

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



Decision

Title of Matter: Karishma Kavita Devi (Grievor)
v
Lautoka General Transport Co Ltd (Employer)

Section: Section 211(1)(a) *Employment Relations Act 2007*

Subject: Adjudication of Employment Grievance

Matter Number: ERT Grievance No 205 of 2017

Appearances: Ms K K Devi, the Grievor and Mr Ravneel, her support person.
Mr P Singh, Company Director

Date of Hearing: 7 March 2018

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 8 March 2018

KEYWORDS: Employment Relations Act 2007; Right of women to take maternity leave; Unjustifiably and unfairly dismissed

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 Grievor was dismissed in her employment by letter issued on 29 July 2017, for reasons that can be succinctly described as being the operational requirements of the firm. The Respondent Employer is a bus company, operating a fleet of approximately 30 vehicles in the Lautoka and surrounding areas. The Grievor was employed by the Respondent as an Accounts Clerk from the period 12 August 2014 to 11 August 2017. The dismissal letter provided to the Grievor, attributes the reasons for the decision to the impact that the introduction of the 'e-ticketing system' has had on the requirements of the company, to perform many of the cash handling duties that were otherwise previously required.
2. The case of the Grievor on the other hand, is that the Employer terminated her services, after learning that she was approximately four months pregnant at work and to avoid the payment of any entitlements that would become due to her in relation to maternity leave¹. It was further

¹ See Section 101 of the *Employment Relations Act 2007*.

stated within the preliminary submissions made on behalf of the Grievor, that the employer subsequently advertised for an additional 'Accounts Clerk' in the *Fiji Sun* public notices, on 27 October 2017, to refill the position that she had previously performed.²

The Case of the Employer and Justification for the Dismissal

3. Because both parties were self-represented in proceedings, the Tribunal allowed a good deal of latitude in how both submissions were made and evidence received. The primary consideration where such flexibility takes place, is nonetheless that all parties are given an opportunity to be heard fairly and that all relevant evidentiary issues can and with the assistance of the Tribunal, will be explored.
4. Mr Singh, as the Director of the company provided a written statement in support of the case of the employer. In addition, he called Ms Lavenia Dikutu to give evidence on behalf of the company.

Ms Lavenia Dikutu

5. Ms Dikutu, told the Tribunal that she had been engaged as a clerk at Lautoka General Transport for the past five years. The witness stated that the Grievor commenced in her employment, some 18 months following her engagement. Ms Dikutu agreed with the propositions put by Mr Singh, in relation to the nature of her duties and the fact that since December 2017, she claims to have been working a reduced number of hours each week, because of the impact that the e-ticketing system has had on her accounts work³. The witness agreed with the proposition put by Mr Singh, that she had been given a notice of termination by him due to operational reasons and consistent with the policy of 'last on first off', however stated that this was rescinded when it became clear to the employer that Ms Devi, the Grievor, was in fact the last employee engaged by the company.

Mr Pyara Singh

6. In addition to the submissions provided by the employer, Mr Singh intermittently gave evidence from the bar table and the Tribunal has accepted the submissions made in that context. The key relevant aspects of the submissions made by Mr Singh are as follows:
 - That he was not aware that Ms Devi was pregnant when he took the decision to terminate her services on 29 July 2017;
 - That the replacement position of Accounts Clerk was advertised on 27 October 2017, only after Mr Singh was advised by a Ms Sanjeshni Devi, an employee of approximately 15 years, that she was to finish in her employment by the end of March 2018, due to her husband being transferred to Suva⁴; and

² See Exhibit E1.

³ It is important to note that there has been no verification of this claim. This could easily be done through the time and wages records of the employer. Though it should be noted that the Grievor only claims to have been required to work a 40-hour week.

⁴ Mr Singh claimed to have been provided with that notice, only one week earlier by Ms Devi.

- That as Ms Sanjeshni Devi held the position of Company Secretary, that he needed an employee to understudy that role and to assume responsibilities after 31 March 2018.

The Case of the Grievor

7. Ms Devi provided a hand-written statement, the main points of which she addressed as part of her oral submissions. Ms Devi claimed to have informed another staff member, Ms Sanjeshni Devi, as to her pregnancy and was made aware of the fact by her, that she had in turn discussed the matter with Mr Singh. The Grievor also told the Tribunal, that she had advised Mr Singh that she had to attend a prenatal clinic several days before she was given notice of her dismissal.
8. Considering the ostensible centrality of the evidence of Ms Sanjeshni Devi to proceedings, the Tribunal requested that she attend to give evidence and to ensure that the issues in dispute could be resolved as quickly as possible.

Evidence of Ms Sanjeshni Devi

9. The Tribunal secured the primary evidence from Ms Sanjeshni Devi, as follows: -
 - That she had been employed by the Respondent Employer for the past 12 years;
 - That she had initially advised Mr Singh, that she would be leaving her employment in April 2017, following the transfer of her husband to Suva at that time;
 - That in December 2017, she had verbally indicated that she would be resigning from her employment, although made the decision in January 2018 to stay for a further 12 months, due to the schooling of one of her children;
 - That she had been training a new employee, Ms Komal Prasad in all aspects of the accounts work, however had not trained her in any of the duties of Company Secretary, given that she had no intention of leaving her employ this year;
 - That she had been made aware that Ms Karishma Devi was pregnant some one month before she was dismissed in her employment;
 - That to her knowledge other office employees were aware that Ms Karishma Devi was pregnant, including Ms Lavenia Dikutu;
 - That some time prior to Ms Karishma Devi's dismissal, she had advised Mr Singh, that Ms Devi was pregnant;
10. During cross examination by Mr Singh, the following further salient points were noted: -
 - That the witness did post the advertisement in the Fiji Sun as directed by the Employer;
 - That she did type up the dismissal letter on behalf of the company; and
 - That she did tell Mr Singh that Ms Karishma Devi was pregnant prior to her dismissal.

Has the Grievor Been Justifiably Dismissed?

11. The Respondent Employer claims that the only reason why the Grievor was dismissed, was due to operational reasons. Although having said that, the office complement of workers seems to have been four persons in July 2017 and it remains that same number in March 2018. This is seven full months after the notice to dismiss was given purportedly for operational reasons. If it was the case that Ms Sanjeshni Devi had initially intimated that she would leave her

employment some time around April 2017, Mr Singh could have easily put in place an understudy arrangement with one of the existing staff, whether Ms Dikutu or Ms Karishma Devi, to ensure that her role could have been absorbed by the remaining employees. If it was the case, that Ms Sanjeshni Devi was then intending to leave in January 2018, then such departure could have been factored into the employer's decision-making processes. After all, Part 12 of the *Employment Relations Act 2007*, imposes a positive obligation on the employer to provide a worker with at least 30 clear days' notice of any decision to make that person redundant⁵ and to also provide them with an opportunity to be consulted in a bid to explore ways of averting or mitigating the adverse effects of any proposed termination⁶. This would include attempts to find alternative employment or retraining. None of this took place whatsoever.

12. In *Kumar v Nunuku Auberge Resort Fiji*⁷, 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 dismissal 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,⁸ 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 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,

⁵ See Section 107(1)(a) of the Act.

⁶ See Section 107(1)(b) of the Act.

⁷ [2017] FJET 2

⁸ See [1995] IRCA 333;62 IR 371 at 373

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.

13. The Tribunal does not accept that the decision of the Employer was sound or defensible in the circumstances. Ms Karishma Devi and Ms Sanjeshni Devi both attest to the fact that the employer knew the Grievor was pregnant. Their evidence is preferred to that of Mr Singh. Further and perhaps more telling, was the fact that Mr Singh claimed to have only been aware of Ms Sanjeshni Devi's intention to leave her employment, one week earlier than the job advertisement being placed in a local newspaper. The Tribunal does not accept that evidence and considers the evidence of Mr Singh untruthful in this regard. Further, Mr Singh told the Tribunal that the new employee had been engaged to ensure an effective hand over of the company secretary's position as at the end of March of this year. Again, Ms Sanjeshni Devi told the Tribunal under oath, that she would be remaining with the employer for another 12 months from January this year and that no such training had been undertaken to 'pass over' the responsibilities of company secretary to another employee.
14. The Tribunal finds that based on the above set of facts and circumstances, including the fact that there still remained four employees working in the office of the employer, that the reasons for dismissal were not genuine and on balance more likely to have arisen because of the fact that Grievor was pregnant and would ultimately be seeking paid maternity leave, to which she was entitled to under the Act. Even if Mr Singh was aware that Ms Sanjeshni Devi was to leave her employment in January, he appears not to have wanted to factor Ms Karishma Devi in as a possible replacement, because she would be wanting maternity leave around that time. The fact that Mr Singh persisted with such fundamental and contradicted assertions and made no effort to discharge his obligations to consult under the Redundancy provisions set out within Part 12 of the Act, only provides extra support to the Tribunal's belief that there was no justification for the dismissal.
15. The Grievor has made no claim that she suffered any extra hurt or embarrassment arising out of the way the dismissal was executed and on that basis the Tribunal will not consider any of the issues that may otherwise arise in such cases as articulated in her Honour Wati's decision in *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuinaruku*⁹.

⁹ [2017] FJHC92 at [61].

What is the Appropriate Remedy?

16. There are a variety of considerations that can be relied upon when deciding as to what would be an appropriate amount of compensation to be awarded to a Grievor in the case where it has been established that she or he has been unjustifiably dismissed in employment¹⁰. These would include: the length of service with an employer; the likely remuneration received if the employment had continued; attempts made to mitigate any loss of income; any other income received by the Grievor prior to any decision being reached by the Tribunal; the capacity of the employer to pay; and any other special features of the case.

17. Further, in *Rentokil Initial Ltd v Kean*,¹¹ Wati J identified the primary considerations that a Tribunal must take into account, when formulating a view as to the appropriate compensation to be awarded, as being:-

(a) the employer's conduct in the mediation and the progress of the case.

(b) the delay caused by the employer.

(c) whether the employer should take responsibility for the delay in the determination.

(d) the employees employment status since termination.

(e) whether the employee mitigated his loss.

(f) the conduct of the employer hindering the employee from mitigating the loss and

(g) any other relevant factors.

18. The Grievor told the Tribunal that she has given birth to a baby boy, who is now two months' old. Insofar as it is expected that a worker should mitigate their loss in such cases, the fact that a pregnant woman seeks employment when nearing five months of the term, poses some problems that from any fair viewpoint can easily be identified. Ms Karishma Devi had an expectation to continue in her role. Mr Singh had himself stated within the dismissal decision letter, that she was a "good employee". There is no reason why Ms Devi would not have continued in her employment beyond any period of maternity leave. The Grievor indicated that she had an eight-year-old child and it is obvious that she was accustomed to balancing work and family responsibilities. In the circumstances, the Tribunal believes that an award of 26 weeks wages is fair in the circumstances. That amount is based upon the anticipated 84 paid days (12 weeks) maternity leave that would have otherwise become due had the employment relationship continued and an additional 14 weeks being an estimated period likely to have taken place from the date of termination up and until the date of confinement.

19. The Tribunal is calculating the compensation amount, based on what the Grievor says was her hourly rate of employment, being \$4.30 per hour for a 40-hour week (inclusive of 8% FNPF = \$13.76). This would otherwise equate to \$158.24 nett a week.

¹⁰ See *Peni Koro Lagi v Calm Fire Professionals*, [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)

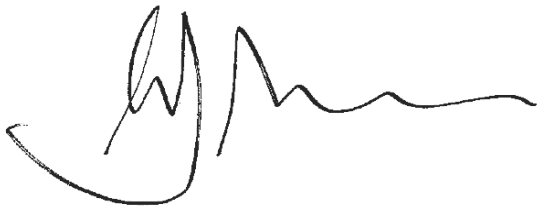
¹¹ [2013] FJHC 193; ERCA 6.2011 (17 April 2013)

20. As a result, the Employer will be ordered to pay to the Grievor the nett sum of \$4114.24, with a further amount of \$357.76 to be paid into the Grievor's Fiji National Provident Fund (FNPF) Account.

Decision

It is the decision of this Tribunal that: -

- (i) The Grievor Ms Karishma Devi, has been unjustifiably dismissed in her employment.
- (ii) Lautoka General Transport Co Limited should pay the Grievor a compensation amount in the sum of \$4,114.24 within 21 days from today's date.
- (iii) Lautoka General Transport Co Limited should make a contribution of \$357.76 into the FNPF Account of the Grievor, within 21 days from today's date.



Mr Andrew J See
Resident Magistrate