

**IN THE EMPLOYMENT RELATIONS COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

**CASE NUMBER:** ERCA 31 of 2017

**BETWEEN:** **FIJI NATIONAL UNIVERSITY**

**APPELLANT**

**AND:** **MESAKE NACOLADOUBOTA**

**RESPONDENT**

Appearances: Mr. B. Singh for the Appellant.

Ms. L. Mataigusu for the Respondent.

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

Coram: Hon. Madam Justice Anjala Wati.

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**JUDGMENT**

**Catchwords:**

*Employment Law – Appeal – whether the Tribunal was correct in arriving at a finding that the procedure to terminate the worker was wrong in law making the dismissal unfair- is a worker entitled to be heard in a case for summary dismissal.*

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***Cause***

1. The employer appeals against the decision of the Tribunal wherein it found that the termination of the worker was lawful but unfair. It ordered the employer to pay the worker 3 month's wages within 14 days of the decision.
2. The worker ("**Mesake**") was employed by the Fiji National University ("**FNU**") from 18 June 2012. He was employed as a General Manager of Unifarm.

3. Mesake was summarily terminated on 27 January 2016. The reasons for termination of the worker is outlined in the letter of 27 January 2016 summarily terminating him from work. The precise reasons for termination was dishonesty and theft.
4. It was alleged that the worker had colluded with one Amit Lal of Small Works. Mesake was alleged to have obtained a contract for grass cutting for \$3,500. He used the staff of the employer to cut the grass. He received a sum of \$3,500 under the name of FNU. He pocketed \$3,000 from that price and used it for the 2015 Christmas Party for the staff and himself.
5. He was also alleged to have permitted the slaughter of a pig from the farm belonging to FNU to be consumed during their 2015 Christmas Party. He ordered that the pig be recorded as dead as he was already under directions from the Chancellor not to consume any livestock from the farm. The worker was also alleged to have used root crops from the farm. He was said to have signed the stock variance card but refused to accept accountability for it.

#### ***Tribunal's Findings***

6. The Tribunal found that the worker had admitted both in examination in chief and in cross examination that he did have a pig slaughtered from the Unifarm's stock and the same was recorded as dead. The worker had agreed that he was specifically advised by the Vice Chancellor that he could not use any meat from the farm's stock as it was against the University's Policy.
7. The Tribunal also referred to the allegation of pocketing \$3,000 as grass cutting money. The Tribunal found that the worker had admitted that he wanted to throw a grand Christmas party for his staff and Amit Lal had assisted him by contracting the farm workers to do the work.
8. The Tribunal found that there was lawful cause to terminate the worker.
9. It also stated that it will determine whether the process undertaken to arrive at the decision to terminate the worker was fair. The Tribunal found that the employer fell short in ensuring that the worker was given an adequate opportunity to respond to the allegations. It also found that after the initial meeting with the worker, the employer failed to give an opportunity to the worker to respond to its findings.

***Grounds of Appeal***

10. The main concern on appeal is that the Tribunal had wrongly arrived at the finding that the termination was unfair when this was a case for summary dismissal for dishonesty and theft.
11. The employer says that the process for summary termination is set out by the law and complied by the employer.
12. The employer says that it carried out the termination fairly. The orders for the compensation of 3 month's wages are not justified.

***Law and Analysis***

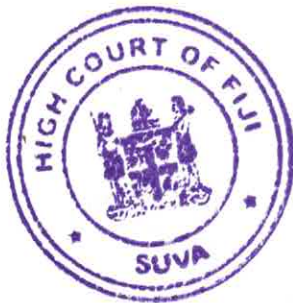
13. The worker was terminated for dishonesty and theft. He was found by the Tribunal to have been dishonest and stolen from the employer. The worker does not appeal that finding. I therefore do not need to address the findings of the Tribunal so far as it concerns whether the employer had a lawful cause to terminate the worker.
14. On the appeal, I am required to however examine whether the Tribunal's findings that the employer did not follow the procedures in carrying out the termination is correct.
15. This was a case for summary dismissal. In a summary dismissal case the law does not impose on the employer a duty to provide the worker with an opportunity to respond to the allegations. I am also not convinced that there was any contractual provision imposing such an obligation.
16. In some allegations, the evidence before the employer may be so convincing that it can dismiss the worker instantly without hearing him or her. In other cases the employer may wish to carry out an investigation to ascertain the truth of the allegations.
17. In a situation where the employer wishes to carry out the investigation to ascertain the correctness of the allegation, it may hear some of the people including the staff and the worker. It can choose whether it will hear the worker. Being heard is not a right of the worker as sometimes the grant of a hearing to the worker can be prejudicial to the employer.

18. As an illustration, in a case where a worker is alleged to have been leaking trade secrets, if a worker gets to know that the employer is going to carry out an investigation, he or she can damage or destroy the evidence or interfere with the process of an independent investigation.
19. The employer may proceed to carry out summary dismissal without hearing the worker if it has sufficient evidence before it to satisfy that there is a lawful cause. An employer can also choose to hear the worker. It is not mandatory to hear the worker. It all depends on how satisfied the employer is with the evidence before it.
20. In this case the employer gave the worker an opportunity to respond to the allegations. I therefore cannot fathom the basis on which the Tribunal found that the worker was not given an adequate opportunity to respond to the allegations. The worker had testified that he was being questioned by the employer.
21. I have seen the interview questions tendered in evidence. It is detailed. It has specific allegations. The worker is given an opportunity to answer every allegation. He was aware of the investigation against him. He was given the opportunity to present his side of the evidence to the employer. He was not denied the process of being heard although it is not a requirement to be heard in summary dismissal cases.
22. The Tribunal found that the employer also had to hear the worker after its initial findings. There is no requirement that the employer hears the workers again after its initial findings.
23. The Tribunal erred in coming to a finding that the worker was not given an adequate opportunity to respond to the allegations and that he was not given an opportunity to respond to the findings of the employer. The process for summary termination is outlined in the Employment Relations Act 2007. None of the provisions was referred to in the findings and found to have been breached.
24. I wish to finally say that in assessing the lawfulness of the termination, the Tribunal must look at whether the employer's reasons for terminating the worker is justified and whether the process outlined by the law is followed.
25. In assessing the fairness of the termination, the Tribunal had to see whether the conduct of the employer in carrying out the termination was proper. If the manner in which the termination was carried out caused the worker humiliation, loss of dignity and injury to his feelings, the employer will be said to have unfairly terminated the worker.

***Final Orders***

26. In the final analysis, I make the following orders:

- a. I allow the appeal.***
- b. I set aside the findings and orders of the Tribunal on unfair dismissal.***
- c. Each party to bear their own costs of the appeal proceedings.***



*Anjala Wati*

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

**Judge**

**30.05.2024**

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**To:**

- 1. Fiji National University, Legal Department for the Appellant.***
- 2. Ministry of Employment, Productivity and Industrial Relations for the Respondent.***
- 3. File: Suva ERCC 31 of 2017.***