

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



Decision

Title of Matter: Mikaele Vulaca (Grievor)
v
Land Transport Authority (Employer)

Section: Section 211(1)(a) Employment Relations Promulgation

Subject: Adjudication of Employment Grievance

Matter Number: ERT Grievance No 65 of 2017

Appearances: Ms Vuli, Fiji Public Service Association, for the Grievor
Ms Sigasiga, for the Employer

Date of Hearing: 28 August 2017

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 14 October 2017

KEYWORDS: Employment Relations Act 2007; Unjustifiably and unfairly dismissed; Disobeyance of lawful instruction; Complicit conduct of Employer; Right to be Heard.

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 grievance arises out of the summary dismissal of the Grievor, in circumstances that are claimed to be procedurally unfair and in breach of natural justice.¹

The Case of the Employer and Justification for the Dismissal

2. In considering the case of the Employer, the Tribunal has had regard to the following evidence and materials:-

- The Respondent's Submissions, dated 26 June 2017;
- The Respondent's Closing Submissions filed on 12 September 2017;
- The Evidence of Ms Matila Cama;

¹ See Closing Submissions of the Grievor dated 11 September 2017 and the ER Form 1, as filed on 21 February 2017.

- The Evidence of Mr Deo Reddy; and
- The Evidence of Mr Avishek Chandra.

3. The following key facts and issues arises out of the above evidence.

Ms Matila Cama

4. Ms Matila Cama is the Team Leader, Human Resources for LTA. Ms Cama has worked in that role for the past 3 years and spoke of her current role involving recruitment and selection, employee relations and training, HR services and administrative functions. The witness told the Tribunal that the Grievor was appointed as a Road Safety Officer with the Respondent and prior to that, held the position of Public Service Vehicle (PSV) Officer². According to Ms Cama, the Grievor was transferred to the position of Road Safety Officer by Memorandum dated 28 April 2014.³
5. The witness was taken to Document E within the *Respondent's Submissions*, that was a Memorandum from the Manager Human Resources, Mr Radakua to the Grievor dated 26 July 2016,⁴ that read:

This memo is to advise that following the discussion with the Chief Executive Officer and Departmental Managers, you will be transferred to Call Center Department for three (3) months effective from Monday 01 August 2016.

Your terms and conditions of employment remain the same.

For any further clarification, please do not hesitate to contact the undersigned.

Yours faithfully

Tomasi Radakua
Manager Human Resources

6. According to the witness:

"we were directed to prepared the transfer letter to the Call Center (and that)

(She couldn't) recall reason for transfer (though) believe(d) based on something relating to performance".⁵

² Tribunal was referred to Document A within the Submission of the Respondent dated 26 June 2017, (Marked Exhibit "A").

³ See Document B within the Submission of the Respondent, marked as Exhibit B.

⁴ See Document E within the Submission of the Respondent.

⁵ There is no evidence whatsoever that the transfer was performance based, in fact according to Mr Reddy, it was to meet a spike in complaints being received by LTA at the customer call centre.

7. Ms Cama said that when the letter was issued, that a copy was provided to the Manager responsible for payroll. The witness said that the Human Resources Section had "received a few email enquiries informing us that (the) officer had not been physically relocated from Manager Enforcement".
8. Ms Cama claimed that there were "a number of 'follow ups' to us (and that) we proceeded to issue a charge letter for insubordination". The witness stated that after HR had drafted the charge letter, that it was sent to the Legal Unit for vetting. The witness was referred to Document H within the Respondent's Submissions, that appeared to be some form of internal legal advice provided to the Manager Human Resources in relation to this issue. Ms Cama was taken to the Minutes of the *Core Management Meeting* at page 3,⁶ that recommended the dismissal of the Grievor to the Board and the subsequent summary dismissal letter that was issued.⁷ According to the witness, the matter was referred to the LTA Board in in December 2016.⁸ The Witness was referred to Document "I", that was a table prepared by the Respondent in relation to previous disciplinary infractions of the employee and in addition indicated that there was further complaints that were received in relation to the Grievor after his employment.⁹
9. During cross examination in relation to the Disciplinary Issues that formed the basis of the later Document G, the witness accepted that all issues other than the transfer request the subject of these proceedings, had been previously dealt with by the Employer. The witness was asked whether she had received any performance reports pertaining to the worker whilst he was employed in his former duties and she indicated, that she could not confirm. Ms Vuli showed the Human Resource Officer a Certificate of Performance that had been issued to the Grievor on 6 October 2015, in which it had indicated that he was the "Best Performance Officer for the Central Division in the Third Quarter of 2015". The witness acknowledged that this document was signed by the Chief Executive Officer. In relation to the summary dismissal letter, the witness indicated that she was not part of the Core Management Team process that caused the letter to be issued.

Mr Abhishek Chandra

10. Mr Chandra was the Team Leader, LTA Call Centre. He holds a Bachelor of Commerce, Majoring in Accounting and Information Systems. Mr Chandra was the Manager to whom the Grievor was intended to report, when the Grievor's transfer into that role was to come about. The witness was taken to Document F of the Respondent's Submissions that was an email communication that he had sent initially to Mr Reginal Karan, the Grievor's then supervisor and then later to his own supervisor Mr Deo Reddy on 9 August 2016, advising that the Grievor had not as yet assumed his relocation to the Call Centre. According to Mr Chandra, he did not receive any response to his email from Mr Karan. The witness told the Tribunal that several days later he had spoken to Mr Deo from the Enforcement Team and was advised that he would look into it.
11. The witness said under cross examination, that he "(doesn't) recall (Mr Deo) contacting me again". According to Mr Chandra the Call Centre was in Valelevu and in January 2017, it moved

⁶ See Document D of the *Respondent's Submissions* dated 26 June 2017.

⁷ See Document C of the *Respondent's Submissions* dated 26 June 2017.

⁸ See Document D of the *Respondent's Submissions* dated 26 June 2017.

⁹ See Document K of the *Respondent's Submissions* dated 26 June 2017.

to Nausori. The evidence of the witness was that prior to that time, he said that he had worked in the same building as the Grievor. Mr Chandra told the Tribunal, that he knew the Grievor and he had spoken to him. The Witness told the Tribunal:

I said aren't you suppose to come. He said, "I am still based with Regional Manager as per direction of Regional Manager.

12. Mr Chandra, said that he believed he had told Mr Karan about that conversation, though didn't tell Mr Deo (Reddy).

Mr Deo Reddy

13. Mr Reddy holds the position of Manager Enforcement, LTA. He holds a Diploma in Automotive Engineering and an Advanced Diploma in Management. Mr Reddy gave the Tribunal a brief understanding of the nature of work of the Enforcement Section and indicated that the purpose of the temporary transfer for the Grievor to the Call Centre, was so that he could assist newer staff, as he had been told by the Manager Customer Services that the complaints and problems in that area had been increasing.
14. Mr Reddy said that he sent a memorandum in relation to the insubordination of the Grievor, for failing to transfer to the Call Centre. Mr Reddy told the Tribunal that his "duty cuts out when the (HR Transfer) letter issued to (the Grievor)". The witness stated, that he went to HR and found out the previous history of the Grievor. According to Mr Reddy, after a long time, Mr Chandra mentioned to him, that the complaints were not being attended to within the Call Centre. Mr Reddy indicated that every day he would speak to the Grievor, but that "I have no say to deal with him". Mr Reddy said that he was only alerted to the fact that the Grievor was dismissed after he had been issued with a summons to appear in the Tribunal.¹⁰
15. When questioned by the Tribunal, the witness indicated that he had been in the position of Manager Enforcement for three years. The witness said that he had received a copy of the email sent by Mr Chandra on 9 August 2016, indicating that the Grievor had not as yet transferred to the Call Centre. Mr Reddy also acknowledged that he was aware that the Grievor was to be located in another building, as a consequence of the transfer. Mr Reddy indicated that he normally saw Mr Chandra several times a week and was advised by him, that the Grievor was willing to transfer.
16. According to Mr Reddy, when the initial transfer letter was issued to the Grievor, Mr Karan had come and spoken to him on that same date regarding the issue. The witness told the Tribunal, that he thought Mr Karan was constantly talking to the Grievor.

¹⁰ The Tribunal finds this as hard to comprehend, given that it was Mr Reddy himself who had initiated the recommendations that gave rise to the ultimate dismissal of the Grievor.

17. The witness stated, that he had been advised by the Grievor that his Regional Manager, Mr Emosi Caniogo, had asked him to do some investigation of complaints being made. Mr Reddy told the Tribunal that he did not include that information in his memorandum of complaint to the General Manager, Technical and Operations, Mr Ali and could not offer a reason why he failed to do this. Upon further questioning by the Tribunal, the witness indicated that he participated in a weekly meeting with Mr Chandra and the Regional Manager and this issue had never been raised.

The Case of the Grievor

18. The Tribunal has had regard to the following:-

- Outline Submissions of Mikaele Vulaca (Grievor) dated 10 July 2017;
- Closing Submissions of the Grievor, filed 4 October 2017.

19. Mr Mikaele Vulaca commenced work in the predecessor department to the LTA in 2009. He said that he was initially engaged as a Road Safety Officer and that he was the sole income earner.
20. The Grievor acknowledged that he had received a request to transfer to the LTA Call Centre, but further stated that he had been advised by his Regional Manager, Mr Caniogo, to “stay with him”. According to the Grievor, he had shown his Regional Manager the letter and “I was informed to stay put with him... to work with him”. According to the witness, he was working at the Enforcement Section on 16 February 2017, when the Team Leader HR, gave him a dismissal letter. He said that the letter was just handed to him and that Mr Jioji Ledua, told him to leave the office. According to the witness, his Regional Manager was not at work that day.
21. The Grievor reinforced in his Evidence in Chief, that he had not been provided with any opportunity to be heard. Under cross examination, the witness refuted the suggestion put to him, that he had disobeyed a lawful direction to transfer and restated the fact that his Regional Manager insisted that he remain seated near him, but that he could still do some work for the call centre. The Grievor told the Tribunal that he was 56 years of age and had been in receipt of \$17,000 per annum.

Should Failure to Follow the Directive in this case, Give Rise to Dismissal?

22. As earlier mentioned, the Manager Human Resources provided the Grievor a Memorandum dated 26 July 2016 that stated:

This memo is to advise that following the discussion with the Chief Executive Officer and Departmental Managers, you will be transferred to Call Centre Department for three (3) months effective from Monday, 01 August 2016.

23. Two days later, the Manager of the Call Centre Mr Chandra sent an email communication to the Grievor’s Manager, Mr Karan, indicating that the transfer had not taken place. That in itself appears somewhat strange, on the basis that the transfer was not to take effect until 1 August 2016. In any event, approximately 10 days later Mr Chandra forwarded a copy of that email to the Manager Enforcement, Mr Reddy. Why he did so without more is unclear. There is certainly no email communication in response from Mr Karan that had also been forwarded. So it is hard for the Tribunal to ascertain, had there been some communication in this regard. But what

appears to have taken place next, is rather than anyone make any enquiry of the Grievor, Mr Karan or the Regional Manager Mr Caniogoi, as to why Mr Vulaca had not acceded to the transfer request, instead a Memorandum was prepared for the General Manager Technical and Operation, recommending that the employee be disciplined.

24. The thrust of that Memorandum dated 9 August 2016¹¹ is to bring together the disciplinary issues associated with the Grievor's employment history, for the purposes of supporting a pattern of conduct that was regarded as misconduct. At the end of the day and after what would appear to be an unduly length of time, on 16 February 2017, the Acting Chief Executive Officer of the Respondent, issued the Grievor a summary dismissal letter.

Was the Grievor Justifiably Dismissed?

25. In *Kumar v Nunuku Auberge Resort Fiji*¹², this Tribunal 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 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 dismissal¹³ 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,¹⁴ 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

¹¹ See Annexure G to the Respondent's Submission dated 26 June 2017.

¹² [2017] FJET 2

¹³ The use of the word dismissal may or may not have negative connotations to it and so is used in a similar way to termination for these purposes.

¹⁴ See [1995] IRCA 333;62 IR 371 at 373

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.

26. The Tribunal does not accept that the dismissal was justified based on the circumstances of the case. Here we have a situation, where the worker had received a transfer instruction from the Human Resource Department, but had also been issued with an oral instruction from his Regional Manager, that he was not to physically relocate. That is, the Regional Manager had wished for the Grievor to remain working and assisting him in various investigations of complaints.¹⁵

Problems with not giving Employee Right to be Heard

27. Mr Reddy, as Manager Enforcement gave evidence to the Tribunal that the Grievor had advised him that this was the reason why he had not physically relocated. Despite that, Mr Reddy did not include that reason for the inaction of the Grievor within his memorandum recommending disciplinary action. Whether that omission was deliberate or simply negligent was an issue that was not explored, however the effect of that, was to produce less than objective facts to the General Manager for consideration. Whether or not, that issue was known to the in-house legal team, who also appeared to assist in the facilitation of the dismissal, is also not known. It is surprising how that issue would not have been made known, following a fairly simple inquiry being made. The fact that the Grievor was not given an opportunity to provide any account to the employer, is simply the best argument for why employers should provide employees with natural justice and a right to be heard before a decision of this nature is taken. That is, unless you get your facts right in the first place, you simply may make a decision, that cannot be justified.

¹⁵ There was some suggestion in the evidence of the Grievor, that Mr Canioqo was happy for him to undertake some of the call centre queries, but that he wished him to physically remain close by to assist also in other work.

28. The Employer seems to be relying on the case of *Carpenters Fiji Ltd v Latianara*¹⁶ to support the view that there need not be any right to be heard, where it believes that it can summarily dismiss an employee. This clearly shows why employees need to be certain that their actions are justified. A summary dismissal that is not justified will therefore expose the employer to remedies under statute. One really good reason why employers should provide employees the right to be heard, is so that they do not get the decision wrong. Obviously there will be on occasions quite clear cases, where little is to be gained by hearing from the employee, but this is not one of those cases. The Grievor had a perfectly good reason for not relocating. The evidence of Messrs Karan and Reddy, was that this reason was known to both of them. As Mr Karan had told the Tribunal, he was advised by the Grievor that he was willing to move, but for the "directions of the Regional Manager". Mr Reddy, stated that:

Mr Vulaco told me that Mr Caniogo had asked (him) to do some investigations and complaints being made

29. Mr Reddy could have raised his concerns with Mr Caniogo, the Regional Manager or the General Manager, Mr Ali. He also could have brought the issue to the attention of the Human Resource Manager. Mr Reddy could have raised the issue at the weekly meeting in which all key persons attended. He did not do so. Based on the available evidence, Mr Caniogo could have clarified the situation and a decision further taken as to whether the request for transfer was still to be actioned, or whether or not the alternative arrangement of allowing the Grievor to remain at his physical location whilst still assisting the Regional Manager, could be allowed.

30. The fact that the Grievor had been the "Best Performance Officer" for the Central Division in the Third Quarter of 2015, is also another factor for whatever reason the Respondent's lawyers and HR advisors appeared to have ignored. The tabulated disciplinary action that had been included by Mr Reddy in his memorandum to the General Manager, was vague and required much more detail in order to substantiate any 'compounding' of the allegations. In any event, as Ms Cama had indicated, all of those issues other than the present allegation of insubordination, had already been dealt with by the Employer. The section within the memorandum pertaining to the Grievor's performance can also best be described as self-serving. It was clearly a less than objective analysis of the performance information that would have been available to Mr Reddy.

31. Mr Reddy had told the Tribunal that he had seen Mr Karan during the relevant period and was advised by him that:

I have spoken to Mika and he is willing (to transfer)

32. Again that issue was not contained within Mr Reddy's memorandum recommending the disciplinary action be taken.

Conclusions and Other Issues

33. Based on the above circumstances and factual backdrop, the Grievor's conduct cannot amount to insubordination. If that was the final 'disciplinary straw' that was suppose to justify the summary dismissal, it cannot be justified upon any objective view. One final issue within the

¹⁶ [2011] FJHC 822

materials provided by the Employer, is located at Annexure K to the Respondent's Submissions dated 26 June 2017, in which a complaint was made to the Authority by a law firm in relation to certain conduct of the Grievor. There was not any proper exploration of that issue by any party and so at best, that issue remains of little direct assistance at this time at least, when evaluating the question of justifiability and fairness. If at some stage, that issue warranted a further investigation, then that may bring about other issues, not for the present purposes needed to be considered by the Tribunal.

34. Overall, the Tribunal believes that the Grievor should be reinstated in his position as a Road Safety Officer, with all entitlements paid to him as and from 16 February 2017.

Decision

It is the decision of this Tribunal that:-

- (i) The grievance of Mr Mikaele Vulaca be upheld, insofar as he was unjustifiably summarily dismissed in his employment.
- (ii) The Grievor is to be reinstated to his substantive position as Road Safety Officer with the Respondent, with all entitlements being restored and continued as and from 16 February 2017.
- (iii) The Grievor is at liberty to make an application for costs within 28 days.



Mr Andrew J See
Resident Magistrate

