2024  
Before                            :        Levaci SLTTW, A/J

**J U D G M E N T**

***(APPEAL FROM EMPLOYMENT RELATIONS TRIBUNAL)***

**Cause and Background**

1. The Appellant Appeals against the decision of the Tribunal awarding the Respondent a sum of \$10, 499.94 as Workmen’s Compensation arising from injuries sustained during the course of his employment.
2. The Labour Officer made an application before the learned Tribunal pursuant to section 5 (1) of the Workmen’s Compensation Act on behalf of the Respondent.
3. The facts of the case which is not disputed by parties is that the Respondent was employed as General Manager overseeing the operations of the company including

other tasks like burning rubbish. On 7 December 2017 he was burning rubbish on the work site witnessed by a worker who also gave Affidavit evidence during trial.

4. The Appellant argued that the burning of rubbish was not part of the Respondent's responsibility and called the daughter of the owner who also ran the company as well as a colleague of the Respondent. They both agreed all employees were contracted and part of their contract contained rules and regulations prohibiting burning of rubbish. The colleague confirmed he had a yearly contract and admitting there were rules and regulations which he was aware prohibited burning of rubbish.
5. The medical report which was tendered by the Respondent was not contested by the Defendant and accepted as evidence of the injuries sustained by the Respondent.
6. The Appellant has now appealed against the decision of the learned Tribunal challenging the decision that the actions of the Respondent was of wilful misconduct when he burned the rubbish that day.

### **Grounds of Appeal**

7. The Appellant has filed the following grounds of appeal as follows –
  1. *'That the Tribunal erred in fact and in law in finding that the Appellant 'clearly intended to provide evidence that the burning of rubbish was not part of the Respondent's responsibilities' where the Appellant did in fact provide evidence of that fact.*
  2. *That the Tribunal erred in fact and in law when it held that the only issue to be determined by the Tribunal was whether the injury sustained by the Greivor/Respondent arose in the course of employment.*
  3. *That the Tribunal erred in fact and in law when it found that the substantial question for the Tribunal's consideration was whether at the time of the accident, the Greivor/Respondent was doing something which in itself was connected to his duties.*
  4. *That the Tribunal erred in fact and in law when it found that the case authorities provided by the Respondent/Appellant did not assist the Tribunal in determining the matter.*

5. *That the Tribunal erred in fact when it found that the Greivor/Respondent was not aware that burning was prohibited by the company and there was no evidence before the Tribunal to suggest that he was not qualified to undertake such a task.*
6. *Further, the Tribunal erred in fact when it found that there was no evidence that the Greivor/Respondent knew his actions were wrong.*
7. *That the Tribunal erred in fact and in law when it held that the Respondent failed to prove that the Grievor/Respondent did not know that his actions were wrong and that there is nothing in the evidence, no documents to suggest that burning rubbish at their worksites was prohibiting stating "Although counsel for the Respondent submitted the existence of company rules that prohibited the burning of rubbish. However, there is nothing in the evidences that would assist the Respondent in this matter".*
8. *The Tribunal erred in law and fact when it held that although other witnesses affirmed the existence of company rules, they failed to tender the same to the Tribunal and that the Tribunal could only assume that the evidence would not assist the Respondent/Appellant in this matter.*
9. *That the Tribunal erred in fact and in law when it found that in absence of company rules, the Grievor/Respondent's action or omission did not amount to serious or wilful misconduct and that the burning of rubbish was incidental to his work and the was responsible for keeping worksites clean.*
10. *That the Tribunal erred in fact and in law when it found that every Friday the Grievor/Respondent would gather the boys to clean the worksites and this included cleaning by means of burning rubbish.*
11. *That the Tribunal erred in fact and in law when it found that since there was no evidence that the Company disciplined the Greivor/Respondent, there can have been no act of serious and wilful misconduct on the part of the Grievor/Respondent.*
12. *That the Tribunal erred in fact when it found that since the **Form OSHF 1** stated that the accident occurred near the incinerator, the Grievor/Respondent was burning rubbish piled by another company at the company's workshop without stating the relevance to the law on the issue of frolic or serious misconduct in the performance of an employee's duties.*
13. *That the Tribunal erred in fact and in law when it found that the Grievor/ Respondent's injuries did arise in the course of his employment."*

## **Law on Appeal**

8. 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.’
9. Section 225 of the Employment Relations Act 2007 stipulates that an Appeal to the Employment Relations Court is as of right from a decision of the first instance of the ERT.
10. 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 from the face of the record the Court finds that the Tribunal has blatantly erred in facts or law and has acted in ultra vires or has failed to consider a pertinent issue raised before the Tribunal.
11. 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).

## **Submissions by Parties**

12. In their oral argument, the Appellant states that there was no evidence at trial to establish that the Respondent’s responsibility was to burn rubbish as he was the General Manager of the company. The Company had rules and regulations annexed to every contract signed by employees prohibiting open fire. The Respondent’s witness confirmed of the same and the Court corrected the parties

when a contract was handed over, that it was a 2014 contract and not 2020. However there was no contract of the Respondent tendered. Only his job description.

13. Furthermore Appellant argued that there was nothing to indicate what weight was given to the other witnesses as opposed to the Respondents evidence nor whether their evidence was accepted as credible or otherwise. The burden of proof remained with the Employer. However the Appellant argued that the matter fell outside Workmen's Compensation Act when the Respondent engaged in misconduct. The Grievor acknowledged that he had no knowledge the burning was prohibited and admitted there was a number of tenant companies that also placed their rubbish at the same burning area. He acknowledged that the neighbor's complained about the burning of rubbish and hence would have been aware of the law and its consequences. Therefore there was indirect evidence, as argued by the Counsel, that he was aware of the prohibition under law and in their company policy and failed to comply thereby acting in wilful misconduct. His wilful misconduct, was outside of his duties of employment.
14. The Respondent did not appear on the date of Hearing nor filed any written submissions although a notice of hearing was served on them and Affidavit of Service regarding the Notice and Grounds of Appeal was filed by the Appellant.

### **Analysis and Determination**

#### **Grounds (2) and (3) of the Appeal**

15. Grounds (2) and (3) identified share similar threads of issues more particularly whether the injury sustained during the course of employment was from a task or responsibility the Respondent was required to perform.
16. It is not contested from the Tribunal Records that the Respondent was working in the course of his employment when the incident happened that caused injury.
17. The issue in contention is whether the Respondent was performing a task he was required to perform in the course of his employment.
18. However it is contested that when the injury arose, that the injury was a result of responsibilities the Respondent was required to perform.

19. The learned Tribunal deliberated upon the evidence before it. The Court found that the learned Tribunal did not err in law and in fact in the manner it had deliberated the issues it identified and therefore Grounds (2) and (3) are dismissed.

**Grounds (1), (5), (6), (7), (8), (9), (10), (11), (12) and (13) of Appeal**

20. From the Tribunal's records, the Appellant gave a copy of a job description of the General Manager and relied upon circumstantial evidence that a colleague admitted to obtaining a yearly contract which contained rules about prohibiting burning of rubbish and that the Respondent should have been aware of these prohibitions.
21. There was also admitted evidence from the Respondent that neighbors and tenants were complaining about the burning of rubbish.
22. From the records of Tribunal, it is not disputed that the Respondent was employed as the General Manager to oversee the day to day operations of the company based on the directions or instructions of the owner.
23. There are clear admissions by the Respondent, recorded in the Tribunal records in re-examination, that the Respondent was not instructed nor was he tasked to burn rubbish from the owner. He fully admitted there was nothing to instruct him to burn rubbish. There was also no instructions or directions from the owner not to burn rubbish.
24. Therefore it was entirely in his discretion which he exercised. He admitted he had been doing this for some time and there was no direction to prohibit him from doing so.
25. The second witness for the Respondent gave evidence that he never burned rubbish. They were not contracted at all.
26. It was this exercise of discretion which the learned Tribunal had to decide whether, in the Respondent's conduct, was exercised outside of his responsibilities.
27. The re-examination evidence was very clear that the Respondent knew it was a task he was not instructed nor directed to perform but he did it anyway. He therefore treated the task as any other task he was required to do from practice and not as directed or instructed of him. It was in performing this task that he was injured.
28. Hence the Respondent, gave his evidence he did not have the requisite knowledge that it was wrong to burn rubbish at the site. He also gave his testimony from the

Tribunal records that he was not contract and therefore no rules and regulations regarding prohibition of burning rubbish was shown or explained to him.

29. The Appellant presented evidences, as per Tribunal records, that the Respondent had requisite knowledge because all the other employees were informed of the laws prohibiting burning of rubbish and even his work colleague who was employed under contract and was aware of the prohibition. The Appellant also tendered a job description of the Respondent which did not include as part of his duties, the burning rubbish. The Respondent also admitted when cross-examined that there were complaints from neighbors about burning of rubbish in the said workplace vicinity.
30. However the learned Tribunal found that the Respondent did not have the requisite knowledge that burning rubbish was prohibited because no such rules and regulations were tendered into court, no contract was ever tendered that bound the Respondent to terms and conditions of the regulations and that the Respondent had no knowledge that he was not supposed to burn rubbish.
31. The Court finds that the learned Tribunal erred in law and in fact when he failed to consider other evidences tendered as part of the Affidavits in evidence in chief.
32. The Affidavits showed that there were a number of tenders for work submitted by the company for which the Respondent executed as the General Manager. One of the requirements was that the Respondent was well aware of the Acts and regulations existing in Fiji. To blatantly state to the learned Tribunal that he had no knowledge that burning rubbish was prohibited when he signed off on all tenders for proposals that required his knowledge of the laws of Fiji when acting on behalf of the Company indicates his ignorance of the existing laws on prohibition of burning of workplace rubbish in such an environment on the work vicinity.
33. The Court finds that the learned Tribunal erred in law and in fact by failing to give weight to these other overwhelming evidences that were circumstantial but when put together, clearly showed that the Respondent should have had the requisite knowledge that it was wrong or that there were risks associated with the burning of rubbish which rendered the conduct wrong in law.
34. The Respondents wilful act in conducting himself in such a manner on that day was a misconduct for which fell outside of the scope of duties he was required to perform.
35. The Court therefore finds that the Appellant had established grounds (1), (5), (6), (7), (8), (9), (10), (11), (12) and (13).

#### **Ground 4 of the Appeal**

36. In Ground 4 of the Appeal, the argument by the Appellant is that the case authorities cited regarding the law was relevant and that the learned Tribunal erred in refusing to accept these as proper principles.
37. The decision of the learned tribunal was as follows-

*“13. These authorities do not assist the Tribunal in this (sic) determining this matter. The first case authority adopted by the Respondent refers to the miner performing a task which he was not qualified to perform. The miner was in fact unqualified to perform the task. Secondly, the miner knew that he should not be performing such task, as he was not qualified to perform. He had knowledge of his wrong doing. In this matter, Mr Nand was not aware that burning was prohibited by the company. There is no evidence before the Tribunal to suggest that he was not qualified to undertake such task. Neither were these evidences that he knew his actions were wrong.*

*14. In Labour Officer -v- Kilavata Carriers Ltd [2019] FJET 48, relied on the words of Cotton LJ and Brett LJ in Lewis -v- Great Western Railway Co Ltd on Wilful misconduct, must mean the doing of something, which is wrong to do or omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit, and it involves the knowledge of the person that the thing which he is doing is wrong.”*

38. In the court records, the learned Tribunal had considered cases cited to determine that the tasks for which the workman was found he was not responsible for, were tasks that required certain skills that the workman did not have. Hence the reason why the workman was performing tasks which his employment did not require him to do.
39. Similarly, although this was not mentioned expressively in his judgment, in Lotan -v- Secretary of Labour [1976] Supreme Court, Kermode J held that :

*“The learned magistrate found that all three of these requirements were satisfied in the instant case. Prima facie on the magistrates finding the appellant was liable to pay compensation.*

*In considering section 5 (1) of the Ordinance, however the learned magistrate did not consider other facts which he found proved and facts mentioned in the appellant’s evidence which was not contradicted and whose evidence he accepted.*



*There was no work available for Peni that day and had been instructed by the appellant to go home. He was not supposed to be in the mill at all and was not authorized to clear the water pipe. The appellant's evidence indicates Peni was employed as a carpenter's assistant and he was also employed to cut grass "collect nails etc and other light work". He was not employed by the appellant to work on or near the saw bench or to clear blockages in the water supply to the revolving saw blades. As the appellant stated, there was a person in charge of each machine. Peni endeavored to establish that he had acted under instructions of Vodo but the magistrate did not believe in him.*

*What the learned magistrate overlooked was that notwithstanding the act of clearing the pipe was an act done by Peni for the purposes of his employers business he was not on the accepted evidence performing an act which he was employed to do."*

40. The Court found that the learned Tribunal erred in law in failing to consider the principles arising from the abovementioned cases. That in addition, the learned Tribunal failed to consider whether the performance of the act was something he was not required to do and that even if there was proper supervision from an authorized skilled supervisor, the performance of the act was still not something he was required to do as he was not given the consent to perform it.
41. In application to the case before the learned Tribunal, despite there not being a skill required to burn rubbish, the learned Tribunal erred in failing to apply the principle that the performance of burning rubbish was something the Worker was not required or instructed or directed to do and therefore he acted in wilful misconduct when he did the same.
42. The Court therefore finds that the Appellant had established Ground (4) of the Appeal.

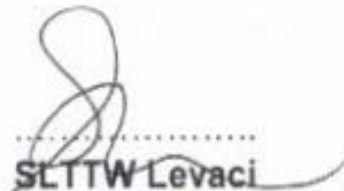
### **Orders of the Court**

43. **The Court finds that :**
  - (i) That all the Grounds (1), (4), (5) (6) (7) (8) (9) (10) (11) (12) (13) of Appeal is upheld;**
  - (ii) That Grounds (2) and (3) are dismissed;**

(iii) The decision of the Learned Tribunal is hereby quashed.

(iv) Costs of \$500 to be awarded to the Appellant.



  
SLTTW Levaci  
A/Judge