

IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE EMPLOYMENT RELATIONS TRIBUNAL



Decision

Title of Matter: Renuka D Narayan (Grievor)
v
Beachcomber Island Resort (Employer)

Section: Section 211(1)(a) *Employment Relations Act 2007*

Subject: Adjudication of Employment Grievance

Matter Number: ERT Grievance No 38 of 2017

Appearances: Mr D Nair, for the Grievor
Mr S Fa, Law Solutions for the Employer

Date of Hearing: 22 July 2017

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 19 January 2018

KEYWORDS: Employment Relations Act 2007; Alleged claim of dishonesty of an employee; Unjustifiably and unfairly dismissed

Background

1. This is a grievance that has been referred to the Tribunal from the Mediation Service in accordance with Section 194 (5) of the *Employment Relations Act 2007*. The Grievor was dismissed in her employment by letter issued by the Employer on 18 January 2017. The thrust of the dismissal letter is that the Employer construed the Grievor to have acted dishonestly, by failing to remain at work to cover the shift of another employee and seeking to give the impression otherwise that she had worked until the required finishing time of 7.00pm.
2. In considering the evidence of the parties, the Tribunal has had regard to:-
 - (i) The Grievor's Submissions filed on 30 March 2017;
 - (ii) The Affidavit of Atish Dip, dated 8 May 2017;
 - (iii) The oral evidence of Mr Atish Dip, Ms Salaseini Tivi and that of the Grievor herself;
 - (iv) Closing Submissions of the Worker, filed on 1 September 2017.

The Case of the Employer and Justification for the Dismissal

Mr Atish Dip

3. Mr Atish Dip told the Tribunal that he is the Accountant and Financial Controller of the Beachcomber Island Resort that is part of the Beachcomber Group of Companies. Mr Dip explained the role previously held by the Grievor as a Reservation Consultant and said that this was a position of which there were several similar roles. Mr Dip told the Tribunal that he had previous concerns in relation to the way in which the Grievor would disregard customer inquiries that had been made through members of the public accessing the Employer's online inquiry request form. The witness indicated to the Tribunal that he had an impression of the Grievor that she had often not responded to email inquiries from potential customers and on other occasions, would simply disregard them in her 'junk mail' inbox.
4. Under cross examination, the witness indicated that he had not previously brought these issues to the attention of the Grievor and had not been aware of any adverse reports placed on the Grievor's Personal File as a consequence of such conduct. Mr Dip told the Tribunal that on the day in question in which the Grievor was terminated, that the other two reservation staff had not been present. It was on this day when otherwise the Grievor would have worked from 8.00am to 5.00pm, that there was an expectation that she worked until 7.00pm, to cover the late shift. According to the Affidavit of Atish Dip filed on 8 May 2017:

On or about 4.45pm on the same day, I was informed by the Grievor that she would complete her daily update report by 5pm and would leave it to the Front Desk to send the same to the Director at 7pm.

Upon my questioning the Grievor on the reason for her suggestion, she informed me that if she was to send the report at 5pm, the Director would query why the same was not sent at 7pm and would subsequently know that no one was working at the Reservations Office at 7pm.

I then informed the Grievor that her suggestion was tantamount to dishonest conduct and to send the report at 5pm.

I also informed the Grievor that I would have to include in my daily report to the Director what she had proposed.¹

5. Mr Dip acknowledged that he met with the Grievor in his office and subsequently terminated her employment and when doing so, denied her access to return to her workstation, for fear of sabotage to the Employer's computer systems. The witness told the Tribunal that he had indicated to the Grievor that he would have another employee access the belongings of the former employee on that basis.

¹ See page 4 to that Affidavit under the heading, "2nd Instance of Dishonesty by Ms Narayan".

Ms Salaseini Tivi

6. Ms Tivi is a Senior Reservation Consultant at the Beachcomber Group of Companies. In her evidence, the witness told the Tribunal that she had responsibility for overseeing reservations and inquiries made to the three resorts managed by the company. The witness stated that she had worked with the Grievor for approximately 16 months and had on one occasion during that time, counselled her in relation to her practice of disregarding customer email inquiries that had been received in the company's 'junk' email inbox.
7. According to Ms Tivi, she had received a telephone call from the Grievor on the day in question, when she had been asked to work late.² Ms Tivi told the Tribunal that she herself had been unwell and was aware that for the Grievor to remain at work at 7.00pm would require that she would have to travel by two buses to Korovuto, where she lived.

The Case of the Grievor

8. Ms Revuka Devi Narayan, is presently working as a receiving clerk in a Nadi Supermarket. Prior to working for the Employer, Ms Narayan had been engaged by Rosie Holidays where she had been working for approximately eight years. According to Ms Narayan she had been approached by the Sales and Marketing Manager of the Beachcomber Group of Companies and encouraged to resign so she could work in reservations with the group. According to the Grievor she had not been asked to work back until 7.00pm by the Sale and Marketing Manager, but said she would have happily done so, if she had been asked. Ms Narayan told the Tribunal that she had been summarily terminated by the Employer by being issued with a "termination letter already in his hand". The Grievor stated that she did telephone Mr Dip and ask could she retrieve her personal belongings. Ms Narayan said that she had to make a complaint to the Labour Office in order to be paid her outstanding entitlements by the Employer.
9. Under cross examination, the Grievor stated that the Employer was aware of her travel arrangements and the distance from her home to the workplace. The Grievor restated that she would have remained at work until 7.00pm on the evening in question, had she been asked to do so. The Grievor told the Tribunal of the difficulties that she faced upon having being dismissed in her employment and the further problems associated with looking for work in those circumstances.

Closing Submissions of the Worker

10. In Directions issued to the parties on 22 July 2017, a timeline was set for the filing of Closing Submissions. In the case of the Employer, these were to be filed by 11 August 2017. Despite frequent requests from the Registry, no such submissions were received by the Employer. The submissions of the Grievor are understandable in the circumstances. The Grievor argues that the primary consideration has to be whether or not there was a justifiable decision. In this regard the Grievor makes appropriate mention of the case of *Kumar v Nunuku Auberger Resort Fiji*³, in which it is stated:

As a starting point, at least in the context of 'unjustifiable dismissal', the question needs to be asked, having regard to the Statement of Reasons provided, whether a termination based on those reasons was justified. The question post Central Manufacturing v Kant, where a new regulatory regime is installed, must be, Can the dismissal be justified? The initial question to

² This evidence was not really challenged by the Grievor, however it was likely hearsay in nature in any event, as to whether or not the witness had direct knowledge of any such request.

³ [2017] FJET 2

ask is not how the dismissal takes place, or what is relied on as part of that 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 justified or not, has been enshrined in international labour law for many years. The Termination of Employment Convention, 1982 (No. 158) adopted at the 68th 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. Articles 5 and 6 thereafter provides additional illustrations of circumstances that would not constitute a valid reason for termination. These include union membership, filing a complaint or participating in proceedings against an employer, discriminatory grounds based on attribute, absence due to maternity leave or temporary absence from work because of illness or injury.

Northrop J in Selvachandran v Peteron Plastics,⁴ provided the following clarification when a comparable question was being asked as to whether a termination decision was a valid one. In that case, his Honour stated:

Subsection 170DE(1) refers to "a valid reason, or valid reasons", but the [Act](#) does not give a meaning to those phrases or the adjective "valid". A reference to dictionaries shows that the word "valid" has a number of different meanings depending on the context in which it is used. In the Shorter Oxford Dictionary, the relevant meaning given is "Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value." In the Macquarie Dictionary the relevant meaning is "sound, just, or well founded; a valid reason."

*In its context in subsection 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of subsection 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly, see what was said by Wilcox CJ in *Gibson v Bosmac Pty Ltd*, 5 May 1995, unreported, when Considering the construction and application of section 170DC.*

...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.

11. The Tribunal does not accept in the circumstances, that the Grievor was attempting to be dishonest in her dealings with the company. She was simply endeavouring to complete a task that she could not otherwise achieve by close of business at 5.00pm. Even if what she had

⁴ See [1995] IRCA 333;62 IR 371 at 373

proposed to Mr Dip was a little ill conceived, that conduct of itself and the summary nature of the dismissal, do not appear to be justified in the circumstances.

12. From the impression of the evidence given by Mr Dip and the Grievor at hearing, there may possibly have been a level of communication difficulties between the two employees, though this is something that Mr Dip did not accept. In his cross examination, he had said that he felt he got on with the Grievor in the same way as he had with other staff. There is no reason why that evidence should not be accepted.
13. In any event, the reason given for the dismissal does seem disproportionate to the event that took place. It is likely that Mr Dip was caught off guard by the request made by his own staff to send a 'delayed' email to a Director of the company. It was also likely that Mr Dip knew at this stage, that the Grievor would not otherwise be available to work until 7.00pm. That would have been the logical way of dealing with the problem. It is more likely than not, that the Grievor had not been formally requested to work back until 7.00pm and it is probably natural enough that she was not going to volunteer, given the travel distance from home, unless perhaps company transport was provided. There was no evidence given by the Employer that this would have been something offered to encourage the Grievor to stay at work.
14. The Tribunal finds that the dismissal is a disproportionate response to the conduct set out within the reasons for dismissal. The other issues raised at hearing in relation to emails that had gone unattended, appear to have been very much an afterthought in a bid to discredit the Grievor.
15. In relation to the manner in which the dismissal was executed, there is little evidence to form a strong view as to whether the dismissal was unfair, in a manner consistent with the findings of her Honour Wati J, in *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuinaruku*⁵. Clearly a summary dismissal in such circumstance will come as a shock to an employee. To that extent if it is unjustified, it may also be seen as unfair. It may likely bring a degree of stress and upset that otherwise could have been buffered, even in the case where a dismissal decision was still made, by notice of termination provided to the employee.

What is the Appropriate Remedy?

16. As said in *Peni Koro Lagi v Calm Fire Professionals*⁶, there are a variety of considerations that can be relied upon when making a determination as to what would be an appropriate amount of compensation to be awarded to a Grievor in the case where it has been established that they have been unjustifiably dismissed in employment. These would include: the length of service with an employer; the likely remuneration received if the employment had continued; attempts made to mitigate any loss of income; any other income received by the Grievor prior to any decision being reached by the Tribunal; the capacity of the employer to pay; and any other special features of the case.
17. At the time of her dismissal, the Grievor had received a salary of \$16,000 per annum. There is no evidence to suggest that she did not have an expectation of this salary continuing and clearly from her own evidence she anticipated this to be the case. It is also acknowledged that while the Grievor sought to mitigate her loss, the fact of the matter is that she is presently unable to pursue employment within the tourism and hospitality industry, where some 'cloud' remains

⁶ See decision dated 4 January 2018.

⁵ [2017] FJHC92 at [61].

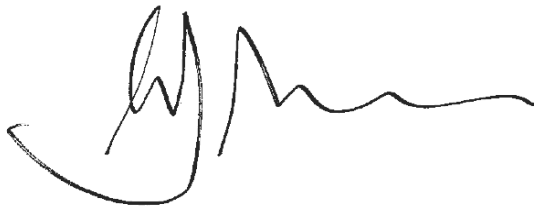
over her suitability, based on a now sullied employment record. If this is the pathway that is required for employees to pursue in such cases, in order to set the record straight, then this unfortunately is what needs to be done. The Grievor has been unjustifiably dismissed. In some respects, there is also an element of unfairness in the manner in which the dismissal decision was executed, although as the evidence in this regard was scant, that shall not feature significantly in the formulation of any compensatory amount.

18. Having regard to the Closing Submissions of the Worker filed on 1 September 2017, the Tribunal believes that an amount of eight month's salary equivalence is an appropriate compensatory sum, having regard to the circumstances of the case and the profound impact that the decision has had on the ongoing employment prospects of the Grievor. An amount of \$10,660.00 has been calculated on that basis. A further amount of \$1,000.00 will be awarded for hurt and humiliation arising out of an unjustified summary dismissal. In total the Grievor is to be awarded the sum of \$11,660.00.

Decision

It is the decision of this Tribunal that:-

- (i) The Grievor Ms Renuka Narayan, has been unjustifiably dismissed in his employment.
- (ii) Beachcomber Island Resort should pay the Grievor a compensation amount in the sum of \$11,660.00 within 21 days from today's date.



Mr Andrew J See
Resident Magistrate