

IN THE EMPLOYMENT RELATIONS COURT AT SUVA
APPELLATE JURISDICTION

CASE NUMBER: ERCA 03 of 2018

BETWEEN: **FIJI NATIONAL UNIVERSITY**

APPELLANT

AND: **PENAIA ROGOIMURI**

RESPONDENT

Appearances:

Mr. B. Singh and R. Chand for the Appellant.

Ms. L. Mataigusu (Labour Officer) for the Respondent.

Date/Place of Judgment:

Thursday 11 July 2024 at Suva.

Coram:

Hon. Madam Justice Anjala Wati.

JUDGMENT

Catchwords:

Employment Law – Appeal – whether the tribunal was correct in arriving at a finding that the worker was unfairly terminated from work and is the award of lost wages for 10 months justified.

Cause

1. This appeal is an appeal by the employer against the decision of the Tribunal that the worker Mr. Penaia Rogoimuri was unlawfully terminated from work. The employer was ordered to pay to the worker 10 months lost wages for unlawful termination.
2. Mr. Rogoimuri was employed by the Fiji Institute of Technology. Upon merger, he was employed by Fiji National University as a Lecturer in Electrical Engineering.

3. The basis of his termination was that in 2015, before his students sat for the final exams, he gave to the students, 2014 final exam paper for revision and that the 2015 final exam paper eventually had 75% similar questions as the 2014 final exam paper.
4. The termination letter of 21 December 2015 reads as follows:

“Re: Summary Dismissal

It is alleged that you gave the test paper to the students for revision whereby from the same test paper you selected and placed 75% of the questions to the Final Exam papers.

It is noted that the students have admitted that the revision paper contained questions that came in the Final Exam papers.

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. 29 on Code of Conduct Policy inter alia states:

- 7.1 *The University expects its employees to conduct themselves within the laws of Fiji, and within the policies and regulations of the University.*
- 6.1.2.2 *Avoiding behavior which might impair their work performance or reduce learning opportunities for students.*
- 9.1.6 *Providing students or others, or being involved with one or more people in providing students or others knowledge, without authority, and/or discriminately, about the contents on examination papers before the examination date.*
- 8.1.5 *Gross misconduct: This comprises one or more serious breach(es) of University policy(ies) or regulation(s), or a conduct that causes, or has the potential of actually or potentially creating an adverse impact on the reputation and/or stature of the University. Gross misconduct includes conduct that involves:*
 - 8.1.5.11 *Cheating or doing anything which may assist a person to cheat in relation to assessment, research, publications or consultancy, including but not limited to plagiarism.*

After reviewing the allegation against you we are of the opinion that you had committed a wrongful act of providing the questions in advance to the students before the exam which is classified as gross misconduct as defined by section 8.1.5 of the FNU HR Policy No. 29.

Given the above and in our considered view, your conduct falls under section 33(1)(a) and (d) of the ERP 2007 and section 8.1.5, 8.1.5.11 and 27.2(a) of the FNU HR Policy No. 29 in which this conduct is classified as Gross Misconduct and the penalty is summary termination of employment.

Therefore, as of 21st December, 2015 your employment is terminated with immediate effect.

You are required to duly complete the Exit Form and hand over to the Acting Dean CEST, together with all FNU property in your possession”

5. The internal memorandum of 3 October 2015 by HR- IR to Acting Direction Human Resources reveals the specifics that Mr. Rogoimuri used the MEC 557 Trimester 3, 2014 papers for revision and gave a copy to the students before the exam. He also prepared the MEC 557 Trimester 3 2015 papers where 75% of the questions were similar.

The Tribunal's Findings

6. The Tribunal found that at the trial the employer could not establish that the revision paper had 75% similarity in the final exam paper. It found that no concrete evidence was provided to this effect.
7. The Tribunal also found from the evidence that after a lecturer prepares a paper, it goes through the Moderator for checking. The particular moderator for the exam paper prepared by Mr. Rogoimuri was not called to give evidence to testify that the revision and exam papers were similar.
8. The Tribunal said that the moderator's opinion was also not sought.

9. It was found by the Tribunal that no moderation policy or guidelines or checklist was presented to the Tribunal to see what guided the Moderator. If the Moderator and the Head of School endorsed the Exam Paper, the lecturer could not be blamed.
10. The Tribunal also said that there should have been evidence on the role of the Head of School in endorsing the Exam Paper. Was there a checklist or policy to follow was an issue that was not addressed by the employer.

The Appeal

11. The crux of the appeal relates to the Tribunal's findings on unlawful dismissal and the remedies.
12. The employer says that there was sufficient evidence in form of examination papers to establish that the two papers were similar. It also asserts that 10 months wages is not justified.

Law and Analysis

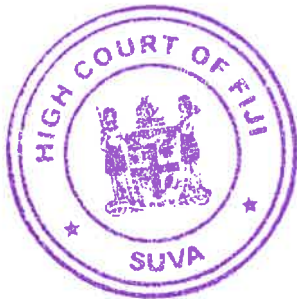
13. I must first set the facts straight. The allegation against Mr. Rogoimuri was that he gave the students Trimester 3 2014 Exam Papers for revision and out of that paper he reproduced 75% questions in the Trimester 3 2015 Exam Paper.
14. The issue is where is the breach? The Tribunal is correct in finding that the employer has not forwarded any policy/guidelines/directions/checklist to the Tribunal which prohibits lecturers from using past years exam papers as revision papers. In fact, these days, past year's exam papers, is used by students to prepare for their exams. This is common knowledge.
15. The second issue is can questions from past years papers be repeated in future exam papers and to what extent can it be done?
16. The evidence of the worker is that only 50% of questions were repeated. That was not refuted by the employer with any cogent evidence.

17. Whatever percentage of the questions were repeated, my concern is the same as the Tribunal's: Where is there any guideline that certain percentage of the questions cannot be repeated from past years exams papers? The Tribunal was not furnished with any such guideline. Even the Lecturers do not have that guideline.
18. There is no policy in place that was followed by the University guiding the Lecturers on how to prepare the exams. If there is, none was produced in evidence. It is only on the basis of a clear policy that a breach of the nature alleged could be raised. . In absence of a clear policy, it is improper for the employer to arbitrarily assert a breach and disadvantage a worker who has decades of teaching experience and preparing exam papers.
19. Further, the evidence unfolded that once a lecturer prepares a paper, it goes through the Moderator and the Head of School. The Moderator plays a role in checking the paper.
20. Again no policy or guideline was tendered in evidence to show what a Moderator does. What is his or her role? There was also no policy to indicate the role of the Head of School.
21. If the exam papers go through 2 other qualified personnel, then they ought to have checked if there was any breach of policy which should include checking of the reproduction of questions from past years papers. The modern day technology can easily detect plagiarism. Why did the Moderator and the Head of School approve the exam paper?
22. I am firmly of the view that if there was a policy against repetition of questions to any extent, the Moderator and the Head of School ought to have refused to sanction the exam paper. There was no policy for anyone to follow and that is why the paper went through to the final stage.
23. If there is common knowledge or particular practice then again the Moderator and the Head of School would have known about it. There is no evidence of any established common knowledge or practice to assert a breach. The employer had no justifiable reasons to terminate the work of the worker.
24. On the question of damages, I find the 10 months wages to be justified. It was 1 ½ years in termination when the matter was heard. There is no evidence that the worker found suitable

work in the 10 months. During the hearing, the worker said that he worked on his farm and at times drove taxi to meet the needs of his family. He had to. He mitigated his loss by working on the farm and driving taxi but he could not find a permanent employment. The 10 months loss in wages is as a result of the unjustified dismissal. I do not find any basis to disturb the award.

Final Orders

25. In the final analysis, I do not find any merits in the appeal and dismiss the same. I order the employer to pay to the worker 10 months lost wages with 4% post judgment interest for 2½ years within 21 days (*date of judgment of Tribunal to date of hearing of appeal*).
26. The employer shall also pay to the worker costs in the sum of \$5,000 within 21 days.



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Hon. Madam Justice Anjala Wati

Judge

11.07.2024

To:

- 1. Fiji National University, Legal In-House, for the Appellant.***
- 2. Ministry of Employment, Productivity and Industrial Relations for the Respondent.***
- 3. File: Suva ERCA 03 of 2018.***