

IN THE EMPLOYMENT

TRIBUNAL AT SUVA

ERT Grievance No. 35 of 2010

BETWEEN: TAITUSI RASOKI

WORKER

AND: UPRISING BEACH RESORT

EMPLOYER

Appearances:

Mr. J. Pulu for the Worker

Mr. K. Singh for the Employer

DETERMINATION OF THE TRIBUNAL

The Employment Relations Problem

1] This worker Taitusi Rasoki began his employment with Uprising Beach Resort on 1st May 2007 and was terminated on 3rd June 2008. He claims that he was discriminated against during his employment with this employer and that his subsequent termination was unfair.

References

2] In this proceeding:

- the worker Taitusi Rasoki shall be referred to as ("TR")
- the Operations Manager Leone Yaragamudu shall be referred to as ("OM")

Background and Evidence

3] At the hearing held on 15th June 2011, OM gave evidence for the employer that he has been working for the employer for the last 6 years and that is current position

is Operations Manager with the main responsibility of supervising the general operation and maintenance of the resort.

4] OM confirmed that TR employment was terminated in June 2008 and the reason was his poor performance which did not improve despite numerous verbal and 3 different warning letters. In that regard OM tried to read from an undated and unsigned letter but was not allowed and that piece of evidence was discarded.

5] OM was allowed to tender the latter dated 5th October, 2007 which is a final warning and suspension letter which reads as follows:

Re: Final Warning and Suspension Letter

Dear Taitusi,

It is with much concern that we issue this final warning letter to you in response to the deterioration of your duties execution and your failure to adhere to rostered times.

There have been numerous complaints from patrons and staff alike on the quality of service you have been providing which has been unsatisfactory.

Furthermore, on Wednesday 26th September, you were supposed to start at 7.00am but you turned up at 11.00am and signed in at 9.00am, which is very serious offence.

There have also been many days where you failed to attend to duties without any relevant explanations.

Management has decided to issue this warning letter to you and to also inform you that you will be on suspension for 2 weeks with effect from Wednesday 3rd October 2007 until 16th October. You are expected to resume duties on Wednesday 17th October 2007.

It is hoped that you will show a marked improvement in your performance when you resume duties in 2 weeks time.

Yours faithfully,

Food and Beverage Manager - Sowani

Supervisor - Eroni

6] OM then tendered the letter dated 5th February, 2008 which reads as follows:

Re: Suspension - Final Warning

Dear Taitusi,

To provide a safe and productive work environment, Uprising Beach Resort expects employees to be reliable and be punctual in reporting for scheduled work. Absenteeism and lateness place a burden on other employees and on the resort. On Saturday 2nd February, you did not attend duty as rostered. You send words that you were sick however, you were seen drunk at Makosoi Estate. Furthermore, there was no sick sheet forwarded to the F&B office to ascertain your sickness. In spite of my counseling and briefs to you last week, you never took heed of the importance of your role in these organizations. Therefore, we do not hesitate to suspend you from work for TWO WEEKS effective immediately.

During this period of suspension, you are not to be seen at the resort premises.

Take this as the last and FINAL WARNING to you. Any other abandonment of duties or disruptive role at work will lead to termination of employment.

Vinaka

Leone Yaragamudu

Operation/Act. F&B Manager

7] Continuing with his evidence OM confirmed that some of his staff were with him when they saw TR drunk and staggering at Mokosoi Estate as they drove past. OM explained, that TR had offended again despite the counseling and briefing he had given TR the previous week. He continued that he had spoken to TR about his behavior and his attitudes to work and what he expected out of him. OM stated that he counsels staff and do give them opportunities to develop and improve, but with TR nothing changes.

8] OM then gave a brief history of TR's attitude and behavior at work; that when the resort was opened, the plan was to give the young people the opportunity to have gainful employment in the hotel industry and when TR joined like other young person, he was given the hotel plan and programme. During the early days TR was part of the entire training team going through the development process and in-house training. When TR started, he complied with all the rules until a few months into the job when he began with alcohol and other forms of drugs and activities that affected and distracted him from his progress. TR started coming to work like a walking brewery with red eyes and looking drowsy.

9] OM told the Tribunal that after the warning letters he would improve and comply with the rules for a while until he slowly slides back into negativity. That was the reason why they had to change TR from a waiter to a cleaner, as it was a huge risk to have him serving guests.

10] As to the policy regarding sick leave OM pointed out that a worker has to give a 4 hour notice before the shift starts and the worker should get a sick sheet and submit it to the pay office. A worker would do that by directly calling the office or ensuring that he meets the head of department and advises him that he cannot work on that shift. As to whether TR followed the policy of the Resort, OM advised that on occasions he would deviate and would be consequently warned and counselled.

11] OM further stated to the Tribunal that TR was given all the proper training to be a model worker and after all the counseling and the warning letters, his attitudes towards work did not change and that led to his termination. His termination letter dated 11th June, 2008 says the following:

Re: Letter of Termination.

It is unfortunate that we have to ask you to leave this company effective immediately. Your performance has been below standard, not punctual to work, questioning management's directive and foremost not performing to the level required from F&B staffs.

We have provided counseling, in-house training and team building; however, we find that you are still making many mistakes. One incident yesterday when you prepared coffee for restaurant guests. First, you disregard the rules of operating the coffee machine and second serving the wrong items. Your service in this resort is terminated immediately.

Please. Return all company uniforms and property that you hold and see Shamin for your final pay and any monies owed to you.

Signed .OM

12] During the termination OM confirmed that TR was paid all outstanding leave including annual leave and that termination was carried out professionally as there were no ill feelings.

13] Under cross examination OM reiterated that he had been with the resort for the last 6 years as the Construction Manager when the resort was being built from June 2005 and when the resort became operational around February 2007, he became the Operations Manager and then after 9 months, he had to move in and became Acting Food and Beverage Manager until October 2009. After that, OM had to leave Food and

Beverage and went back to projects as the resort had to be re-developed and extended. So, from October 2009 to October 2010, he was Projects and Operations Manager and currently Operations Manager after the new extension was opened in May 2011. When questioned as to his qualifications, OM answered that he has a major in tourism and has units in hotel development planning and worked in tourism; in the service and hospitality industry in 1982. OM added that he had been F&B Manager for a couple of hotels and Operations Manager in different companies.

14] As to the 4 letters; 3 for warning and one termination, OM explained that the first F&B Manger Ms. Courtney Bruce wrote the first warning letter, unsigned not dated and no company logo and he would not know the reason why she did not use the official company letterhead. The Labour Officer appearing for TR told the Tribunal that TR was never issued that letter and made an application that it should be disregarded as the first warning letter. The application was agreed to and that letter was disregarded as part of evidence.

15] OM said that when the resort opened, there was no employment contract, but the workers were issued appointment letters, they did not sign any contracts. The appointment letters would have the conditions of work, like hours and so on and progressively included disciplinary procedures.

16] OM was then referred to the occasion on 26th September 2007 when TR was supposed to start at 7.00am but turned up at 11.00am and signed as arriving at 9.00am. OM said that Eroni the restaurant supervisor saw the incident and reported to the F&B Manager who wrote that warning letter dated 5th October, 2007.

17] On to Saturday February 2nd 2008 sometimes at mid-morning, OM whilst driving past Mokosoi saw TR crossing the road, carrying a carton of beer. The Labour Officer questioned OM as to why he did not state that in his letter dated 5th February 2008 by which TR was suspended for 2 weeks. OM answered that in the context of TR overall

performance, he assumed that he was carrying a carton of beer, as he was not at work, had called in sick and he saw him staggering or walking dodgedly from about 10 meters out. The Labour Officer suggested that TR was sick that day and that was the reason why he was staggering as he was going to a hospital or health centre. OM stressed that would not be the case as Makosoi is a small close knit community and everybody knows each other and what was happening.

18] Still during cross examination the Labour Officer questioned OM why he did not stop and ask TR why he was not at work. OM replied that would not be a good idea, as talking to an intoxicated person would be unprofessional and could lead to more problems especially since TR was on final warning.

19] TR in his evidence maintained his claim that he was unfairly terminated, in that he was genuinely sick on the day OM was supposed to have seen him on the road, carrying a carton of beer and staggering. TR could not understand why OM did not stop and ask him why he was not at work and probably gave him a lift as he is a neighbor and a relative.

20] On the allegation that he smelled of alcohol, TR stressed that OM should have produced witnesses to vouch for that and in the absence of any evidence to that effect, the allegation should be discounted.

21] As to the reasons why he could not furnish a sick sheet, TR explained that it was mid-morning and since the bus service in the area is poor, he was forced to return home after waiting for too long and that was the reason why he was staggering, as he was very sick and risked passing out on the roadside, if he had waited.

22] TR complained that there was no employment contract right up to the time of his termination and that was the main reason why he was not accorded the due process. TR continued that this employer could not claim to be a new employer altogether as it

had opened in 2007 and the Labour Department had raised the non-compliance aspect with the employer in their routine inspections.

Analysis and Conclusion

23] The employer's position is that TR was terminated for a just cause and from the evidence his circumstances would cover all aspects of section 33 (1) of the Employment Relations Promulgation 2007 and the employer correctly did not give any notice, or pay in lieu of notice.

24] TR did not attempt to discredit the evidence of the employer through OM but attacked the employer by making various allegations ranging from fabricating evidence, lying, bad faith, falsification of records and not complying with the law.

25] From the evidence, the employer was justified in summarily dismissing TR, but the way it went around dismissing TR was unfair. There was no employment contract and in that regard there was no grievance and disciplinary procedures. TR knew he was in trouble when he received a warning letter, there was no process. TR has the right to be told what the problem is and that dismissal or other disciplinary action is a possibility. He must then be given an opportunity to tell his side of the story, before the employer decides what to do.

26] This employer should investigate any allegations of misconduct thoroughly and without prejudice. Unless there has been misconduct so serious that it warrants instant dismissal, the worker should be given clear standards to aim for and a genuine opportunity to improve. The employer did not do these 2 aspects of TR's employment.

27] Notwithstanding that, employers like this resort are reminded that there are a number of procedural steps that must be taken before an employer reaches the point where it can dismiss for poor performance. These steps include:

- Informing the workers of the dissatisfaction with their performances requiring them to achieve a higher standard;
- Providing information in a readily comprehensible form; and
- Allowing reasonable time for the attainment of those standards.

Exhausting the above steps, the parties can then proceed through the grievance procedure which in the instant case is not provided for.

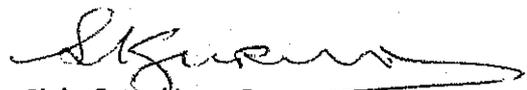
28] The Tribunal from the evidence sees TR as a good candidate for a performance management process. That did not happen and TR believed the assessment of his supervisors and managers but not himself and his capabilities.

29] The New Zealand Employment Court decision in Morris v Christchurch International Airport Limited [2004] 1 ERNZ 336 is illustrative of the distinction between the acts that should be dealt with as part of an ongoing performance management process, and single acts of incompetence or negligence that would justify dismissal. In Morris, an employee who was subject to a performance management process was dismissed as the result of a single act that occurred one month into a review period intended to take up to six months. Her dismissal was held to be unjustifiable.

30] Due to the above reasons, the Tribunal makes the determination that the termination of TR was unfair and Orders the following remedy:

i] Under section 230 [1] [c] [1] the payment of 3 months wages to Taitusi Rasoki as compensation for humiliation, loss of dignity and injury to his feelings in view of the fact that he was one of the first workers in the resort, he lives near the resort and has relatives and friends who work for the resort.

DATED at Suva this 21st day of June 2012


Chief Tribunal

