



Decision

Title of Matter: Joji Oba (Grievor)
v
Vinz Works & Joinery (Employer)

Section: Section 211 (1) Employment Relations Promulgation 2007

Subject: Adjudication of Employment Grievance

Matter Number: ERT Grievance Application No 114 of 2014

Appearances: Ms T Vosawale, Labour Officer for the Grievor
Mr D Nair of the Employer

Date of Hearing: 7 December 2017

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 4 January 2018

KEYWORDS: Employment Relations Act 2007; Definition of casual worker; Unjustifiably and unfairly dismissed.

Background

1. This is a grievance that was referred to the Employment Tribunal on 10 March 2014. The matter was initially dealt with by the former Legal Tribunal Member on 13 January 2016, at which time the parties were requested to file Closing Submissions pertaining to their respective cases. Prior to the Legal Tribunal issuing a decision in this matter, she vacated her office and as a consequence of that, the matter was listed for review by this Tribunal. Rather than dealing with the matter de novo, the Tribunal decided to review the case file and to seek clarification from the parties as to the central features of their respective cases. It is as a result of this process, that this decision is now made.

Relevant Issues

2. Mr Nair of Counsel, did at the outset submit that the Grievor was a casual worker and therefore argued that no dismissal grievance could arise based on such a circumstance.
3. After an interrogation of the nature of the work performed by the Grievor and having regard to the definition of 'casual worker' as provided within Section 4 of the *Employment Relations Act 2007*, the Tribunal held that the Grievor was not a casual worker.

4. For the sake of the record, the definition of casual worker at Section 4 of the Act:

“means a worker whose terms of engagement provided for the worker’s payment at the end of each day’s work and who is no re-engaged within the 24 hour period immediately following the payment.”

5. In the event that the Grievor was not a casual worker, he was entitled to understand the duration of the employment contract entered into with the Employer and he would have been entitled to have been provided with a dismissal letter in such case where the employment contract was to come to an end.¹The Employer contended that the Grievor was not dismissed, but rather never returned to work following being questioned over the theft of certain tools and equipment, the property of the Employer. The evidence at trial, was that the Grievor had completed approximately 18 months of work with the Employer prior to termination. Mr Nair asked that the Tribunal have regard to its decision in *Lee v Subrails Furniture Joinery and Upholstery Ltd* [2012] FJET 2, however the facts of that case do not appear to be relevant to these proceedings.
6. It is noted in the Closing Submissions of the Employer filed on 12 February 2016, that it relies on two decisions of the Employment Court. The first, in the case of *Fiji National University v Ravuyawa*,² dealt with a situation where the Court found that the employee abandoned his employment. In that case, the Employer had in place a Policy Manual, the terms of which were incorporated by reference into the employment contract as follows:

“An employee who is absent without authority for more than 24 hours during the schedule work week without acceptable notification to her/his superior or an authorized designated senior officer in the University, shall be deemed to have abandoned the position and shall be deemed to have resigned from his/her employment. In such cases, the head of department/Manager is to notify the Human resources Director who will handle related personnel processing”.

7. The case presently before this Tribunal is of a far different complexion. Further, the Employer relies on the decision of *Nasese Bus Company v Prasad*³. Nothing, significant can be derived from that decision, other than the fact that the Tribunal at first instance, did a very hasty job of issuing its judgment. The consequences of that are self apparent and the actual fate of the grievance and the determination as to whether or not there was a dismissal, remains unknown.
8. During the proceedings before this Tribunal, the Employer was given an opportunity to reconcile with the Grievor, however indicated that it did not wish to do so. Mr Nair of Counsel, attempted to portray this case as one of significance to the building and construction industry, insofar as it was suggested that it would establish a precedent for cases where workers were otherwise engaged based on the demands of projects and the special needs and requirements of tasks and the other aspects giving rise to short term contracting of workers. Firstly, the Tribunal does not regard the employment of a worker for 18 months as being a short term engagement. Secondly, there was no evidence whatsoever of any attempts by the Employer, to ascertain from the Grievor why he had not returned to work. If there was some confusion on the Employer’s part, it gave no indication that it sought to resolve that. The Grievor claims he was stood down because of a lack of work and Mr Nair on occasions has sought to argue that if

¹ See Section 114 of the Act.

² [2015] FJHC 1032

³ [2014] FJHC 149; ERCA18.2012 (12 March 2014)

this was the case, then it was an appropriate response for an employer in this industry to take. Employers are free to engage workers on temporary contracts. When they do so, the terms need to be clear. It is best that this is often done in writing. At least insofar as the initial overarching labour requirement is concerned. There is also a requirement under Section 24 of the Act, for an Employer to provide a worker with work. Without any contractual or statutory arrangements in place to the contrary, standing down a worker because of a dip in demand, is not a unilateral right.

9. The case of the Employer appears to have transformed from one thing to another over time. It is noted within the evidence provided by the Employer's witness to the Legal Tribunal, that the Employer was also relying on the fact that the Grievor had been engaged in project work for a period of only three weeks at the relevant time, prior to termination. Yet, the Tribunal prefers the case of the Grievor insofar as he was stood down from work by the business owner. At trial the Employer could have sought to counter the evidence in this regard, by calling upon the owner of the business, Mr Vinay Singh to give evidence, but it failed to do so. It may also have been the case that there had been some investigation into incidences of employee theft at work, but this does not appear to have been the central case of the Employer; instead it seems to be one based on the claim that the Grievor had abandoned his employment. It also seems to be not in dispute that the other workers who left their employment around that same time, found their way to the Labour Office to make a complaint about the practices of the Employer. Obviously all was not well at the workplace.

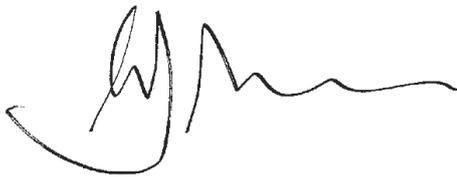
Conclusions

10. Based on the materials before this Tribunal and for the reasons indicated at the review of this matter, the Tribunal finds that the Grievor was dismissed in his employment on the basis that the Employer failed to provide him work. This took place in a manner inconsistent with the requirements of an ongoing employment contract. Based on his length of service, the Grievor should be provided with some compensation for the adjustment costs associated with the unjustified dismissal. Because of the way in which this matter has been determined, an award of one month's wages equivalence is regarded as appropriate in the circumstances.

Decision

It is the decision of this Tribunal that:

- (i) The Employer pay to the Grievor the compensation amount of one month's wages equivalence, calculated at \$672.00. Such payment to be made within 28 days hereof.



Mr Andrew J See
Resident Magistrate