

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA.
EXERCISING CIVIL JURISDICTION**

CIVIL ACTION NO. ERCC 05 of 2019

BETWEEN : **EITESH SHARMA** of Namosau, Ba, Unemployed. **PLAINTIFF**

AND : **SOUTHERN CROSS FOODS LIMITED**, a limited liability company
having its registered office at Lot-1, Wailekutu Fiji. **DEFENDANT**

BEFORE : Hon. Justice A.M. Mohamed Mackie.

APPEARANCES : Mr. Padarath N. with Ms. Devi R. For the Plaintiff.
Mr. Kumar A. with Mr. Khan A. for the Defendant.

DATE OF TRIAL : 15th May 2025.

SUBMISSIONS : Not filed by the Plaintiff.
Filed by the Defendant on 30th July 2025.

JUDGMENT : Delivered on 7th October 2025.

JUDGMENT

A. INTRODUCTION:

1. This is an action commenced by way of Writ of Summons and the Statement of claim dated and filed on 7th August 2019, against the Defendant Company seeking the following reliefs;
 - a. *Damages for breach of contract, unlawful and unfair dismissal.*
 - b. *Damages for humiliation, loss of dignity and injury to feelings as a result of the breach, unlawful and unfair dismissal.*
 - c. *Costs.*
2. Having filed the acknowledgement of service on 26th August 2019, the Defendant Company (“the Defendant”) on 06th September 2019 filed its Statement of Defence cum Counterclaim and moved, *inter alia*, for;
 - i. *An Order for dismissal of the Plaintiff’s claim;*

2. The incident of dispatching goods on **27th of February 2014**, without Quality Assurance Clearance, on which a suspension period of 2 weeks was imposed on him as evidenced by the letter dated **28th February 2014** and marked as **“Pex-2”**.
- e. In relation to the aforesaid latest incident occurred on 21st March 2015, a Police Complaint was lodged on the same day by **Ms. Renaz Rehman** (Finance Manager) (DW-1), following which a Statement was recorded from one **Ashwita Chand** (Group HRO Officer), and one **Kamal Krishna** (a Driver) and one **Abinesh Lal** (delivery boy) were interrogated and interviewed, who had revealed that it was Mr. EITESH SHARMA, as the team Leader, (the Plaintiff hereof) had called them for loading of those goods.
- f. By the letter dated 15th September 2015, marked as “D-2” and addressed to **Ashwita Chand**, the Crime Sergeant of Ba Police Station had informed that the investigations have revealed that Mr. Eitesh Sharma, without any documentation had loaded the goods, but the offence of theft could not be proved as the goods did not leave the premises. It was also stated that, according to the Plaintiff Mr. Eitesh Sharma, it was only an entrapment used by him, wherein he claimed to have acted as a decoy, and the relevant investigation in this matter was completed and the file was closed.
- g. The Plaintiff claimed that, after two or three days of the incident on 21st March 2015, he had gone on leave for one week, and when he returned for work as normal to the factory, the Security Officer stopped him, talked to him rudely and told him that he can't go into the factory.
- h. That on his request, a call was made to his supervisor **Mr. Shanil Pratap** from the Security point, who in turn told him to wait for a Minute, after which Ms. Renaz Rehman called back and told him that he should take leave till they sort out the case and let him know.
- i. By the letter dated 12th June 2015 and marked as “Pex-3”, he was informed by the Company that the Noodles case was still under investigation at the Police Head Quarters in suva , and they will let him know of the outcome.
- j. After the said letter, having waited for further two to three weeks, he met **Mr. Bishawar Sharma**, at a Rugby Tournament held in Suva, and thereafter, with a prior appointment, met him at his REWA Dairy Office, who told him that the case was still under investigation and would let him know the outcome.
- k. As the matter was still pending and he was not given a Termination Letter. Finally, after sending the “Pex-7” letter through his Lawyers demanding a sum of **\$60,743.00**, he went to the Labour Officer, and pursuant to the non-settlement at the mediation as evidenced by “Pex-5”, his grievance was referred to the Employment Tribunal of Lautoka.
- l. The plaintiff, admittedly, did not go for alternative dispute resolution process prescribed in the Employment Agreement. His grievance at the Tribunal was finally

dismissed on withdrawal of the same owing to the monetary jurisdictional issue raised therein, however with an order for costs in a sum of \$1,500.00 payable by him to the Defendant Company. This sum of costs remains still unpaid and the Defendant has included the same in its Counterclaim in this action. The Defendant's counterclaim also includes the claim of one month's salary from the Plaintiff on account of the alleged termination of the employment by him, without one-month prior Notice as per the Agreement.

C. THE TRIAL:

5. At the one-day trial held on 15th May 2025, the Plaintiff gave evidence on his behalf by marking exhibits from “Pex-1” to “Pex-9, which are enumerated as follows;

1. *“P-ex-1”- The Employment Agreement dated 14th April 2011.*
2. *“P-ex-2”- The letter dated 28th February from the Defendant to the Plaintiff.*
3. *“P-ex-3”- The letter dated 12th June 2015 from the Defendant to the plaintiff.*
4. *“P-ex-4”- The letter dated 05th August 2015 from Crime officer-Ba to the Labour Officer.*
5. *“P-ex-5” - The Certificate of Mediation dated 29th September 2015.*
6. *“P-ex-6”- Letter dated 08th October 2015 from Messrs. SAMUEL K RAM to the Defendant Company.*
7. *“P-ex-7”- Letter dated 23rd May 2016 from Messrs. SAMUEL K RAM to the Defendant Company.*
8. *“P-ex-8”- Plaintiff's Salary Slip from 9th Feb to 15th Feb 2015.*
9. *“P-ex-9”- Letter dated 5th March 2015 from the Defendant to the Plaintiff on wages Review.*

6. On behalf of the Defendant, the Financial Controller, Ms. Rinaz Rehman (DW-1), gave evidence, by marking exhibits from “D-ex-1” to D-ex-4, which are enumerated as follows;

1. *“D-ex-1 “The Employment Agreement dated 14th April 2011.*
2. *“D-ex-2” Letter dated 14th September 2015 from Crime Sergeant, Ba addressed to Ashwita Chand.*
3. *“D-ex-3” The letter dated 21st November 2012 from the Defendant addressed to the Plaintiff.*
4. *“D-ex-4”The letter dated 27th May 2016 from the Defendant addressed to the Crime Sergeant of Ba Police Station.*

D. EVIDENCE:

7. The plaintiff (PW-1) in his evidence stated, inter alia, as follows;

- a. That he joined the Defendant Company from 1st January 2011 as a dispatch clerk, he signed the “Pex-1” Employment Agreement on 14th April 2011, his role was receiving the finished goods from the factory, entering them into his system and dispatching them for the transportation, shipments and delivery from the Factory warehouse, among other responsibilities. He was promoted as the Team Leader of the Stock Department in 2015 and prior to this he had worked as a dispatch clerk for the Company under its previous owner “Nestle” for around 6 years.

- b. He was suspended in 2014 for two weeks by letter dated 28th February 2014 marked as “Pex-2” on the issue of loading of blocked AIO (all in one) Noodles without any authority. He described about the 2014 February 27th incident, inter alia, as per pages 8 and 9 of the transcripts as follows;

Page-08.

Q: So, it says here that in relation to this suspension, in regards to lack of responsibility by you and dispatchers, by loading blocked AI noodles on 27th, which was picked up by Lynette and loading. What does that mean? Loading, blocked. Did you load the blocked AI noodles?

A: Actually, that noodles which is blocked was ordered for a customer, for overseas export, was ordered for a customer. **And the shipment is about to leave, the boat is about to leave, we don't have much time. So, we loaded the other item in front. And this particular noodle we loaded at the back of the container and we didn't lock the container. We just load it.**

Q: So, when you say you loaded the other items, the other items had the green and the yellow sticker?

A: Yes.

Q: So, together with the green and yellow sticker, this blocked red items were also loaded into the container?

A: It was loaded at the back of the container.

Q: Where was the container located?

A: Container was located at the factory and it was on top of the truck.

Q: And was it locked?

A: **It wasn't locked. We didn't put the padlock because we were waiting for the release of that particular noodles.**

Q: And what happened after?

A: After that, we waited for the release, we were waiting for the response from the QA. If they approved, then we released. If QA, Quality Assurance approved that its container and release the truck for shipment. Because shipment was, **it was very urgent, we don't have much time for the shipment. So, we just loaded at the back of the container and we still wait for the response from the QA Department. If it's**

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then were going to release the container. If not, then were going to offload the container because we don't have much time for the shipment.

Q: What was the response from the QA Department regarding those?

A: Before QA Department give us any response, the Nestle compliance, she came and she saw the noodles loaded and she asked why we're loading the broken noodles. We told her that the shipment is about to move, about to leave and we won't release the truck. We wait for the response from the QA, Quality assurance Department. If it okay, then were going to release that. If not, then we are going to offload the noodles.

Q: And after the conversation, what happened? After the conversation with Lynette from Nestle compliance?

A: If I recall, I think the noodles were, the block was released from the QA Department and I think it was, the truck was released for export.

Q: So, it was, the entire shipment was released for export?

A: I think so, yeah. If I recall.

Q: Okay, that and this was, this happened on the 27th of February, 2014 as per the letter?

A: I think so.

Q: So, when this letter was served on you, what were you explaining?

A: Actually, the Operation Manager Radhika told us that Nestle compliance is there, they are very strict, so we have to issue something, a suspension letter or something like that. Yes, they do issue my letter and for these two weeks, the Operation Manager told me, you can come and sit in my office and do your normal job, but you cannot go to the warehouse. So, for these two weeks, all the two weeks, I went to my Operations Manager's office, I sit there, on her table, just beside on her table, and I worked, as my normal working procedure, I worked, I ordered everything, the container, loading, but I didn't go to the warehouse.

- c. Then PW-1 spoke about the latest incident on 21st March 2015 where he, admittedly, had loaded unauthorized and unapproved items to an outside vehicle, and with regard to the receipt of the "Pex-3" letter dated 12th June 2015 from the Defendant Employer informing that the Noodles case was still under investigation. He admitted that this was with regard to the theft at the Factory, which he was attempting to describe as planned decoy operation by him and the factory Management. (as per pages 11, 12, 14 & 15 of the transcript). He admitted that the incident occurred on a Saturday. It is to be observed that he was trying to paint a different picture about the incidents to justify the loading of unauthorized goods on both instances.
- d. He added that after this incident on 21st March 2015, he went to work for one or two days and got leave for one week and when he came back to job thereafter, the security did not permit to go in. He says further that after talking to the Supervisor Mr. Shanil Pratap, over the phone, Ms. Renaz called and told him to go on further leave until they inform about the outcome of the investigation. His evidence that he went to work for one or two days after this incident appear to be false.
- e. He also gave evidence about his going before the Employment tribunal, where due to the monetary jurisdictional issue he had to withdraw the application and the same was dismissed subject to a cost of \$1,500.00 payable to the Defendant.
- f. It was notable that during his examination in chief, he did not utter a word about the incident in the year 2012, where he was involved in the loading of unauthorized blocked Noodles to Frankies Samoa, upon which he was issued with the Disciplinary Action letter dated 21st November 2012 by the Defendant. This was marked as "Dex-3" during his cross examination.
- g. He further admitted that his appointment was subject to suspension, disciplinary action and termination by the Defendant Company as per clause 7 and 9 of the Agreement and also subject to the dispute resolution process as per clause 18 thereof.

- h. It was observed that when the Plaintiff was questioned under cross examination as to why the goods were loaded without authorization and necessary Quality assurance documentation, the witness appeared to struggling to answer. He admitted the failures in this regard on his part

Evidence of DW-1:

- i. Ms. Renaz Rehman, the Financial Controller of the Defendant Company, who had come to the scene of incident on 21st March 2021 from home after being notified as it was a Saturday, has given clear and convincing evidence in relation to the unauthorized loading of goods. She had served in the Defendant Company for 15 years.
- j. She is the one who made the complaint to the BA Police Station about the incident stating that the Plaintiff was the suspect in the incident of unauthorized loading and it was always the responsibility of the Plaintiff, as the Team Leader of the Logistic Department, to arrange the transportation of loading and unloading of goods at the Stores.
- k. This witness appeared to be very prompt, clear in her evidence and observed to be an objective witness telling only the truth. She confirmed further that the loading had been done into an outside vehicle, which was a KDC Van, not into a CJ Patel's Vehicle as usual. Her evidence withstood the cross examination by the Plaintiff's counsel. The contents of the documents marked as "D ex-1", "D ex-2", "D ex-3" & "D ex-4" were corroborating her oral evidence. Her evidence remained un-assailed.

E. APPLICABLE RULES, LAWS & ANALYSIS:

8. The Plaintiff, as per paragraph (a) of the prayers to his Statement of claim, moves for Damages for breach of contract, unlawful and unfair dismissal. Thus, the Plaintiff must prove on balance of probability that there was a breach of contract on the part of the Defendant owing to the alleged unlawful and unfair dismissal.
9. It was only in paragraph 6 and 6.3 of the Statement of Claim, the Plaintiff used the word "termination" by averring that it was unfair, unlawful and he was informed that his service was terminated because he decided to exercise his statutory right in making a complain to the Labour officer. But he did not adduce any tangible evidence to show that he was in fact dismissed or his service was terminated prompting to complain to the Labour Officer.
10. Conversely, the Defendant in its Statement of defence has maintained a stern position that what took place was only the suspension, and no termination or dismissal as alleged by the Plaintiff. However, in paragraph 5 (i) of the Statement of Defence, the Defendant states that it was the Plaintiff who himself terminated his contract of service by lodging a claim before the Tribunal on the allegation of unfair dismissal. The plaintiff through his own oral evidence and the annexures marked as "Pex-2" & "P ex-3" has confirmed that it was nothing but a suspension. No dismissal or termination as alleged by the Plaintiff has been established.

11. Evidence shows that, throughout the process, the Defendant had been informing and updating the Plaintiff that the matter was still under investigation. It was the Plaintiff who had taken the position that he was dismissed in order to justify his commencement of the proceeding before the Tribunal.
12. Further, there was no any Agreed Fact on the question of dismissal or termination, nor was there even an Agreed Issue on it based on the Plaintiff's Statement of Claim, except for some issues on it based on the allegation in the Counterclaim by the Defendant to the effect that it was the Plaintiff who himself terminated the service by complaining to the Labour Officer.
13. The parties, as per the Agreed Fact No-5, having agreed that the Defendant **suspended** the Contract of Service of the Plaintiff for two weeks on 28th February 2014, subsequently have raised the issue No- 3 to the effect; Whether the Plaintiff was suspended, as if the suspension was an issue to be decided by the Court. Thus, the issue No-3 is redundant.
14. However, it is undisputed that the contract had clear provisions, as per clause 9.2 thereof, for the Defendant to suspend the Plaintiff at its discretion in relation to any misconduct referred to in clause 9.1 thereof. The clause 9 of the Contract also provides discretion to the Defendant even to terminate or dismiss a worker for any misconduct.
15. In my view, evidence is in abundance for this Court to be satisfied that the Defendant has had compelling and convincing reasons not only to have the suspension imposed on the Plaintiff, but also to dismiss him on account of aforesaid all 3 incidents. The suspension automatically came in to operation after the incident on 21st March 2015, as the Plaintiff did not report to work on his own volition, for which he claims that he was on annual leave. There was no evidence to show that he applied for and obtained annual leave for one week. There was no need for him to be formally suspended at this time, as he had stayed back at home on his own volition for the reason best-known to him.
16. However, I observe that the letter marked as "Pex-3" dated 12th June 2015 and sent by the Defendant to the Plaintiff informing that the investigation was still pending, was sufficient to infer that he was still under suspension after the 21st March 2015 incident and he had not been dismissed or terminated by that time.
17. The Plaintiff under his cross examination, as per page 39 of the transcript, admitted that he was fairly treated by the Defendant Company in terms of his increment and promotion. He also acknowledged that as per clause 7 of the Agreement the Company can terminate the services.
18. The most devastating and detrimental factors that have worked totally against the Plaintiff hereof are the 3 incidents occurred in November 2012, February 2014 and March 2015 as pleaded by the Defendant and alluded to by the Counsel for the Defendant in his written submissions. These are the incidents that validly questioned the integrity and

suitability of the Plaintiff to continue as a worker under the Defendant any further. None of these incidents were disputed or challenged by the Plaintiff.

19. After the first incident in 2012, he was warned, and subsequent to the 2nd incident in 2014, he was suspended for two weeks, and finally after the 3rd incident in March 2015, he avoided the workplace on his own volition, under the pretext of taking his annual leave for one week, apparently, due to the embarrassment caused to him by his own act in the presence of co-workers and officers, when he was caught in action of unauthorized loading of goods into an outside vehicle on a generally non-working Saturday.
20. The letter dated 14th September 2015 marked as “Dex-2” being sent by the Police addressed to Ms. Ashwita Chand (Group HRO Officer) on the Outcome of the Investigation, clearly states that the relevant Driver and the Delivery- boy were interrogated, interviewed and released, and according to them it was Eitesh Sharma – Team Leader who had called them for loading of food items. It was also revealed, as per this letter, that Mr. **Eitesh Sharma** had started to load the items without any documentation, however an offence of theft cannot be proved as the goods had not left the premises.
21. The above particular piece of evidence was not challenged by the Plaintiff. Instead, all what he was attempting to do was to paint two different pictures to the incidents of unauthorized loadings. At one instance, he says that due to the urgency and in order to avoid the delay in shipment, he started the loading pending the necessary QA documentation with the plan of unloading those goods in the event the issual of documentation did not eventuate. (Vide his evidence in this regard reproduced in paragraph 7 (b) above). This evidence, in my view, has to be totally disregarded as it cannot assist the Plaintiff in justifying his act of unauthorized loading on the day in question and substantiating his purported claim against the Defendant.
22. The next scenario he attempted to paint was the purported decoy operation he claimed to have had arranged, along with the company officials, to trap the pilferage or theft. This was not supported by any independent evidence. The Plaintiff not even suggest such an arrangement to the Defence Witness Ms. Rinaz Rehman (DW-1) , the Finance Manager during her cross examination. The Plaintiff, who averred it, should have proved it by adducing necessary evidence in that regard.
23. In the light of the above analysis, I don’t find any justifiable ground for this Court to arrive at a conclusion in favor of the Plaintiff that there was an unlawful / unfair dismissal and any breach of contract on the part of the Defendant company. Thus, the need to consider damages for the alleged dismissal or for the alleged humiliation, loss of dignity and injury to feelings will not arise.
24. In my view, all what befell on the Plaintiff were due to his own misdoings that blatantly violated and contravened the relevant provisions of his Employment Contract. This court will not extend its helping hand to a person, whose hands are tainted in this manner.

F. COUNTER CLAIM :

25. The Defendant is seeking a counterclaim from the Plaintiff for the payment of one (1) month's salary in lieu of notice, and a further sum of \$1,500.00, being the Costs ordered by the employment Tribunal on 24th October 2017.
26. I am mindful of the provision in clause 8.1 of the Agreement which says that the Employee may terminate the Agreement by either; giving one 1 month's written notice to the Company before the date upon which the Agreement is to terminate, or by paying the Company one (1) Month's base salary in lieu of (1) one month's written notice.
27. I don't find that the circumstances in this case will require the compliance of either of the above conditions by the Plaintiff. The Plaintiff was already on suspension, with sufficient ground even for his prompt dismissal. The Plaintiff's non-reporting to work soon after the 21st March 2015 incident need not necessarily have taken the Defendant by surprise. By his wrongful act itself on 21st March 2015 and by his subsequent absence from work, under the guise of annual leave, the Plaintiff had indirectly given notice. The circumstances, upon which the Plaintiff left the Company was different from what was meant in the relevant clause of the Employment Agreement. His failure to give notice need not have caused any immediate loss or damages to the Defendant for the same to have been avoided by the process of giving one month's notice, or to be compensated by paying the one month's salary in lieu of it.
28. Another part of the counterclaim by the Defendant is for an order to pay the costs ordered by the Employment Tribunal, which was in a sum of \$1,500.00. I don't think that the amount of costs ordered in a separate judicial proceedings /forum can be a subject matter of claim in another action or forum. The Defendant can make use of the recovery mechanism in that forum which ordered the Costs. Hence, this part of the counterclaim also has to necessarily fail.

G. COSTS:

29. The Defendant in its prayer to the Statement of Defence moves for costs on a full Solicitor/ Client indemnity basis. The Defendant is not succeeding on its Counterclaim for the reason stated above. However, the Defendant has defended an unwarranted claim against it for last 6 long years. Though, the circumstances demand the cost to be ordered as prayed for by the Defendant, I decide to limit the amount of costs for a sum of \$4,500.00 (Four Thousand Five Hundred) to be paid in 28 days from the date of this judgment.

H. CONCLUSIONS:

30. The Plaintiff has failed to prove his claim on the balance of probability. He has not proved breach of contract, unlawful and unfair dismissal on the part of the Defendant. The evidence is in abundance that it was the Plaintiff, who acted for his detriment by contravening the salient provisions of his Contract of Employment. Thus, his claim against

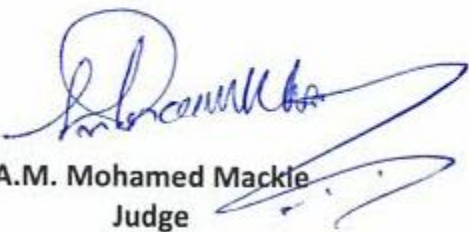
the Defendant has to fail and necessarily be dismissed with an order for a reasonable sum as costs in favor of the Defendant.

31. For the reasons stated in paragraphs 25 to 28 above, the Defendant's Counterclaim against the Plaintiff also has to fail. Thus, no Order for cost in that regard.

I. FINAL ORDERS:

32. In the light of the above analysis, I make the following final Orders;
- a. The Plaintiff's action fails.
 - b. The Plaintiff's Writ of Summons and the Statement of Claim filed against the Defendant on 7th August 2017 is hereby dismissed, with costs in favour of the Defendant.
 - c. The counterclaim preferred by the Defendant fails and the same is hereby dismissed, however, with no costs against the Defendant.
 - d. The Plaintiff shall pay the Defendant a sum of \$4,500.00 (Four Thousand Five Hundred Dollars) being the summarily assessed costs, within 28 days from the date of this judgment.




A.M. Mohamed Mackie
Judge

At the High Court of Lautoka on this 7th day of October 2025.

SOLICITORS:

For the Plaintiff:

Messrs. SAMUEL RAM LAWYERS, Barristers & Solicitors

For the Defendant:

Messrs. PATEL SHARMA LAWYERS, Barristers & Solicitors