



Decision

Title of Matter:	Noneel Prasad v Fiji Electricity Authority (FEA)	(Grievor) (Employer)
Section:	Section 211(1)(a) Employment Relations Promulgation	
Subject:	Adjudication of Employment Grievance (Unjustifiable or Unfair Dismissal)	
Matter Number(s):	ERT Grievance 121 of 2016	
Appearances:	Mr D Nair, Industrial Relations Advocate Ms Y Fatiaki, Legal Counsel, FEA	
Date of Hearing:	Saturday 1 April 2017	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	15 May 2017	

KEYWORDS: Unjustifiably or unfairly dismissed; Summary dismissal; Conducting of unauthorised electrical works; Conducting of disciplinary inquiry; Cyclone Winston.

CASES CITED:

Moti Chandra & Company Ltd v Credit Corporation (Fiji) Ltd [2013] FJCA 129 at [20].
Parvinesh Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2
Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuaruku [2017]FJHC92; ERCA 9 of 2014.

Background

1. This is a referral made to the Tribunal in accordance with Section 194(5) of the *Employment Relations Promulgation 2007*. The referred matter relates to a grievance lodged by Mr Noneel Prasad on 22 June 2016. The details of the grievance referred by the Mediation Service, comes about following the suspension and later dismissal of Mr Prasad from his employment with the

Fiji Electricity Authority (FEA). The Grievor "is seeking reinstatement and compensation for the alleged unfair suspension and dismissal".¹

2. It is also perhaps worth mentioning that the initial and subsequent grievance was the subject of a mediation process undertaken by the Mediation Service on 11 July 2016 and 20 July 2016. A further attempt to resolve the grievance by way of mediation was undertaken by the Tribunal on 21 December 2016.

The Case of the Employer

3. The Employer claims that the termination of the Grievor Mr Prasad is justified on the basis of what was regarded generally as a serious breach of trust and misconduct. The specific charges that were alleged against the Grievor can be summarised as:-

1. *Breach of employment contract;*
2. *Breach of the FEWA Collective Agreement² being unauthorised and grossly negligent conduct;*
3. *Carrying out connection services to Service Mains in Breach of Network Circular No 1; and*
4. *Disregard for the FEA Safety Manual.*

4. In its submissions, the Employer states that Mr Prasad had worked for the Respondent for the past 15 years. At the time of his dismissal he had been engaged as a Liveline Linesman, who had been carrying out electricity restoration works as part of the Cyclone Winston rehabilitation program within the Rakiraki area.
5. The basis for the dismissal arises out of the fact that the FEA's Chief Executive Officer (CEO), Mr Hasmukh Patel had been travelling around that region on 30 April 2016, whilst undertaking a general inspection of the progress of works. During the course of his travels, Mr Patel apprehended a casual employee working on a service main pole at a private residence occupied by a Mr Salen Chand. The Respondent asserts that this work was not authorised work. Upon investigating the matter further, it was discovered that the Applicant, together with another casual employee,³ was actually inside the residential home. The primary allegation that was levelled by the Employer against the Grievor is that he had wilfully left his scheduled work with two casual employees and undertook private electrical restoration work to a member of public, in contravention of FEA policies and procedures. After the conduct of a disciplinary inquiry conducted by the Employer, the Grievor was ultimately suspended from his duties and then dismissed from his employment.

Evidence of Mr Hasmukh Patel

6. The first witness to give evidence on behalf of the Respondent Employer was the CEO, Mr Hasmukh Patel. Mr Patel had earlier sworn to an Affidavit dated 19 September 2017, that was

¹ See Form 4 – *Certificate of Declaration and Referral of Employment Grievance or Employment Dispute to Employment Tribunal*

² It is noted here, that the Grievor's Union Representative has told the Tribunal in evidence that this Collective Agreement does not apply in the case of workers who are members of the CETWUF.

³ Despite that fact not being made known to the CEO at the time of the initial discovery.

marked and admitted into evidence as Exhibit E2. Mr Patel told the Tribunal that he had been employed with the FEA for the past 38 years. His evidence was that following the devastation caused by Tropical Cyclone Winston that a plan had been prepared by the Authority in conjunction with Government that established priorities for the restoration of electricity supply throughout the country. Mr Patel said that on 30 April 2016, he travelled to the West to see the work in progress. It was his evidence that while travelling along Kings Road that day, he stopped at a residence where he could see an FEA vehicle and a person up a service pole⁴, with the service mains broken and lying on the ground.

7. According to Mr Patel, the person who was working on the service pole climbed down when he noticed that the CEO had arrived. The witness said that he had asked his driver to "pull over", because the FEA does not carry out repairs on consumer service mains. This work, he explained, involved a permit and inspection system and needed to be conducted by private contractors. He said that this was a "known fact" among FEA employees and reference was made to Annexure 'HP1' to his Affidavit sworn on 14 September 2016, in which a Memorandum to all Network Personnel made this clear. Mr Patel explained the reason why there was a distinction between the private and public works. According to Mr Patel, the casual worker who had been apprehended up the service pole, "was flabbergasted" when he was confronted by the CEO. Mr Patel said that he asked the worker who else was he with and he had indicated the Grievor, who he said was in the residence.⁵
8. Mr Patel said that he approached the residence and met the owner of the property. The CEO said that he asked that person could he tell Mr Prasad to come outside. Mr Prasad did so and was asked what he was doing at the property. According to the witness, the response was:

"the power poles had leaned and the mains broke, we are trying to help him out".

9. The witness said that Mr Prasad had accepted at that time, that the work was not his responsibility. He said that physically the Grievor, was "sweating profusely (and) that "he was surprised and fearful when he saw me". Mr Patel said he instructed the Grievor to immediately leave the place and return to his team working at the Volivoli Resort area. Mr Patel says that he had thereafter gone to see Mr Prasad's immediate supervisor and was told, that he had not been aware of where the Grievor had been and was not aware that he had been at that particular residence. According to the CEO, Mr Prasad had indicated that he had received his instructions to attend the residence, from Mr Shyamal Bhan, who at the time was engaged as the Liveline Co-ordinator. Mr Patel told the Tribunal that all involved, including the two casuals and the Team Leader Mr Bhan, were terminated in their employment. Under cross examination by Mr Nair, the witness was asked to clarify the way in which the priorities of restoration works had come about and also about the distinction that had been made within the *Network Circular No 1* Issued to all Network Personnel, that restated "reconnection of service mains shall only be carried out by Installation Inspectors from the Regulatory Unit following approved reconnection procedures." According to the witness, Mr Bhan had told him that he admitted having given the

⁴ The Employer submits that the service poles and supply to the residential addresses of the consumers was not part of the scheduled priority works and that supply to a residence from the service pole, was a private responsibility. (Refer Exhibit E1)

⁵ As it transpired, following an investigation undertaken by the Authority, another employee was also in the house at that time.

instruction to the Grievor, that it was not authorised and that he knew it was wrong.⁶ Mr Patel said at the time in which he had apprehended the Grievor at the private residence, that he had not said that he had received the instruction from the Live Line Co-ordinator. When asked by the Tribunal as to whose responsibility it was to 'straighten' a leaning Mains Pole, the witness, responded that it was a private matter, as it was deemed an "act of nature".⁷

Evidence of Mr Jitendra Kumar

10. The next witness to give evidence was Mr Jitendra Kumar an Electrical Engineer who had been engaged with the Respondent Employer for the past 25 year. Mr Kumar held the position of the General Manager, Network. Mr Kumar told the Tribunal that 70% of the FEA network had been devastated by the cyclone; that a plan had been actioned to prioritise essential services and that teams had been "working on multiple fronts".
11. Mr Kumar was the deponent of an Affidavit prepared for the proceedings and this was marked and admitted into evidence as Exhibit E3.⁸ The witness gave evidence in relation to his knowledge of the Grievor and the procedures involved in undertaking domestic supply work. Mr Kumar told the Tribunal that Mr Bhan had incorrectly issued instructions that should have been referred to the Inspection Team. During cross examination, Mr Kumar gave evidence that he was authorised to carry out an Investigation into the incident and did so by virtue of his position.⁹ The witness told the Tribunal that he did not interview the CEO as part of that process and admitted that restoration of services did require the connection to consumers as well. Mr Kumar told the Tribunal that he did not interview the casual employees as part of his investigation and the report of the Investigation Team¹⁰ was compiled by the Human Resource Department. According to the witness, following on from the compilation and consideration of the Investigation Report, a suspension letter was issued to the Grievor on 2 June 2016, whereupon Mr Prasad was suspended from duties for 28 days, pending termination.¹¹ Mr Kumar had admitted that there had been no instruction given that there was a priority of reconnection of services to only certain consumers. He nonetheless said that the reconnection works had been undertaken in accordance with the FEA Cyclone Action Plan.

Evidence of Mr Mukesh Chandra

12. Mr Chandra was a driver for the FEA who had been employed within the organisation for 21 years. His evidence was consistent with that of the CEO, insofar as he pulled over in the motor vehicle at Mr Patel's request and accompanied him out of the vehicle and was within earshot of the communications that subsequently transpired. Under cross examination, Mr Nair challenged the veracity of the Affidavit sworn by Mr Chandra on 20 February 2017 and marked as Exhibit E4. Mr Chandra maintained that it was his Affidavit and that the person who had prepared the document had done so reliant on his words.

⁶ This appears to be somewhat at odds with the Statement provided by Mr Bhan that was contained within the Incident Report at Appendix 4.

⁷ It is noted that at p4 and Appendix 5 of the Investigation Report compiled by Mohammed Siraz dated 8 May 2016, that it was reported by Mr Bhan, that the service line became low during the course of repair works being carried out on the FEA pole by contractor Marigold Holdings.

⁸ See Affidavit of Jitendra V Kumar sworn on 19 September 2016.

⁹ Having said that, the Investigation Report was compiled by Mr Siraz, the Health and Safety Officer, HR Department.

¹⁰ See Annexure "JVK 2" to the Affidavit of Jitendra V Kumar sworn on 19 September 2016.

¹¹ This issue will be canvassed later within the decision.

The Case of the Grievor

Evidence of Mr John Paul

13. Mr John Paul is the National Secretary of the Construction, Energy and Timber Workers' Union of Fiji ("the CETWUF"). Mr Paul gave evidence that his Union has members within the FEA and said that the Grievor was one such member up and until the time of his termination. According to Mr Paul, the Union became actively involved in the representation of the Grievor following the Disciplinary Inquiry that had been undertaken. The witness advised that a meeting was organised with the General Manager HR, Mr Naveen Lakshmaiya, whereupon he says he was told that the General Manager would confer with the CEO and hopefully resolve the matter. Mr Paul told the Tribunal that he had anticipated that the matter would be resolved consistent with the nature of the discussions that had taken place, however says that instead he received a copy of the termination letter as issued to the Grievor. According to Mr Paul, his evidence was that the FEA had relied upon another Union's Collective Agreement¹² when steering through the disciplinary and termination process.¹³

Evidence of Mishal Melvin Singh

14. Mr Melvin Singh is a former employee of Rakiraki Electrical and told the Tribunal that it was arranged for him by that business, to temporarily go and work for the Authority, as they had needed casual workers to assist in the restoration efforts. Mr Singh said that he had received instructions from the Live Line Co-ordinator, Mr Shyamal Bhan. Mr Singh explained the circumstances as to why he was working at the residence of Mr Chand. The witness said that the day earlier, he had been advised by Mr Bhan of the need to go to the residence to secure the aerial mains, as the "post was leaning".¹⁴ He said that he was told that Mr Prasad would drive him to the location. Mr Singh told the Tribunal that he was a qualified electrician and "lifted the aerial main and put it on top of the intermediate post". He informed the Tribunal that Mr Prasad had driven him there. Mr Singh confirmed that he was approached by Mr Patel as to why he was working at the location and the whereabouts of Mr Prasad, but indicated that he was unaware of the fact that he was talking to the CEO of the Authority at that time. Mr Singh told the Tribunal that "Noneel was not doing any work" at the residence¹⁵.

15. Under cross examination, the witness conceded that he had no permit to perform the work that he was doing on that day. According to Mr Singh, the main post was leaning and a crane driver had come to straighten the post. He indicated in response to questioning from the Tribunal that the men were dropped off at the residence around 8.30am and were to be collected around 1.00pm. Mr Singh said that he had been fixing the cross arm/bar that had been broken and then had been sitting down for quite a while, talking, telling stories and using Facebook on the phone.

¹² See extract as contained at Appendix 14 to the Disciplinary Report, located at Annexure "JVK2" to the Affidavit of Jitendra V Kumar sworn on 19 September 2016.

¹³ Ms Fatiaki informed the Tribunal that there had been negotiations between the parties following the repeal of the National Essential Industries Decree 2009, however that matter was now the subject of a dispute before the Employment Relations Tribunal. The process that is set out within Schedule B to the Suspension Letter issued to the Grievor on 2 June 2016 (See Annexure "JVK3" to the Affidavit of Jitendra V Kumar) nonetheless appears to have been called up 'administratively' by the Employer as no present Collective Agreement is in place with the Grievor's own Union.

¹⁴ This doesn't seem to make much sense, seeing that in other places, the evidence appears to have been that the lines were low as a result of the post being 'straightened' by FEA contractors, Marigold Holdings.

¹⁵ This is an issue that possibly could have been explored further by the Respondent, having regard to the fact that Annexure "JK1" to the Affidavit of Jitendra V Kumar, provides some suggestion that Mr Singh had earlier indicated otherwise.

Mr Singh understood that Mr Bhan had met the owner of the residence Mr Chand, at Dream View Villas, that had been the 'camp site' for workers who had been deployed to work in that Volivoli region.

Evidence of Mr Noneel Prasad

16. Initial submissions on behalf of the Grievor, were filed in the Tribunal on 29 August 2016. In addition, Mr Prasad had filed a 'Supplementary Affidavit' on 18 January 2017.¹⁶ The Grievor stated that prior to his termination he was engaged as an Electric Power Live Line Linesman for the FEA. He said he had commenced work with the Authority in 2000 after undertaking training as a Trainee Electric Power Linesman. Mr Prasad told the Tribunal that he was assigned to work within the Rakiraki area following the cyclone and that the works allocation came to him from Mr Shyamal Bhan, the Live Line Co-ordinator. The witness told the Tribunal that he found Mr Bhan as a supervisor to be overpowering and was responsible for the allocation of hours of work, preparation and review of times sheets and other supervisory matters. The Grievor was referred to Appendix 1 within the *Investigation Report* as contained within Exhibit E3, that contained a hand written statement that he agreed he provided as part of the investigation process. Mr Prasad said that he provided this statement to Mr Bhan and that the true state of affairs was contained within his later Supplementary Affidavit (Exhibit G1). According to the witness, in relation to the initial handwritten statement that he provided the Employer, this was done under duress. That is, in circumstances where Mr Bhan "was standing beside (him) and telling (him) what to write".¹⁷
17. Mr Prasad indicated that the arrangement for him going to Mr Chand's residence was that he would drop off the casual workers and return to collect them around 1.00pm. The witness indicated that he returned to collect them at the designated time, though had a stomach upset and asked to use the washroom. According to Mr Prasad, he was threatened by Mr Bhan following the incident to the effect that if he didn't write the statement as he said, that he would "deduct time".¹⁸ Mr Prasad admitted to having known Mr Chand from the hotel in which they had been staying while undertaking the restoration works. The witness denies sweating profusely when confronted by the CEO and said that he was confused with the events that had transpired at that time. During the course of his evidence, Mr Prasad said that he had been involved in previous restoration works in Suva and was not aware of any policy where works were categorised based on priorities and FEA/consumer splits.¹⁹ Mr Prasad told the Tribunal that he was interviewed by a Disciplinary Committee and required to answer question that had been put to him. According to the witness, the "FEA did not come and ask me once, what happened that day." The witness indicated that he had anticipated a different course of events and that the General Manager Human Resources had indicated that it was likely that he submit to an investigation activity, not be part of a Disciplinary Inquiry. Mr Prasad told the Tribunal that in relation to the Disciplinary Meeting, when he asked should he have a support person present, that he was told that it was "not important".

¹⁶ This Affidavit was referred to as Exhibit G1 in proceedings.

¹⁷ At one point in proceedings, the Witness even suggested that it was not his signature on that document.

¹⁸ Presumably this is a reference to the way in which hours of work and ultimately remuneration is achieved.

¹⁹ It is also noted within the materials, that the Network General Manager, Mr Kumar claims that Mr Bhan had indicated that there was another similar case at the Naria Subdivision. (See Annexure JVK1 his Affidavit)

18. Under cross examination, Ms Fatiaki put to the Grievor, the inconsistencies in his statements and the fact that he had earlier in effect admitted to the conduct. In response, Mr Prasad said that while he wrote the statement as provided to Mr Bhan, that he did not sign the document. Mr Prasad said that he did not know the actual work that was to be done at Mr Chand's residence and that it was Mr Bhan who had told him what to write within the Statement. Mr Prasad said that he felt he had a "gun pointed to (his) head". Counsel challenged the legitimacy of such a claim and questioned the witness as to why he did not bring such a situation to the attention of the Employer. Mr Prasad said that this same person was listening to my responses within the Disciplinary Inquiry. The witness was then referred to the Memorandum sent out to Network Personnel in relation to the reconnection of service mains.²⁰ The Grievor indicated that he simply did not know of this edict. The Tribunal then took the opportunity to ask the Grievor why it was the case that he had not mentioned anything in relation to Mr Bhan's conduct prior to trial. The Tribunal asked the witness did he read the Investigation Report once provided to him as part of the materials filed by the Employer.²¹ The witness suggested that he did not read it in any detail. The witness was queried as to why there was no mention of these issues in his later Supplementary Affidavit made in January 2017. In response, the Grievor said words to the effect that "I forgot to tell the Union about the threatening from Mr Bhan".

What Needs to Take Place In Cases of this Type?

19. Within the *Closing Submissions of the Worker*,²² it is said that the issue for determination is whether the decision to terminate the employment of the Applicant (Grievor) was "justified, procedurally fair". Without wanting to become too pedantic in these matters, the issue of procedural fairness is not necessarily a central feature to the analysis, even though it is clearly a preferred way of doing things from a human resource or industrial relations point of view. The scope of the inquiry is limited to whether the dismissal was justified and whether it was undertaken in a fair manner. In relation to the question of what constitutes a 'justifiable dismissal', this Tribunal has provided a brief analysis of the history of that concept, within the decision, *Parvinesh Kumar v Nanuku Auberge Resort Fiji*²³. In the case of what constitutes an 'unfair dismissal', a clear prescription is provided for by her Honour Wati J in the case of *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuaruku*²⁴. The application before the Tribunal is to be determined within this framework.

The Conduct of the Grievor

20. Against the myriad of inconsistent statements, it is difficult to state with complete certainty what really transpired on 30 April 2016. Mr Bhan and Mr Chand, the owner of the residence where the unauthorised works took place, were not called as witnesses in proceedings. Nor was the second casual worker Mr Anmol Raj who was allegedly located in Mr Chand's house on the day of the incident. Mr Joe Cheer, the Team Leader Live Line Central, was also not called, so as to give any understanding as to his knowledge of what had transpired and where were his casual employees and Mr Prasad, at all relevant times.²⁵ The evidence seems to nonetheless suggest

²⁰ See Appendix 10 within the Investigation Report dated 30 April 2016.

²¹ The responses of the Witness to the questioning by the Tribunal, were not particularly convincing.

²² Filed 24 April 2017.

²³ [2017] FJET 2

²⁴ [2017]FJHC92; ERCA 9 of 2014.

²⁵ Unfortunately the time sheets of the workers were never tabled.

that Mr Bhan and Mr Prasad had come in contact with Mr Chand at the FEA camp site (Dream View Villas) where the FEA permanent workers had been located during the works exercise. Whether there had been any offer of monies or favour to encourage Mr Bhan to direct workers to Mr Chand's home is probably of little import at this time.²⁶ The issue was that Mr Bhan would have known that the works were not authorised and would have constituted a breach of the regulatory arrangements and the permit system in place for undertaking service mains reconnections.

21. Mr Prasad drove two casual workers to the residence of Mr Chand. Those workers, according to the evidence of Mr Singh, spent a good deal of the time on 30 April at least, not working, but rather telling stories and chatting on Facebook. According to the Network General Manager Mr Kumar, he had been initially informed by Mr Singh, that Mr Prasad and Mr Raj had been undertaking electrical works within the house of Mr Chand. That Mr Raj was not observed by the CEO at the property, is at least suggestive of the fact that the two workers were inside of the house and perhaps some 'internal house wiring was being undertaken. In this regard attention is drawn to the fact that in his original hand written statement, Mr Prasad indicates that:

...on Friday 29th April 2016 Mr Shyamal Bhan told me to drop casual staff to Mr Salend Chand's Resident at Raki Raki for house wiring.

When I visited Mr Salend Chand's Resident then he told me that he has spoken to Shyamal about his service main and to drop the ladder on Saturday Morning 30 April 2016.

22. Coupled with Mr Singh's alleged comments to Mr Kumar, albeit that they are hearsay, there is evidence to suggest that some house wiring, that is internal works, were being undertaken at Mr Chand's property on either or both of the days 29 and 30 April 2016. A proper reading of Mr Prasad's Statement, provides sufficient 'signposts' to suggest that he was speaking of two distinct days, where internal and external works were being carried out, whether consecutively or concurrently. The use of the term 'house wiring' seems quite distinctive from any 'service main' work. Further, Mr Prasad appears to have been at Mr Chand's house on an occasion prior to Saturday Morning 30 April 2016, because he was told to drop the ladder on the Saturday.
23. The Tribunal is of the view that it is likely that Mr Raj was working on the 'house wiring' on 30 April when the CEO had arrived at Mr Chand's house and there is a possibility that Mr Prasad had also been doing the same, on one or both of those days also.²⁷ Had Mr Cheer the Team Leader been called to give evidence, or Mr Vimal Chand, an employee who appears to have accompanied Mr Prasad in the vehicle to drop off the ladder and casual workers on 30 April 2016, then some better understanding would have been available as to the length of time that Mr Prasad and the other casual employees had been absent from their authorised duties.²⁸ A

²⁶ Certainly Mr Bhan appears to have given evidence as to why the request had come about that was contradictory, particularly insofar as it was suggested that the service main had become low as a result of the work of FEA contractors, rather than as a result of the effects of TC Winston.

²⁷ Although it is noted within the Statement of Joe Cheer at Appendix 7 of the Investigation Report, that he said that on 30 April 2016, Mr Prasad had left the worksite at approximately 1300hrs.

²⁸ Mr Cheer makes no mention of that fact in his Statement at Appendix 7 and so it is somewhat unclear as to who these casual workers were reporting to at that time. It would have been useful to determine whether they were missing on 29 April at any stage.

further question could have been put to Mr Raj as to what was he doing within Mr Chand's house on 30 April 2016, when the CEO had visited the residence. And why was it that Mr Prasad didn't tell the CEO, that another casual employee was inside the house at that time? Within the materials, the issues pertaining to 29 April 2016 do not appear to have been explored at all.

24. The Tribunal accepts and finds that Mr Prasad knew that the works being undertaken at a private residence would not have been authorised. If it was the case that this work also consisted of house wiring, then such a situation would have been even more obvious to him. Having regard to his prior inconsistent statement, the Tribunal is mindful of the decision in *Moti Chandra & Company Ltd v Credit Corporation (Fiji) Ltd*,²⁹ where the Court of Appeal recognised the importance of a court evaluating the competing accounts of events, having regard to a witness's demeanour and linguistic ability when giving subsequent oral evidence. As earlier mentioned, the Tribunal did not find some of the Grievor's oral testimony as credible.³⁰ Having regard to the length of time taken between when that statement was made and when the Grievor claims that it was made under duress³¹, the Tribunal is inclined to the view that the original statement is one, nearer to the reality of the situation. Even if it was the case that Mr Bahn had been the intermediary between the Investigation Team and Mr Prasad when the Grievor was asked to submit a statement, there is simply no plausible reason why his objection or claim of duress, was not articulated either following his termination, in his initial pleadings, or in his revised or Supplementary Affidavit provided in January 2017. There is simply no mention of any such issue.
25. The likely scenario to all of this was that Mr Chand was an acquaintance of Mr Bhan and Mr Prasad, as he worked at the accommodation in which the workers' camp was based. Both Mr Bhan and Mr Prasad would have been well aware that to provide any such assistance to Mr Chand was outside of their remit. This was a private residence, that was not part of the then current scope of priority works. Whether Mr Prasad was directed to Mr Chand's home by Mr Bhan or whether he had been part of a wider discussion perhaps involving both men, is probably not that material. If Mr Prasad had any concerns, he could have just contacted the Network General Manager Mr Kumar and raised them with him. There is no evidence of any attempt to do so. Even when apprehended at Mr Chand's home, Mr Prasad could have very easily explained the entire situation to the CEO, Mr Patel. There is again no such evidence and one must really question why. He certainly didn't appear to tell Mr Patel, that Mr Raj was also inside the house at the time. The Tribunal finds that the more plausible situation is that Mr Prasad had been quite complicit in this activity. That he attended the home of Mr Chand on both the 29th and 30th April 2016 and was involved whether directly or indirectly, in the provision of unauthorised electrical works, while otherwise being required to perform the duties allocated to him as part of the Respondent's restoration action plan.

Is the Dismissal of the Grievor Justified in Such Circumstances?

26. In *Parvinesh Kumar v Nanuku Auberge Resort Fiji*³² this Tribunal stated:

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

²⁹ [2013] FJCA 129 at [20].

³⁰ Particularly, the answers given to the Tribunal's specific questions.

³¹ Essentially at the trial of these proceedings in April 2017.

³² [2017] FJET 2 at [24] to [27].

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 dismissal³³ 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....."

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.

27. To answer this question, some context needs to be put around the nature of the work that was being performed by the Grievor and others as part of the Cyclone Winston recovery efforts. As the evidence of Mr Kumar made clear, 70 percent of the country's electricity network had been affected. There needed to be a systematic way of dealing with the major priority areas. There was simply no discretion given to Messrs Bhan or Prasad to do otherwise. The internal wiring works that were likely to be undertaken, were completely outside of the activities that FEA employees were authorised to perform. Mr Prasad would have been well aware of that fact. The connection of the consumer mains to the service pole, required a regulatory permit. Again Mr Prasad would have been aware of that fact, yet he knowingly transported other casual workers to Mr Chand's home, to undertake that work. Regardless of whether those persons may have been qualified electricians or not, they were not authorised to perform the 'outside work' without a permit. Perhaps more importantly, the Employer, let alone the people of Fiji, would have expected that the services of these special purpose personnel were being deployed to undertake the specific priority work for which they were engaged. That Mr Singh recounted a long period of time spent chatting and being on Facebook, would have hardly been of consolation to the thousands of consumers still without power.
28. The question in determining whether or not the justification of the dismissal exists, must be considered looking at the proportionality of the punishment, having regard to the specific conduct. The Grievor seems to rely on the 'Nuremberg Defence', insofar as he claims that he was instructed to undertake the activities at the behest of Mr Bhan. That is not accepted. The Grievor had been an employee for in excess of 15 years. He was trained in the organisation and would have had good access to the Network General Manager, should he have needed to consult with him at any time. He could have sought the counsel of Mr Cheer, his Team Leader. He could have contacted his Union. He appears to have done none of this. Yet having said that, the Tribunal is concerned about some of the manner by which the Disciplinary Inquiry took place, particularly if it was the case that all of the individual employees sat in the same room, whilst supposedly providing candid and truthful accounts of what had transpired to the Investigating Team. Another concern would have been if it was the case that Mr Prasad provided his signed statement to Mr Bhan and not an independent third party. Clearly opportunities to allege duress and lack of disclosure are always going to be available in such circumstances. That opportunity can easily be avoided through effective and well applied human resource practices. The fact that the two casual workers provided a joint statement to the Authority,³⁴ was also

³³ 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.

³⁴ See Appendix 8 to the Investigation Report.

highly clumsy. Mr Singh had been outside when the CEO had arrived, Mr Raj was believed to be inside the house. Those issues should have been explored by the investigators. They certainly do not flow out of the joint statement provided. One additional area of concern, related to the evidence of Mr Paul who seemed quite insistent that the General Manager Human Resources had indicated that the situation could be resolved without the need to terminate Mr Prasad. Again, that is unfortunate if that discussion had taken place, but Mr Patel was free to form his own view as to the seriousness of the issue and the consequence that should follow once armed with all relevant information. The problem was that the investigation did have 'gaps' and the advice provided to Mr Patel, could have been more thorough in some areas and more objective in others.

29. One further issue that was raised by Mr Paul concerned the reliance by the Employer upon a process that was located in a Collective Agreement that otherwise should not have applied to the Grievor. A brief exploration of that issue by the Tribunal, revealed that the parties were still involved in discussions pertaining to the development of a new agreement. While the point raised is clearly a valid one, the Tribunal is of the view that nothing significant results from the Employer 'administratively' relying on a process that was otherwise well known and utilised in the context of other workers.³⁵

Conclusions

30. While there is no direct evidence that Mr Prasad himself had been performing any electrical work at the residence of Mr Chand, there is at least some evidence to suggest that he possibly may have been. Certainly it seems quite probable that Mr Raj may have been undertaking internal house wiring works at least on 30 April 2016 when he was apparently inside of the residence of Mr Chand. In the case of the Grievor, he appears to have been at Mr Chand's residence on both 29 and 30 April and had picked up and dropped casual staff at that location at least on one day, so that they could perform "house wiring" and later work to the "service main". This was a deliberate diversion of resources away from what those workers, including Mr Prasad, were deployed to do. There is a great inconsistency between the version of events that had been provided initially by Mr Bhan and Mr Prasad, but also including that of Mr Singh. A better attempt should have been made by the Authority to reconcile these issues. Many of these issues were also left largely uncanvassed by Mr Prasad prior to trial. The credibility of Mr Prasad in this regard, is challenged by the lateness in which complaints of duress have surfaced. He could have easily subpoenaed Mr Bhan to give evidence. For whatever reason, he did not do so.
31. There are also electrical safety issues at work here as well. This is an industry that can allow zero deviations from its own regulatory and safety requirements. Mr Prasad would have been well aware of this. The Grievor could have subpoenaed other employees who could have given an account to support some of the claims that he made, but did not do so. It seems quite clear, that if the case of duress had surfaced earlier than at trial, Mr Paul himself would have strongly agitated those matters with the Authority. Other than the oral testimony of the Grievor, there is no other supporting evidence that this took place at all. While the Tribunal sympathises to some extent with Mr Prasad and the ultimate decision that has been made³⁶, on balance, albeit a finely poised one, the Tribunal finds that in the circumstances the dismissal was justified and that no remedy should be available on that basis. The conduct of Mr Prasad was reckless and remains suspicious on its face. The Tribunal is of the view that the Grievor has not been totally

³⁵ Obviously, the parties do need to resolve the existing discussions in relation to any new Agreement.

³⁶ That is, the Grievor had spent 15 years with the Employer and there is no other evidence of poor performance or misconduct before the Tribunal.

candid in the way in which he has faced the Employer's response to the incident. It is likely that a deal of corroborative conduct has also taken place, with those who were associated with the works. Mr Kumar's account of Mr Singh's initial version of events, where he had indicated that Mr Prasad and Mr Raj had been undertaking internal wiring, remains an issue that is hard to ignore. The fact that Mr Prasad raised the issue of 'house wiring' in his own hand written statement and Mr Bhan made no mention of that fact, compounds the issues of doubt that cloud the Grievor's case and has been influential in the evaluation of all relevant evidence. The fact that the house owner Mr Chand and his wife were also not called to give evidence, remains somewhat difficult to understand. The Tribunal is of the view that the Employer's right to dismiss the Grievor was justified in the circumstances.

Decision

32. It is the decision of this Tribunal that the grievance of Mr Noneel Prasad against the Fiji Electricity Authority should be dismissed.

The Tribunal orders accordingly.




Mr Andrew J See
Resident Magistrate