



## **Ex Tempore Decision**

**Title of Matter:** **FIJI MINE WORKERS & STAFF UNION**  
**v**  
**VATUKOULA GOLD MINE**  
**Section 211 (1) *Employment Relations Act 2007***

**Subject:** **Adjudication of Employment Grievance (Dismissal of Mukesh Prakash)**

**Matter Number:** **ERT Dispute 23 of 2017**

**Appearances:** **Mr A Singh for the Union.**  
**Ms N Samantha & Ms M Besetimoala for the Employer**

**Date of Hearing:** **5 October 2017**

**Before:** **Mr Andrew J See, Resident Magistrate**

**Date of Decision:** **5 October 2017**

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### **Background**

This is an Employment Relation Tribunal Dispute Number 23 of 2017. It relates to the dismissal of Mr. Mukesh Prakash, a former Operator working at the Vatukoula Gold Mines. The focus of this dismissal dispute arises out of the dismissal letter dated the 6<sup>th</sup> of May, 2016 in which the Employer summarily terminated the Grievor, on the basis of what was otherwise regarded as his wilful damage of Dump Loader 53 and Dump Loader 71, the property of the Employer. The wilful damage is said to arise during the course of the Grievor's employment relating to two separate incidents; one on the 16<sup>th</sup> of April, 2016, the second on the 25<sup>th</sup> of April, 2016.

In both cases it appears that there is no dispute in regards that there was damage to the Employer's vehicles, that resulted in repair works variously estimated, in the first instance between \$18,000 and \$34, 000 repairs and in the second, \$15,000 to \$35, 000.

## **Evidence**

The Tribunal in the conduct of this determinative conference has had regard to a variety of evidence, submissions and appearances by employees of the Vatukoula Gold Mine, including the Section Head, the Head of Human Resources, two representatives from Site Safety, two mechanics and the Superintendent Mr. Chandra, who was overseeing the activities that were undertaken by Mr. Prakash in his role as a Diesel Equipment Operator.

The evidence was that Mr. Prakash had been working with the Employer or previous entities that were operating the Gold Mine, for approximately 18 years. And the evidence is that aside from one incident that hasn't been articulated by the Employer, that the Grievor was regarded as a good employee without any other work issues, particularly in relation to his capacity to operate and drive vehicles in his charge.

It is the case that as a result of these two incidents and enquiries that were conducted by the Employer, one on the 27<sup>th</sup> of April and one on the 30<sup>th</sup> of April, that ultimately a Discipline Hearing was conducted and undertaken by a panel that was chaired by Mr. Francis Baleisasa in his capacity as Section Head of Mining South.

It was Mr. Baleisasa who having regard to all the material that was available to him, formed the view that Mr. Prakash was guilty of not following standard procedure and was guilty on the charge of wilful damage. It was also the recommendation that was made by Mr. Baleisasa to the General Manager of the Mine, that the Grievor would be dismissed in his employment. That obviously took place, after that disciplinary hearing on the 04<sup>th</sup> of May and was communicated to the worker on the 06<sup>th</sup> of May, though it was effective from the 01<sup>st</sup> of May.

There is some question mark obviously in relation to how one backdates the dismissal in employment of an employee, but for the present purposes we won't dwell on that issue.

## **Statutory Test**

In cases of this type the test that needs to be applied is twofold. Generically cases of this type appear before the tribunal and are referred to as 'unfair dismissal' cases. But there are two elements to it. The first is a question whether or not there is justification in the dismissal and in that respect the language of the legislation refers to whether an employee has been justifiably dismissed. The second issue pertains to whether or not in the cause of the execution of the dismissal, the termination has been undertaken in a fair manner, that is in a way that still preserves the dignity of the worker; it doesn't unduly cause any extra hurt or humiliation as a consequence of the action that has been taken.

This Tribunal is only concerning itself with the question of whether or not there is justification in dismissal on the basis of information it's been provided and on the reasons that have been given as contained within the dismissal letter. The Tribunal wants to make reference to the guiding authority that it assesses matters of this type and that's *Kumar v. Nanuku Auberge Resort* 2017 FJET 2. The other considerations that may be relevant in cases of summary dismissal where these allegations of unfairness are identified, is *Yanuca Island Limited Trading as Shangri-La Resort & Spa* (Employment

Relation Court Number 09 of 2014). The Tribunal places its primary focus on the charge that has been alleged, that the worker had wilfully intended to cause damage to the vehicles DL 53 and DL 71.

The question that was put to Mr. Baleisasa and others, was whether or not the Grievor actually wilfully intended to cause damage to the vehicle, as opposed to perhaps having negligently or recklessly caused damage to the vehicle.

And the Tribunal is of the view that while there might have been a negligence that arises as a consequence of Mr. Prakash's conduct, there is certainly no evidence whatsoever to support the argument that he wilfully intended to cause damage to either of those vehicles.

#### Vehicle DL 53

On that basis, the Tribunal finds that the reasons given for the dismissal in this case that would be the justification for the dismissal, are not supported by the evidence that is available. In the first case, (DL 53) the damage arises because of the fact that the oil cap appears not to have been located on the engine or the neck of the entrance for the oil. This in fact caused oil to spill, ultimately supporting a view that the oil ran dry within the machine. The evidence of Mr. Christopher Francis was that under his supervision in the previous night shift, the oil cap was located and fixed where it should have been. There is also acceptance by the parties that the oil cap wouldn't be checked in the ordinary course of checking the oil level as part of the pre-start procedures.

Mr. Francis also suggested that it could have been the case that the oil cap may have come off during the course of operations. And there is no reason why this Tribunal would find such a proposition farfetched in the circumstances in relation to the incident involving DL 53.

The worker claims that there were no specific indications that the vehicle was under stress. This is said, despite the fact that in the Board of Enquiry Report that was signed by Mr. Prakash on the 01<sup>st</sup> May, 2016, it indicates in comments as to the standard procedure and whether or not it is followed; that the incident is reported as "oil coming out of the engine, smoke coming out of the engine but Mukesh continue to operate until the oil ran dry".

There is some challenge as to whether or not the signature of Mr. Prakash or his signing of the document on the 1<sup>st</sup> of May was done in a way in which he actually acknowledged those particular comments, or whether or not he was acknowledging the fact that he was then deemed to be a person responsible for preventative action and the timeframe for it.

It seems that there is a dispute in relation to whether or not at the time in which the vehicle ceased operations, there was smoke visibly coming out of the engine. The Tribunal is not inclined to the view to suggest or to consider that Mr. Prakash would have continued to operate the vehicle had he had known that there was smoke coming out of the vehicle and there were problems with the oil level.

## Vehicle DL 71

In relation to the 2<sup>nd</sup> incident, it doesn't seem to be in dispute that one of the mechanics assisting in the 'topping up' of the water levels of the radiator, on that particular day, did tighten the radiator cap. It's acknowledged by the Tribunal that the operator should have also checked to see if the radiator cap was firmly in place. Outside of that though, the same types of consideration takes place. We have an operator who has in fact 18 years of unblemished experience, regarded as a good operator. That was the evidence that was given; a good employee. The comments in relation to the Board of Inquiry, say that Mr. Mukesh conducted some checks, but the mechanic checked the oil level for him. The ultimate finding by the Board of Inquiry was that the conduct of the employee by not physically checking on the machine prior to operating, gave rise to the vehicle overheating and causing a crack that was seen on the engine block; due to the overheating of that vehicle.

Given the manner in which this determinative conference was conducted, there has not been complete access to all of the employer records pertaining to previous incidents of break downs underground, particularly in relation to its heavy vehicle fleet. There are various suggestions in the evidence that's been provided by the OHS and the Manager, Mr. Tamanibici, that for the 2016 year there were 11 incidents involving heavy machinery underground and in the 2017 year so far, there was 6 incidents.

Based on that information and having regard to the fact that Mr. Christopher Francis has indicated that DL 53 was an old vehicle that had been in operations prior to his commencement of employment and the fact that the Tribunal hears the DL53 is presently not in operation for other maintenance problems; the Tribunal accepts that these incidents do occur and that there is a strong obligation on the operator to ensure that for obvious health and safety reasons, they comply with all of the procedures of the company pertaining to start up and operation of vehicles. There is also an obligation on the company to ensure that the vehicles are operating in proper working order and that the timely review of issues should apply where incidents do take place, so as to facilitate and enable corrective behaviour to take place.

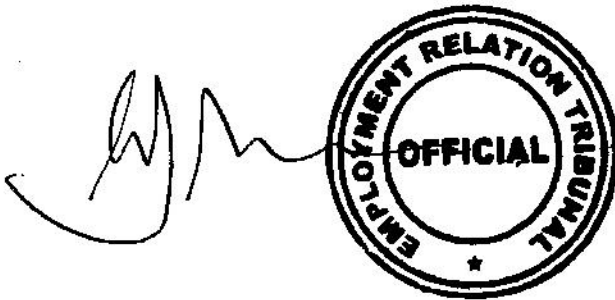
In this case before the Tribunal, the evidence is that the first incident took place on the 16<sup>th</sup> of April and yet there does not appear to have been any corrective action taken nor any discussions that were had directly with the Grievor for a period of two weeks. Now, during that time of the two weeks, the second incident took place on the 27<sup>th</sup> of April. One would have thought that if the Employer prided itself on its own health and safety obligations and to attend to its company policy and procedures, that part of that would have required corrective conduct to have taken place, that may have included the counselling of Mr. Prakash and even if it was the case, some disciplinary behavior could have or should have taken place coinciding with that incident. Instead what seems to have taken place is that the disciplinary inquiry collected both Board of Inquiry results and reliant on the unfortunate sequence of events, gave rise to a decision that in some way does not appear to be justified; insofar as it seems excessively harsh.

On that basis, the Tribunal finds that the Grievor has been unjustifiably dismissed, insofar as he did not wilfully set out to damage either DL 53 or DL 71. It's recognized that the Employee nonetheless has failed to observe all of the necessary protocols and perhaps was not as vigilant as he should have been in the operation of the vehicles. On balance, having regard to all issues and all of the evidence of the parties and taken into account all the submissions that were made freely by all persons who attended this determinative conference, the Tribunal believes that some form of compensation should be made available to the worker. That compensation should be made on the basis that he was out of work for a period of time and now continues in a role in which his salary is somewhat reduced by approximately \$1 an hour, I think \$0.80 an hour.

When considering issues of compensation, the Tribunal also wants to take into consideration what would be regarded as the concept of contributory conduct of the individual and intends to offset the compensation that it intends to award, by an amount that has regard to that particular concept.

The claim of the Grievor was for a monetary amount of \$9000. The claim is based on this adjustment that takes place between wages lost between the period May, 2016 to February 2017 and it appears that there is someone going claim for compensation based on the ongoing loss that arises. The worker was in receipt of salary of \$12,000 per year and in this instance having regard to all those factors that the Tribunal has described, it intends to award compensation in the amount of \$4500 to be paid within 21 days.

I order accordingly.

The image shows a handwritten signature in black ink on the left, which appears to be 'Andrew J. See'. To the right of the signature is a circular official seal. The seal has a double border. The outer border contains the text 'EMPLOYMENT RELATION TRIBUNAL' at the top and 'OFFICIAL' at the bottom, with a small star at the very bottom center. The inner circle is empty.

**Mr Andrew J See  
Resident Magistrate**