

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 12 of 2017

**BETWEEN:** **NONEEL PRASAD**

**APPELLANT**

**AND:** **FIJI ELECTRICITY AUTHORITY**

**RESPONDENT**

*Appearances:* Mr. D. Nair for the Appellant.

Ms. M. Rakai for the Respondent.

*Date/Place of Judgment:* Thursday 30 May 2024 at Suva

*Coram:* Hon. Madam Justice Anjala Wari.

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**JUDGMENT**

**Catchwords:**

*Employment Law – Appeal – summary dismissal of employee – whether the Tribunal was correct in arriving at a finding that the employer had justifiable reasons to carry out the termination of the worker – worker performing unauthorized acts not within his remit – nature of work performed by the worker could lead to extensive risk to him and the employer – Tribunal’s findings of justifiable reasons cannot be impeached on any basis.*

**Cause**

1. The employer appeals against the decision of the Tribunal wherein it dismissed the worker’s grievance against the employer for unfair suspension and dismissal.

2. Noneel Prasad was employed as a Liveline Lineman by Fiji Electricity Authority ("**FEA**"). He had worked for FEA for 15 years and 6 months before being dismissed on 30 June 2016.
3. The worker had commenced his employment as a Trainee Electric Power Lineman on 30 October 2000.
4. On 20 February 2016, Tropical Cyclone hit Fiji at category 5 level. The nation lost power. This required the FEA to undergo restoration works all over the country to restore power.
5. It was therefore one of the Fiji Government's prompt action to urgently attend to the needs of its citizens who were severely affected. One of the major urgent tasks was to restore the electricity transmission pole lines out. It was called the "**Restoration Works**" by FEA.
6. The FEA had to prioritize Restoration Works as the Fiji Government had implored to it that restoration of electricity lines in the affected areas in the Western Division be given priority. For that reason, the FEA made it a top priority amongst its list of construction works/projects to carry out this task with urgency.
7. Given the urgency of the Restoration Works, the FEA deployed a large number of employees from its Network Division to meet the task. The worker Noneel Prasad was amongst this team deployed to carry out the works.
8. The incident leading up to and surrounding the worker's termination occurred on 30 April 2016 when the worker was tasked to carry out Restoration Works in Rakiraki.
9. The Chief Executive Officer ("**CEO**") was passing Rakiraki when he noticed someone on FEA's ladder attending to a customer's service main. The customer was Salen Chand.
10. The CEO then got off his vehicle and queried with the casual worker one Mishal Melvin Singh, who was on the ladder, as to what he was doing on the customer's service main.
11. Mishal Melvin Singh was asked who he was with at Salen Chand's house. The CEO then told Mishal Melvin Singh to go and call that worker.
12. Noneel Prasad came out of the house. The CEO then asked him what he was doing at Salen Chand's house and why they were working on the customer's service main and who authorized them to do such works.

13. The worker Nandee Prasad said that he was there to use the bathroom at Salen Chand's house. The CEO questioned why at Salen Chand's house when his campsite was quite far away and there were facilities there. The worker remained evasive.
14. The employer says that the worker had seriously breached the employer's policy that no network personnel is allowed to carry out service main works.
15. The crucial circular that the employer says had been breached by the worker is **Network Circular No. 1: Service Mains Reconnection**. It was issued on 24 October 2014 by the General Manager Network Mr. Jitendra V. Kumar. It was addressed to all Network Personnel. The material parts read as follows:

*"Despite earlier instructions that the reconnection of service mains are not to be carried out by Network personnel, there are some personnel who are not complying with this instruction.*

*This is a reminder that the reconnection of service mains following damage to service lines, change of conductors with service line connections, change of poles and change of cross arms with service line connections shall **NOT** be carried out by Distribution Personnel.*

**Reconnection of service mains shall only be carried out by Installation Inspectors from the Regulatory Unit following approved reconnection procedures.**

*For Levuka and Savusavu this work can be carried out by Network employees who have undergone specific training in this regards with the Regulatory/Training Departments ..."*

16. Seeing that there was breach of directions, the CEO informed the General Manager Network about the issue. An investigation was carried out by the Human Resources team of FEA. The team compiled its report known as **"April 30<sup>th</sup> 2016 Incident – Carrying out Service Main Works – Unauthorized by FEA contrary to the Designated Restoration Works"**.
17. The report was issued on 8 May 2016. The main parts of the Report are the Recommendation and Conclusion. It reads as follows:

**8. Recommendation**

*From this Investigation Report, it is recommended that:*

- (a) *The Team carried out unauthorized work at Salen Chand's service main in Rakiraki.*

- (b) *The authorized works for them was restoration.*
- (c) *The persons in the Team (Shymal Bhan, Noneel Prasad and Joe Cheer) had committed the unauthorized breaches of the Authority's policies and procedures. Despite knowing the **set authorized works**, they blatantly ignored the Authority's instructions and chose to breach the same anyway.*
- (d) *It is established that Noneel Prasad knowingly acted and blatantly took the 2 casualties in his team to carry out **UNAUTHORIZED works at Salen Chand's service main at his residence, Rakiraki**.*
- (e) *Further, Noneel Prasad did not obtain a **VALID PERMIT** to carry out the service main installations at Salen Chand's residence.*
- (f) *Noneel Prasad also instructed Mishal to attend to the pole on the service main knowing fully the casual was not competent and/or experienced to carry out repairs on the said service main.*
- (g) *Noneel Prasad had colluded with the 2 casualties earlier mentioned by concocting a false story about the **UNAUTHORISED work was in progress at Salen Chand's place** – CEO of the Authority happened to stop and enquire at the time on what specific works Noneel Prasad, Mishal Singh and Amol Raj were working on.*
- (h) *Noneel Prasad left the job site without informing the Team Leader – Joe Cheer therefore his and the 2 casualties whereabouts were unaccounted for on 30 April 2016.*
- (i) *Noneel's blatant disregard for the Authority's Policies and Procedures showed that he did not act to safeguard the Authority and/or himself. His actions were inexcusable especially when he knew that he was not tasked to work on any customer service mains.*
- (j) *Furthermore, Noneel was not assigned to carry out electrical repairs on any customer's installation, nor supervise any electrical repair works on any customer's installation.*

- (k) He was on restoration works and thus any diversion from the restoration works delayed the set Restoration works. The Authority has in fact been given a time frame from the Fiji Government to complete such restoration works and this incident was contrary to the Authority's specific instructions to the Team to work only on restoration works.
- (l) Although members of the Team (Shymal Bhan, Noneel Prasad and Joe Cheer) have worked with the Authority with a minimum of 8 years and over, their blatant disregard for the Authority's Policies and Procedures is significant and in most instances a terminable offence.

## 9. Conclusion

*It has been found that the Team had carried out the work which was not in the scope for Restoration works for Rakiraki. The Team failed to report the unauthorized works being carried out on Salen Chand's property which was contrary to the restoration works assigned to them. This was a blatant breach of the Authority's policies and procedures.*

*By engaging unqualified personnel to carry out electrical repairs to the customer's installation, they displayed recklessness, and disregard for the safety of the employee(s), casuals, the safety of the customer and his family, and more so the safety of persons carrying out the installation. Their actions also exposed FEA to high risk, and claims by the customer or other residents in that vicinity for any potential damages/losses. The fact remains that the CEO of the Authority had seen the **UNAUTHORIZED** work at Salen Chand's residence and by querying further, he immediately knew that Noneel Prasad and the 2 casuals were not authorized or supposed to be attending to the service main for Salen Chand.*

*It was evident that UNAUTHORIZED works were being done, and this is a blatant breach to the instructions given by the Authority specifically for restoration works only.*

*It was evident that:*

- *They failed to adhere to FEA's Safety Manual;*
- *Failed to follow the Authority's Policies and Procedures, Circulars, and*
- *Failed to comply with their Employment Contracts with the Authority".*

18. Following the Report, the worker was dismissed. His termination letter was issued on 27 June 2016 effective 30 June 2016.

***Tribunals Findings***

19. The Tribunal started by determining what the worker was doing inside Salen Chand's house and whether his actions amounted to carrying out unauthorized works. The Tribunal said that it accepted the evidence of the employer's General Manager Mr. Jitendra Kumar that he was told by the casual worker Mr. Mishal Melvin Singh initially that the worker and one other casual worker Mr. Amol Raj had been undertaking electrical works within the house of Salen Chand.
20. The Tribunal said that although the General Manager's evidence was hearsay, there was other evidence to suggest that some house wiring works were being undertaken at Salen Chand's property.
21. The Tribunal said that this evidence was established through the worker's own hand written statement where he had said that:

*"...on Friday 29<sup>th</sup> April 2016 Mr. Shymal Bhan told me to drop casual staff to Mr. Salen Chand's residence at Rakiraki for house wiring.*

*When I visited Mr. Salen Chand's residence then he told me that he has spoken to Shymal about his service main and to drop the ladder on Saturday morning 30 April 2016."*

22. The Tribunal found that the CEO did not see Mr. Amol Raj at the property is suggestive of the fact that the worker and Mr. Amol Raj were inside the house and perhaps some "internal house wiring" was being undertaken.
23. The Tribunal found that the worker's action amounted to carrying out unauthorized duties. The Tribunal accepted and found that the works undertaken at a private residence would not have been authorized. If it was the case that the Restoration Work also consisted of house wiring, then such a situation would have been more obvious to employer.
24. The Tribunal did not accept the worker's evidence that he was under duress from his supervisor Mr. Shymal Bhan when he gave the statement to the employer. The worker had testified during the trial

that Shymal Bhan was standing beside him and telling him what to write. The Tribunal rejected his evidence as incredible and stated that there is simply no plausible reason why the worker did not articulate his claim of duress either following his termination, in his initial pleadings, or in his revised or Supplementary Affidavit.

25. The Tribunal found that the likely scenario to the situation was that Mr. Salen Chand was an acquaintance of Mr. Shymal Bhan as he worked at the accommodation in which the worker's camp was based.
26. The Tribunal concluded that both Mr. Shymal Bhan and the worker would have been well aware that to provide any such assistance to Mr. Salen Chand was outside their remit. This was a private residence that was not part of the then current scope of priority works. Whether the worker was directed to Mr. Salen Chand's home by Mr. Shymal Bhan or whether he had been part of a wider discussion perhaps involving both men, the Tribunal found, was probably not that material.
27. It was the Tribunal's finding that if the worker had any concerns, he could have just contacted the Network General Manager Mr. Jitendra Kumar and raised that with him. There was no evidence of any attempts by the worker to do so. The Tribunal said that when the worker was apprehended at Salen Chand's home, the worker could have very easily explained the entire situation to the CEO. He could have informed about being directed by Shymal Chand to perform certain functions. The Tribunal said that there again was no such evidence and one must really question why. The worker did not appear to tell the CEO that Mr. Amol Raj was also inside the house at the time.
28. It was therefore found by the Tribunal that the more plausible situation was that Mr. Raj was also inside the house at the time and that the worker was quite complicit in this activity. He was part of providing unauthorized electrical works while otherwise being required to perform the duties allocated to him as part of the employer's restoration action plan.
29. The Tribunal accepted the evidence of the employer that the internal wiring works that were likely to be undertaken were completely outside the activities that FEA employees were authorized to perform. The worker, according to the Tribunal, would have been well aware of that fact.
30. The Tribunal said that the connection of the consumer mains to the service pole, required a regulatory permit. Again the worker would have been aware of that fact, yet he knowingly transported other casual workers to Mr. Salen Chand's home, to undertake that work.

31. Regardless of whether those persons may have been qualified electricians or not, they were not authorized to perform the "outside work" without a permit. Perhaps more importantly, the employer, let alone the people of Fiji, would have expected that the services of these special purpose personnel were being deployed to undertake the specific priority work for which they were engaged and here Mishal Melvin Singh's evidence was that he spent a long period of time chatting and being on Facebook. The Tribunal said that this would hardly be any consolation to the thousands of consumers still without power.
32. The Tribunal said that the question is determining whether or not the justification of the dismissal exists, must be considered looking at the proportionality of the punishment, having regard to the specific conduct.
33. The worker, the Tribunal reflected, seemed to rely on the "Nuremberg Defence", insofar as he claimed that he was instructed to undertake the activities at the behest of Mr. Shymal Bhan. That is not accepted, remarked the Tribunal.
34. The worker had been an employee for in excess of 15 years. He was trained in the organization and would have had good access to the Network General Manager, should he have needed to consult with him at any time. He could have sought the counsel of Mr. Cheer, his Team Leader. He could have contacted his Union. The Tribunal said that he appears to have done none of this.
35. Having said that, the Tribunal expressed concern about some of the manner by which the Disciplinary Inquiry took place, particularly if it was the case that all of the individual employees sat in the same room, whilst supposedly providing candid and truthful accounts of what had transpired.
36. Another concern, the Tribunal said was if it was the case that the worker provided his signed statement to Mr. Bhan and not an independent third party. Clearly opportunities to allege duress and lack of disclosure were always going to be available in such circumstances. That opportunity could have been easily avoided through effective and well applied human resource practices. The fact that the two casual workers provided a joint statement to the Authority, was also highly clumsy.
37. The Tribunal said that Mr. Mishal Melvin Singh had been outside when the CEO had arrived. Mr. Amol Raj was believed to be inside the house. Those issues should have been explored by the investigators. The Tribunal remarked that they certainly do not flow out of the joint statement provided.



38. The Tribunal said that one additional area of concern, related to the evidence of Mr. Paul, the General Secretary of the Union of which the worker was a member of. The Tribunal said that Mr. Paul seemed quite insistent that the General Manager Human Resources had indicated that the situation could be resolved without the need to terminate the worker. The Tribunal said that that is unfortunate if that discussion had taken place, but the CEO was free to form his own view as to the seriousness of the issue and the consequences that should follow once armed with all relevant information. The Tribunal said that the problem was that the investigation did have “gaps” and the advice provided to the CEO, could have been more thorough in some areas and more objective in others.
39. The Tribunal said that one further issue that was raised by Mr. Paul concerned the reliance by the employer upon a process that was located in a Collective Agreement that otherwise should not have applied to the worker. A brief exploration of that issue by the Tribunal revealed that the parties were still involved in discussions pertaining to the development of a new agreement. The Tribunal said that while the point raised was clearly a valid one, it was of the view that nothing significant results from the employer “administratively” relying on a process that was otherwise well known and utilized in the context of other workers.

#### *Grounds of Appeal and Analysis*

40. The first ground of appeal is that the Tribunal erred in law when it dismissed the employment grievance based on assumption without properly analyzing the evidence that was adduced during the hearing which established that the worker was not performing any unauthorized works on 30 April 2016.
41. In analyzing whether the worker was carrying out any unauthorized work, the Tribunal did not base its findings on any assumptions. It arrived at that finding in reference to the evidence. It found the worker’s evidence incredible. The worker had admitted in his earlier statement to the employer that Mr. Shymal Bhan told him to drop the 2 casual staff to Mr. Salen Chand’s residence at Rakiraki for house wiring. The worker then blamed the Line Co-ordinator Mr. Shymal Bhan for making him write that statement. Why would Shymal Bhan force him to write that statement about house wiring when his own statement to the employer was that he did not give any instructions to do the repair works but to either secure or disconnect the service main. This was enough to doubt the worker’s evidence that he was under duress to write that statement.
42. The worker could have clearly explained to the CEO at the time of being confronted why the casual worker Mr. Mishal Melvin Singh was working at the service main. One aspect is very clear that the

worker was part of the team that was carrying out unauthorized works at a customer's service main which was not their authorized work. He was, and so was the casual worker, unauthorized to perform such a task. He was in direct breach of the *Network Circular No. 1 – Service Mains Reconnection* issued on 24 October 2014. If he was not aware of this, at least he knew that the scope of the *Restoration Works* did not permit him there at Salen Chand's residence.

43. Given the evidence, it was open to the Tribunal to accept that the worker was in direct breach of the employer's instructions.
44. Ground 2 of the appeal states that the Tribunal erred in law and in fact when it took into consideration the hearsay evidence of the employer that was given during the hearing and was not substantiated with facts in arriving at the said decision. The issue of employer's hearsay evidence was referred to in paragraph 22 of the judgment.
45. The worker has not refuted that he was found by the CEO at Salen Chand's residence and one of the casual workers was working at the service main that was not the authorized work. There is hardly any hearsay evidence involved in arriving at that fact finding.
46. In ground 3, it is alleged that the Tribunal erred in law and fact when it unfairly shifted the onus of proof on the worker when the burden of proof in dismissal cases vests with the employer.
47. I do not find any instance where the Tribunal had shifted the onus of proof and the burden of proof. The entire judgment reflects that the Tribunal required the employer to establish that it had lawful and justified reasons to terminate the worker. Paragraph 26 is reflective of that. It reads:

*"In Parvinesh Kumar v Namuku Atberge Resort Fiji [2017] FJET 2 at [24] to [27] this Tribunal stated:*

*The question post Central Manufacturing v Kent, where a new regulatory regime is installed, must be can the dismissal be justified? The initial question to ask is not how the dismissal takes place, or what is relied on as part of the process, but whether the reasons for giving rise to the decision to terminate are justifiable. The concept of whether or not a termination or dismissal at work is justifiable or not, has been enshrined in international labour law for many years. The Termination of Employment Convention, 1982 (No. 158) adopted at the 68<sup>th</sup> International Labour Convention session in Geneva sets out within Part II, Division A, a framework for assessing whether or not a dismissal is justified. Article 4 for example, provides that "The employment of a worker shall not be terminated unless there*

*is a valid reason for such termination concerned with the capacity of conduct of the worker or based on the operational requirements of the undertaking, establishment or service...*

*The concept of what constitutes a justifiable decision within the meaning of Section 230(2) of the Promulgation, could well canvas such concepts as to whether the dismissal decision was sound, defensible or well founded; not capricious, fanciful, spiteful or prejudiced."*

48. Ground 4 states that the Tribunal erred in law and fact when it decided at paragraph 19 of the judgment that the issue of procedural fairness is not necessary when this aspect is a fundamental ingredient of the principles of natural justice.

49. The appellant's counsel is decontextualizing what the Tribunal had said. It had stated as follows:

*"Without wanting to become too pedantic in these matters, the issue of procedural fairness is not necessarily a central feature to the analysis, even though it is clearly a preferred way of doing things from a human resource or industrial relations point of view. The scope of the inquiry is limited to whether the dismissal was justified and whether it was undertaken in a fair manner."*

50. This was a case of summary dismissal and the procedure in terminating the worker is outlined in the ERA. The worker did not raise any issues regarding non-compliance of the procedure. Following the evidence, the Tribunal identified that the central issue was whether the termination was justified and undertaken in a fair manner. The appellant of course cannot bring new grounds of procedural defect in the appeal.

51. In the preliminary submission of the employee, the lack of procedural propriety was submitted to be the statement in the suspension letter of 2 June 2016. It was argued that the suspension letter had stated that the worker was suspended until termination. Mr. Nair argued that the view to terminate the worker was already formed and that was wrong on the principles of good faith. In the closing submissions, the complaint was that the CEO played the role of the complainant and the judge. Nothing about non-compliance of the law was alleged.

52. Although the suspension letter stated that the worker is suspended until termination and the CEO was the complainant in the case, the Tribunal had ultimately decided whether the reasons for termination was justifiable. Against that independent finding, the complaint by the worker that the employer had

already formed a view to terminate him and the CEO was the complainant in this matter thus tainting the fairness of the process does not hold merit.

53. Ground 5 of the appeal states that the Tribunal erred in law and in fact when it gave undue weight to the unauthenticated letter by the worker and disregarded his sworn testimony in court and the affidavit.
54. It is incorrect to suggest that the letter by the worker was unauthenticated. The Tribunal had assessed all the evidence including the letter or shall I say statement of the worker given at the investigation stage. That letter was very much part of the evidence. The worker had written it so it was authenticated. He claimed he did so under duress. That was rejected by the Tribunal on the basis of credibility. I have explained earlier why the worker's evidence on duress is unacceptable. In any event, the crux of the finding is that the worker did not deny being at a place where he was not authorized and dropping off a casual worker to do unauthorized works. That was enough for the employer to take action against the worker. He was a complicit in getting unauthorized works done. The casual worker was playing with electricity. He was not even authorized to be working at the customer's service main nor was the worker. This could expose everyone to huge risk including the employer. Only trained personnel were authorized to work at service mains.
55. Ground 6 alleges that the Tribunal erred in law and in fact when it dismissed the grievance despite his own findings that the investigation process was not objectively carried out and contained inconsistencies.
56. The shortfall in the investigation process was an observation made by the Tribunal but that does not impeach the Tribunal's findings on the substantive issue that the reasons for the dismissal was justified.
57. Ground 7 states that the Tribunal erred in not holding that due process was not followed in deciding that the worker was guilty and that the process was tainted with bias and lacked independence and impartiality.
58. The appellant's counsel overlooks that being heard by the employer was a privilege that was extended to the worker. In summary dismissal cases, that privilege is hardly extended to workers. This was a case where the worker was seen by the CEO as part of the team defying instructions of the employer to do work which they were prohibited from performing. There is no denial of this. That single incident is enough for the employer to carry out the termination as the breach was very serious. Like I said, it

exposed everyone to a huge risk. The casual workers could lose their lives as they were not trained by the employer to work on a customer's service main.

59. Ground 8 states that the Tribunal erred when it relied upon the statement of Mr. Joe Cheer who did not give evidence and denied the worker a fair hearing. The statement of Joe Cheer was used to reflect that the worker had left the camp around 1pm. It was also used to reflect that it was not clear from Joe Cheer's statement as to who supervised the 2 casuals. Making those observations from Joe Cheer's statement does not in any way affect the findings of the Tribunal on whether the worker was carrying out unauthorized works. The worker does not refute that he was seen by the CEO at Salen Chand's house. He was not even supposed to be there. He was to carry out Restoration Works. His defiance of the employer's instructions is the main matter.
60. Ground 9 states that the Tribunal erred in law and in fact when it disregarded the sworn affidavit of Mr. Salen Chand who confirmed that there was no unauthorized electrical works carried out at his residence.
61. Firstly, it is immaterial whether electrical works were being carried out at Salen Chand's house. It was clear that the worker was part of a team carrying out unauthorized work at the customer's service main. No one had the permission of the General Manager Networks, Mr. Jitendra Kumar who had earlier prohibited such actions.
62. Secondly, Salen Chand's evidence was not tested. He filed an affidavit and did not come to the trial to tender full evidence. Filing of the affidavit is not enough. Once an affidavit is filed, the evidence is open to challenge. Salen Chand became the worker's witness. It was therefore upon the worker to produce his witnesses to give evidence. If he did not, the employer could just ignore the evidence on the grounds that it was not provided with an opportunity to test the evidence. The worker's counsel is unfairly expecting that that evidence be given weight.
63. Ground 10 of the appeal states that the Tribunal acted unfairly and unreasonably by not upholding that the employer had already determined the fate of the worker when he was suspended from his employment without pay from 03/06/2016 for 28 days pending termination and was terminated on 30/06/2016 therefore the purported process of hearing was merely academic. I have already addressed this before and need not revisit the same.
64. Ground 11 of the appeal states that the Tribunal erred in law and fact by making references to the Nuremberg Defence which was not relevant and insignificant in view of the facts surrounding the case

of the worker. Nuremberg Defence was raised by the worker which required the Tribunal to deal with it. The worker said that he was following the orders. The Tribunal found that that was not appropriate to rely on as he had been in the employ of FEA for over a decade. He could have contacted the proper personnel and advised him of the superior orders to carry out unauthorized works. If the Tribunal did not address this, the worker's counsel would be appealing that his explanations were not considered.

65. It is not proper for counsel to raise concern if a presiding officer is asked to determine an issue raised by a party. In this case, the issue of "superior orders" and "I am therefore not at fault" was raised by the worker himself. Why should the Tribunal not consider it?

***Final Orders***

66. I do not find any merits in the appeal. I dismiss the appeal. Each party shall bear their own costs of the appeal proceedings.



A handwritten signature in black ink, appearing to read "Anjala Wati".

***Hon. Madam Justice Anjala Wati***

**Judge**

**30.05.2024**

*By:*

1. *Mr. D. Nair for the Appellant.*
2. *Messrs Sherani & Company for the Respondent.*
3. *File: Suva ERCC 12 of 2017.*