

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



## Decision

**Title of Matter:** Praneel Prakash Chand (Grievors)  
Rakesh Kumar  
Ambalika Arti Mani  
v  
Rups Investment Limited (Employer)

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

**Subject:** Adjudication of Employment Grievances

**Matter Number:** ERT Grievances 35, 36 and 37 of 2016

**Appearances:** Mr K Tunidau, Kevueli Tunidau Lawyers, for the Grievors  
Mr S Krishna and Mr N Kumar, Krishna & Co Barristers and Solicitors for the Employer

**Dates of Hearing:** Monday 13 November 2017; Tuesday 14 November 2017

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

**Date of Decision:** 27 March 2018

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**KEYWORDS: Employee Theft; Conspiracy to Commit Crime as Employees; Briginshaw Test, Unjustifiable Dismissal; Unfair Dismissal**

**CASES CONSIDERED:**

*GP Reddy & Company Ltd v New India Assurance Company Ltd* [2011] FJHC 680; HBC48.2008L (31 October 2011)

*Kumar v Nanuku Auberge Resort Fiji* [2017] FJET 2; ERT Grievance No 122 of 2016 (10 February 2017)  
*Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd and Others* [1992] HCA 66; (1992) 67 ALJR 170; (1992) 110 ALR 449 (16 December 1992)

*R v Hillier* [2007] HCA 13; (2007) 233 ALR 634; 81 ALJR 886 (22 March 2007)

*Shepherd v The Queen* [1990] HCA 56; (1990) 170 CLR 573 .

*Yanuca Island Limited trading as Shangri Law Fiji Resort and Spa v Vani Vatuinaruku* [2017] FJHC92; ERCA 9 of 2014 (8 February 2017)

## Background

1. These are grievances that have been referred to the Tribunal from the Mediation Service in accordance with Section 194(5) of the *Employment Relations Act 2007*. Because of the common factual issues pertaining to all three grievances and with the consent of the parties, the Tribunal has joined the hearing of these matters into one proceedings. The grievances arise out of the dismissal of all three Grievors by separate letters dated 14 November 2016, that gave notice of their respective termination of employment with an effective date of 30 October 2016.
2. The dismissals of the employees comes about as a result of a theft that took place at Rups Store, Ba, on or around 30 October 2016, in which \$154,895.65 was claimed by the Employer to have been stolen from the store safe.<sup>1</sup> The Employer was of the view that the Grievors had colluded amongst themselves to steal the money<sup>2</sup> and it was on that basis and reliant on the police investigations that were continuing at that time, that the Respondent Employer claims that the dismissal of all three employee was justified.<sup>3</sup> In the grievances that were lodged with the Mediation Service on 8 December 2016, the essential claim of each of the former employees, is that they were terminated unfairly and unlawfully without any evidence of dishonesty whatsoever. In evaluating the evidence and submissions of the parties, the Tribunal has had regard to the following materials and evidence<sup>4</sup>:-

- 3 x Affidavits of Arun Kumar, filed on 12 April 2017;
- 3 x Affidavits of Arun Kumar, filed on 19 July 2017;
- Oral evidence of Mr Arun Kumar given on 13 November 2017;
- Oral evidence of Acting Inspector Ilario Belo given on 13 and 14 November 2017;
- Affidavit of Rakesh Kumar filed on 19 May 2017;
- Oral evidence of Rakseh Kumar given on 13 November 2017;
- Affidavit of Ambalika Arti Mani filed on 19 May 2017;
- Oral evidence of Ambalika Arti given on 13 November 2017;
- Affidavit of Praneel Prakesh Chand filed on 19 May 2017;
- Oral evidence of Praneel Prakesh Chand given on 13 November 2017;
- Affidavit of Sakiusa Turagarua, filed on 19 July 2017<sup>5</sup>;
- 3 x Written Submissions by Employer filed on 12 April 2017;
- Respondent's Written Submissions (After Trial) filed on 24 January 2018.

## The Case of the Employer

3. The case of the Employer is set out within its initial written submissions filed on 12 April 2017. The Employer submits that investigations conducted by the Ba Police, as well as its own internal investigations undertaken, revealed that there was not a forced 'break-in' to the store. It was

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<sup>1</sup> The sum of \$48,083.50 was recovered by police concealed in a cloth bag in a storage area of a clothing section within the First Floor of the store.

<sup>2</sup> Whether the Employer suspected more than just the Grievors is a little unclear from the language of the dismissal letters.

<sup>3</sup> See Annexures J to the Affidavits of Arun Kumar, filed on 12 April 2017. (ERT Grievances No 35, 36 and 37 of 2017).

<sup>4</sup> Note that despite providing the Grievors additional time to file submissions due to the late filing by the Respondent (24 January 2018) and following a further telephone communication with Counsel's Office on 28 February 2018, no closing submissions were received by the Grievors in this matter.

<sup>5</sup> As Mr Turagarua was not called to give evidence, his Affidavit was noted, although not relied on within the consideration of the issues.

further submitted that the only person to have access to the back door of the store in which access to the shop occurs, was Mr Rakesh Kumar, the then store manager. The Employer justifies the dismissal decision on the basis that Mr Praneel Chand was the only person with access to the safe key and further, that there would also have been a 'tower bolt' lock with padlock on the Manager's office door<sup>6</sup>, through which access to the store safe would need to be made. Further, the police located \$48,083.50 in cash and cheques, concealed within a storage area of the Boutique Section of the store, in which Mr Kumar's wife, Ms Mani, was the person in charge. It was contended by the Employer that it would make no sense whatsoever, that such a large sum of money was hidden in the store, by someone other than a company employee, who otherwise decided to only take \$106,812.15. The Employer states that whilst the evidence is circumstantial only, that it nonetheless relies on the civil balance of proof in forming the view that it did.<sup>7</sup>

#### Evidence of Mr Arun Kumar (Regional Manager Western Division) Rups Stores

4. In his oral evidence, Mr Chand told the Tribunal that during the Grievors relevant employment periods, Mr Praneel Chand, Assistant Branch Manager was in charge of keys for the 'store safe', the 'grill key' for the main store entrance and the 'room key' in which the safe was housed. The witness further indicated, that Mr Rakesh Kumar, Branch Manager was in possession of the 'main entrance' key, the 'front roller door' key and all other Section keys throughout the building. The witness said in his evidence, that Ms Mani, the wife of the Branch Manager, was not in possession of any keys. Mr Kumar informed the Tribunal that the reason why the Employer dismissed Ms Mani, was that money had been found in the 'mini bulk' storage area within the Boutique Section of the store, that the former employee had managed.<sup>8</sup> The witness was of the view that "no one else had access to that" storage area. Under cross examination, Mr Tunidau of Counsel, questioned Mr Kumar in relation to the investigation he had conducted, the status of the police investigation and the evidence in which he was relying upon when reaching the decision that he had. That is, that all three Grievors had colluded with each other to steal the monies.<sup>9</sup> The witness indicated that whilst he had no formal qualifications in workplace investigations, he did nonetheless have 20 years' experience working within the company and had previous experience with the break in of stores during that time. Mr Kumar restated his views as to the abnormal nature of the robbery; in which he said, not all the monies were taken from the store; the First Floor window that was found ajar had not been forced open from the outside, but that the window handle was broken from inside; there were no fingerprints or footprints found in the shop; the stock throughout the shop was not disturbed; the office door gaining access to the store safe was unlocked; all other areas of the shop were sealed properly; the main door entrance and other sections were sealed and locked and that approximately \$48,000 was hidden in the shop. Mr Kumar told the Tribunal, that in a "normal robbery" that money would not have been left behind.

#### *The Broken Window*

5. Counsel for the Grievors referred the witness to Annexure A within his Affidavit dated 11 April 2017,<sup>10</sup> in which the photograph depicted the Rups store, being adjacent to a block of residential

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<sup>6</sup> Oral evidence of Mr Arun Kumar.

<sup>7</sup> See decision of Wickramasinghe J in *GP Reddy & Company Ltd v New India Assurance Company Ltd* [2011] FJHC 680; HBC48.2008L (31 October 2011) at [62].

<sup>8</sup> The Tribunal was informed by Mr Arun Kumar, that the mini bulk was a storage area that was used to house hangers and mannequins used by the store. Mr Kumar advised that Ms Mani was the only store member requiring access to that storage facility.

<sup>9</sup> Counsel referred to Exhibit G1 (Annexure J to the Affidavit of Arun Kumar filed on 12 April.

<sup>10</sup> Filed on 12 April 2017. (No 34/2017)

flats. The attention of the witness was drawn to a 'broken window' within that photograph.<sup>11</sup> It was put to the witness as to whether or not as part of his investigation, he considered the possibility of a person or persons accessing the shop from the opened window to the first floor of the store. Mr Kumar explained that the building on the First Floor was 'grilled'.<sup>12</sup> Mr Kumar admitted not having had explored that option but considered it unlikely. Counsel referred the witness to the photographs at Annexures A and B to his Affidavit and the Tribunal was informed about the fact that the said window had inserted within it, a wooden panel some time between 2012 and 2013. The witness conceded that there were no fingerprints that were located around the window. It was put by Counsel for the Grievors that the First Floor windows did not have burglar grills but only window frames. This was refuted by the witness. After understanding the several pages of photographs, Counsel then adopted a somewhat different tact:

*Mr Tunidau: So, this grill cannot be opened from inside, it can only be opened from outside, is that right?*

*Mr Kumar: No*

*Mr Tunidau: How will it be opened from inside?...*

*Mr Kumar: This grill had a window, one, the one sir that you are talking about regarding this case.*

*Mr Tunidau: Yes*

*Mr Kumar: That is the one you are referring to.*

*Mr Tunidau: Yes*

*Mr Kumar: This is a middle window, both sides are sealed. This window can only be opened from the inside.*

*Mr Tunidau: I am talking about the grill*

*Mr Kumar: Oh sorry, sorry*

*Mr Tunidau: The grill is different from the window. I am putting to you for a person to get in or out of the window, the grill has to be removed. ... the only way for a person to get or out of the window is through the grill and that grill can only be opened from the outside is that right?*

*Mr Kumar: Yes sir*

*Mr Tunidau: Yeah*

*Mr Kumar: But sir, with this window, the structure of the burglar bar was within ...attached. So when the window opens the burglar bar will open..*

6. As the evidence of Mr Kumar made clear, the window glass has been broken some time earlier and was replaced by a timber insert, some time around 2012 or 2013. When asked by Counsel, *what did you make out of window being opened? Someone sneaked in or out of window?* The witness replied that no, there had been no footmark or fingerprints detected from the investigation of police officers. Mr Kumar nonetheless conceded that he did not find out who had ransacked the Manager's room.

#### *Earlier Report of Missing Safe Key*

7. Mr Tunidau questioned the witness in relation to the fact that a store 'safe key' had gone missing, during the time in which Mr Rakesh Kumar had been Branch Manager of the Rakiraki store. The witness was referred to the Affidavit of Mr Rakesh Kumar filed on 19 May 2017<sup>13</sup> and conceded

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<sup>11</sup> On occasions in the proceedings Counsel for the Grievors was inadvertently referring to that window as being located on the second floor, but it was in fact the first floor of the building.

<sup>12</sup> Meaning that grills were affixed to the windows of that floor.

<sup>13</sup> Specifically he was referred to Paragraph 6(g) of that Affidavit.

that this issue had been raised at a meeting of store managers held in Lautoka around that same time. Mr Arun Kumar told the Tribunal that despite this meeting taking place in 2015, that up to and until the time of the robbery in October 2016, that the safe lock had not been changed. Mr Kumar told the Tribunal that the safe key had gone missing in 2012 and despite his requests to the company Directors to change the locks, that this had not taken place. Nonetheless, Mr Kumar was of the view that the shop was secure. The witness stated that during the period 2012 to 2016, that the store had been accessing the safe, with the use of a spare key.

#### *The Store Managers Door*

8. Mr Kumar further told the Tribunal that the office in which the safe was located was ‘ransacked’, however the stock throughout the shop was left undisturbed. The witness also indicated that the office in which the safe was housed was locked with a padlock attached to a ‘tower bolt’ lock, that Mr Praneel Chand would open on a daily basis and for which he had a key to the padlock.<sup>14</sup> Mr Kumar conceded that he had not personally interviewed any of the three Grievors in relation to the allegations that had been levelled against them, because he did not want to interfere with the police investigations that had been continuing. Counsel for the Grievors then inquired of the witness, as to who he had interviewed as part of the internal investigation? Mr Kumar replied that he had interviewed Mr Atish Kumar, a maintenance worker; Mr Aman Singh, an office representative from the company headquarters who had been located at Ba for a week prior to the robbery and Mr Kajol Singh, a sales assistant within the Boutique Section, in which Ms Mani was in charge. The witness conceded that none of these persons made any claim to having any direct evidence concerning any of the Grievors.
  
9. On re-examination, Mr Krishna of Counsel asked Mr Kumar to explain the reason why an internal timber panel had been inserted within the frame of the window, found ajar following the incident. Mr Kumar indicated that this took place, as they needed the window space for inside display.<sup>15</sup> The witness repeated his earlier statement, that there was nothing to suggest that people had come into the store through that window. The witness restated that he personally had given Mr Chand a padlock and key for the Manager’s Office Door, yet upon discovery of the ‘break-in’, there was no sign that the door had been forced open. The witness was taken to Annexure E to his Affidavit, that also depicted a closed door, that it was said had not been forced open. Mr Kumar confirmed to the Tribunal that Messrs Chand and Kumar were arrested the day following the reporting of the crime, after which monies were recovered from the mini bulk store area, in which Ms Mani’s boutique section was located<sup>16</sup>. Finally, the witness was asked as to whether there had been any steps taken by the company to address the question of the missing safe key. Mr Kumar clarified for the Tribunal that one of the Directors, Mr Sheren Kumar spoken to Mr Rakesh Kumar and told him to have a padlock with a chain for the current safe, for extra precaution. The Tribunal asked Counsel for the Employer to make available to the parties, a photograph of the Manager’s Office door.<sup>17</sup>

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<sup>14</sup> During this aspect of cross examination, Counsel sought to say to the witness that the door had no key at all. Mr Kumar was speaking of a padlock key that was to be affixed to the tower bolt on that door.

<sup>15</sup> The witness was shown Annexure G to his Affidavit as filed on 12 April 2017, where the photographs of the inside of the ‘broken window’ were shown.

<sup>16</sup> See Annexure H to the Affidavit of Mr Arun Kumar filed on 12 April 2017.

<sup>17</sup> These photographs were later provided to the Tribunal and were canvassed with Counsel during the cross examination of Mr Rakesh Kumar, during a point when the witness was asked to temporarily stand down and retire from the Tribunal room. Photographs referred to as Exhibit E1(a), (b) and (c).

#### Evidence of Ilairo Belo, Acting Crimes Officer Ba

10. Officer Belo was called by the Employer to give evidence, in his capacity as the current Officer in Charge of the police investigation into the store robbery. Officer Belo told the Tribunal that he had assumed carriage for the responsibility of overseeing the investigation, since January 2017. Officer Belo stated that the file records in his possession showed that the investigation team had initially taken a statement from the Assistant Manager, Mr Chand and had closed the store as a crime scene. The witness stated that the investigators were of the belief that there was something wrong with the initial crime report and asked that the Divisional Team in Lautoka undertake a thorough search of the shop. It was as a result of that search, that the money and cheques stored within the bulk area of the boutique section of the store were located. The witness indicated that the file had been forwarded to his superiors to await further directives. Officer Belo indicated that whilst the Grievors had not as yet been charged, they remain the major suspects within the investigation. Officer Belo said that within the investigation, the investigators were not of the view that a person or persons had entered the First Floor 'broken window' from the adjoining building, though conceded that this could have been a possibility. Having said that, Officer Belo then told the Tribunal that a police dog was called upon to locate any traces of persons in the building and said that there was no discernible scent found outside of the building.

11. The Officer in Charge confirmed that as part of the police investigation, that it was noted that the spare 'safe key' had been missing since 2012, however maintained that there was no sign of a break in at the store and observed that the door of the office where the safe was kept, was not even locked. During cross examination, Acting Inspector Belo confirmed to the Tribunal that at this point in time, the outcome of the case was regarded as inconclusive and that no charges had been brought against any of the suspects. It was also acknowledged by the Acting Inspector that there may be other possible suspects. The Tribunal heard that whilst the tracker dog used at the crime scene could not detect any scent outside of the building, that such a scent could be impacted where there was a big rain event. The Acting Inspector conceded that there was nothing on the investigation file to indicate that there had been any such rain event and had further been informed by Corporal Kamal from the dog unit, that there had been no rainfall at the relevant time. The witness also admitted in cross examination, that he was unaware as to whether the money bag concealed on the First Floor, had been tested for finger prints. Acting Inspector Belo further conceded that there was only circumstantial evidence at this point in time, linking the Grievors to the robbery that had taken place.

#### **The Case of the Grievors**

12. At the outset of these proceedings, Mr Tunidau indicated to the Tribunal that in each case, the Grievors sought to be reinstated in their employment, as the primary remedy.

#### Evidence of Rakesh Kumar

13. Mr Rakesh Kumar was the first witness to give evidence in the case of the three Grievors. Mr Kumar told the Tribunal that he was 36 years of age and the father of two children. Mr Kumar is married to Ms Ambalika Mani, also a Grievor in proceedings. Mr Kumar told the Tribunal that he had worked for the Employer for approximately 14 years, having been the Store Manager at Ba for two years and having also worked at the Rups stores in Lautoka, Tavua and Rakiraki. According to the witness, he had been made aware of the missing safe key at the Ba Store from his Regional Manager, Mr Arun Kumar and was referred to Paragraph 6 of his Affidavit filed on 19 May 2017, where his account of discussions held with him, in relation to that issue took place. The witness told the Tribunal that despite his concerns raised in relation to the missing safe key in 2015, that up until the time of the store robbery following the Diwali celebration on 29 October

2016, that the safe had not been replaced. Mr Kumar told the Tribunal that his co-Grievor Mr Praneel Chand, had custody of the only safe key held by the store.

#### Procedure for Unlocking Ba Store

14. Mr Kumar was asked by Counsel to explain the procedure for how the premises would be unlocked in order to open the store. Mr Kumar explained that the opening procedure required that you gain entry from the back of the shop. The witness stated that a representative from the security firm that provides security services to the store, must be present at all times. Mr Kumar stated:

*Praneel opens the grill door. He has got the access to the grill .....he has the key to the grill door. Once that grill door is open then I go up and open the main door which is at the back of the shop.... I had the key (to the main door). Once all the staff, the security, me, Praneel are inside, the security closes the back door.... then I go upstairs to on the system the computers systems... Praneel goes inside the office to take out the floats for the cashiers...*

15. Mr Tunidau then asked the witness in relation to the Manager's Office, in which the safe was kept, the following questions:

*Mr Tunidau: The room where the safe is kept. Does the room have a door?*

*Mr Kumar: It does have a door.*

*Mr Tunidau: Does it have a key?*

*Mr Kumar: No, the door lock was not working, so that there was no key for that door. It was kept open all the time, only just that we pushed the door*

*Mr Tunidau: Have you made any effort to have the door fixed?*

*Mr Kumar: Yes, yes sir our company was too lazy to fix the door as well.*

16. During the giving of his evidence, the witness also explained for the Tribunal, the manner by which cash taken during the daily operations, was managed during the working day. He said that,

*The cashiers tallying money etc... cashiers take money box to office where they balance. Praneel does balancing print out... Praneel take print out ... cash, cheques EFTPOS and puts inside safe.*

17. The witness was referred to a photo contained within Annexure A to the *Affidavit of Mr Arun Kumar* (referred to as Exhibit G1) in which can be seen that a glass panel had been replaced with a timber inset, from which it was suggested by Counsel for the Grievors, that entry to the building for the purposes of the robbery took place. According to the witness, he went to report the incident to the Ba Police Station and said that a "lady officer accompanied him to the shop". Mr Kumar told the Tribunal that the robbery took place around the Diwali weekend when the shop was closed around 11pm on that Saturday evening. The witness stated that it had been very busy and the store was open to the public until 9pm. Mr Kumar said that when the store closed, the balancing of sales took place and they waited for a truck to come and transport the left over fireworks to Suva. Mr Kumar explained that overnight the cash from the day's sales was left in the shop and indicated that Mr Chand was responsible for counting that cash. The witness stated that when it was time to leave the store, that the Security Officer, Mr Kemueli Tumalevu was the last person to exit the door. According to Mr Kumar, the Security and Manager checked all floors before the store was closed. Mr Kumar told the Tribunal that when he returned to the store in

the company of a female police officer following the reporting of the robbery, that when they checked the First Floor of the building, that the officer noticed a “broken window”.

18. In relation to the ‘broken window’ on the First Floor, Mr Kumar said:

*I came to know about that broken window when I went to report the matter to the Ba Police station. A lady officer took us to the shop. .... when I accompanied the police officer to the shop she said, “had we seen any entry from outside of the shop?”. Then we said no. Then she had made rounds around the shop with me, Praneel and other staff. First Floor, Ground Floor, then we went to the First Floor. As soon as we reached the First Floor she noticed the broken window, so we moved closer to that broken window ..... That place where the window was left open. .... The police officer who accompanied me, she showed me the marks of the forced entry. She said a pinch bar must have applied, because there was paint missing on there, but once when the main officers accompanied her, then the scene changed all together<sup>18</sup>.*

19. The witness told the Tribunal that he was subsequently contacted by the Ba Police to come in for questioning where he was held for two days. Mr Kumar said that the allegations of collusion with the other Grievors was totally false and that after he finished work on the Saturday evening on 29 October 2016 at 11pm, the security officer was the last to exit the shop. Mr Kumar said, that it was closed and that they all had left for their various homes. The witness stated, that the “next morning when I woke up, I showered, had breakfast and went to work. It was upon returning to work, that according to the witness “we found out the shop (had been) broken in”. Mr Kumar told the Tribunal that he was not present when the monies were located on the First Floor during a police search. The witness also indicated in his evidence, that there were other employees that potentially could have been suspects, including the Head Cashier and the Office Boy, both according to Mr Kumar, had been employed at the store for around 5 or 6 years. During cross-examination, Mr Kumar was referred to his one-year employment contract<sup>19</sup> and accepted that it had an end date of 31 December 2016<sup>20</sup>. Mr Kumar also acknowledged that in relation to the process for opening the store, that he could not do so without the assistance of Praneel Chand and nor could Mr Chand do it without the assistance of himself. The witness was questioned in relation to the ‘Manager’s Room’ in which the safe was located and was asked as to whether in fact there was a door to that room and a padlock to lock the room. The witness, denied that there was any such padlock. The following exchange ensued:

*Mr Krishna: So you say the door had no hinges?*  
*Mr Kumar: It did not Sir*  
*Mr Krishna: But you could open the door and close it?*  
*Mr Kumar: Yes*  
*Mr Krishna: I put it to you witness that it had a clip lock system where if this was the wall it would have that latch... Isn't it correct that it had a Tower bolt<sup>21</sup>?*  
*Mr Kumar: No sir*  
*Mr Krishna: I put it to you that it had a tower bolt?*

<sup>18</sup> This person could have been subpoenaed to give evidence in proceedings, however for some reason, the Grievors did not see the need to do so.

<sup>19</sup> See Annexure D to the Affidavit of Arun Kumar filed on 12 April 2017.

<sup>20</sup> The Tribunal regarded this questioning as being superfluous to the critical issues before it.

<sup>21</sup> A rod-shaped bolt for fastening a door, attached to one side of the door at the edge and sliding into a latch that is affixed to a wall or door frame, in order to ensure that the bolt once moved into the latch, will keep the door closed. (Also referred to as a barrel bolt).



20. At this juncture, the Tribunal asked that the witness temporarily retire from proceedings in order that some clarification of the evidence could take place.<sup>22</sup> Upon the return of the witness, the following further questioning occurred:

*Mr Krishna: So, I put it to you witness, that at the material time that there was a tower bolt that was there at that time?*

*Mr Kumar: It was not there*

*Mr Krishna: Each shop had petty cash?.. You had power to buy tower bolt?*

*Mr Kumar: Don't have authorities.. not even petty cash for \$1.00.... Had to be approved by Regional Manager.. which is used by Branch Manager.. not used by me,, it is used by the Assistant Manager..*

*Mr Krishna: Did you raise requisition for tower bolt?*

*Mr Kumar: Yes*

21. Counsel for the Employer then asked the Grievor to explain what transpired on the Sunday morning 30 October, when he returned to the store to commence work.

*Mr Krishna: On Sunday opened store all walked in?*

*Mr Kumar: Yes.. came in paper work for fireworks was not done.*

*Mr Krishna: There was a break in on First Floor?. You did go to First Floor?*

*Mr Kumar: Praneel Prasad went to office, then he found office was ransacked.. then contacted Regional Manager. He said to contact Regional Police..*

*Mr Krishna: Did you look at building from outside?*

*Mr Kumar: No.. went to car ..didnt go to each floor to have a look.. just jumped into vehicle.*

*Mr Krishna: Did not go to each floor to have a look ... did not look outside at the building*

#### Evidence of Amalika Arti Mani

22. Both the oral and Affidavit evidence of Ms Mani was scant. According to the Grievor, she was not taken into custody, nor investigated by police in relation to the robbery at the store. Ms Mani told the Tribunal that she did not agree with the grounds given for her dismissal and that she had not colluded with others in relation to the incident that had taken place. Under cross examination Ms Mani agreed to the fact that she had been working under a contract of employment that had an effective end date of 31 December 2016. When asked by Mr Krishna in relation to the Office Manager's room, in which the store safe was located, the witness was of the belief that this room, did have a tower bolt on its door. The witness said words to the effect that "the actual door lock did not have a key, but it had a tower bolt thing. That you latch it ... I think so yeah". Ms Mani told the Tribunal that at closing time on the night of the 29 October 2016, that "when all staff leave the floors are checked". The witness was of the belief that the floors were checked on that evening, though indicated that the "girls left about 10.30" and that the 'boys' and security stay back. Ms Mani stated, that on 30 October 2016, she had got ready to go to work, had telephoned her husband to pick her up and at that point discovered what had happened.

<sup>22</sup>

The Tribunal then brought to the parties' attention, photographs of the Managers Office door that was taken as requested. The issue of the bolt on the door is central to the analysis. According to Counsel, following the incident the tower bolt was removed from the door and a new lock installed.

### Evidence of Praneel Prakash Chand

23. Mr Chand told the Tribunal in his evidence in chief, that he did not either steal any monies nor collude with other staff. Mr Chand indicated that in his role as Assistant Manager at the Rup's store, he was in charge of the 'safe key' and kept that key himself. Mr Chand claims that he had been given the key only three months prior to the Diwali weekend and before that, it had been held by the Store Manager, Mr Rakesh Kumar. According to the witness he had been told by the Regional Manager Mr Arun Kumar to know about the safe, because he will be a future manager. Mr Chand told the Tribunal that he worked for eight years in the Ba branch. In relation to the monies held in the safe on the evening of 29 October 2016, the witness indicated that he had balanced all seven cashiers and kept their cases in the safe. He claimed that he did not count the money, that there had been some money still there from Friday and that he was to count the money on Sunday when he was returning to work. In relation to the Sunday morning 30 October 2016, Mr Chand told the Tribunal that he had the 'grill door' key and that the 'main door' was opened by the Manager. Mr Chand said that he entered the shop at the Ground Floor. The witness further stated:

*Mr Tunidau: Did you see anything*

*Mr Chand: Door doesn't have any lock. Just pushed the door open. No key*

*Mr Tunidau: No tower bolt?*

*Mr Chand: Yes .doesn't lock.*

24. The witness was then shown a photo referred to in proceedings as Exhibit E1(a). Mr Chand indicated that this was a photo of the Office Manager's door.<sup>23</sup> According to the witness:

*the knob was not working, it was just a matter of pushing and pulling the door.*

25. The witness's attention was drawn to the latch shown affixed to the wall adjacent to the door, and was asked by Counsel, *what is it used for?* The witness replied, it is a "killi" to lock with a padlock<sup>24</sup>. Mr Chand was asked whether in 2016, that was operational and the witness replied, no that it was not working like that. Mr Chand stated that on that Sunday morning, he had noticed that the door to the room was slightly opened and saw all the boxes on the table. When asked where those boxes had been left on the previous evening, the witness advised that they had been in the safe itself. Mr Chand told the Tribunal that the monies receiving from the Friday and Saturdays takings were stored in two cloth bags within the safe. Upon noticing the boxes on the office table, the witness said he called his Manager, Mr Rakesh Kumar and thought that a robbery may have taken place.

26. Mr Chand was asked by Counsel; did he look at the safe at the same time? The witness responded that the safe door was a "bit open" and then following further questioning, conceded that it was "fully opened". In cross examination, the witness was taken to Annexure D to the Affidavit of Arun Kumar filed on 12 April 2017, in which was located his contract of employment at the relevant time. Mr Chand acknowledged that the end date for that contract was 31 December 2016. The witness confirmed, that he could not enter the shop without Mr Rakesh Kumar and that Mr Kumar could not do the same without him. Mr Chand was then asked, what were his last steps on the Saturday evening, when the store was closing. The witness replied,

<sup>23</sup>

It should be noted that this photograph is the one provided by the Employer at the hearing at the Tribunal's request. It shows the Managers Office door, with the barrel bolt removed. According to Counsel when the document was initially provided, he had indicated that since the incident, a new door lock had been installed and the barrel bolt removed.

that all the windows were locked, although he did not check whether there was anyone hiding in the shop.

#### *The Store Safe*

27. Mr Krishna, then asked the witness whether he had used the chain and padlock on the safe, as a precaution to the fact that there was a second key that was still unlocated. Mr Chand responded, that he did not put the chain on. As part of that exchange, the following took place:

*Mr Krishna: Which was it ?*

*Mr Chand: Don't know .*

28. The witness was shown the photograph that was Exhibit E1 and it was put to him that there was a tower bolt on the Manager's Office door. The witness claimed that he had no idea why the latch for the tower bolt was there. Further, Counsel drew his attention to the four drill marks that could be shown on that photo and it was suggested to Mr Chand, that this was akin to a tower bolt being fitted to the door. The witness responded, "If I had a padlock... had to get approval". When asked could he see the four drill holes where the tower bolt had been affixed to the door, he responded, "no not there"<sup>25</sup>.

#### *The Tower Bolt*

29. In relation to whether the Manager's Office door was capable of being locked, a further exchange took place between Counsel for the Employer and the witness, in which Mr Chand, restated that the lock was missing from the door. The witness denied under cross examination that he stole the money and further claimed that he did not collude with others. Mr Chand said that the practice of locking the safe with a chain, was never adopted and that he was not ever worried that someone else had the key to the safe. The Tribunal then asked of the witness, whether he could recall when the safe key had gone missing earlier and the response was in 2012. The witness told the Tribunal that he did not wish to hold onto the key. The Tribunal asked the witness how familiar he was with the Manager's Office and the witness conceded that he had been going in and out of that room for the past two years. When asked by the Tribunal whether there was a "killi" or barrel bolt lock on the door of that room, the witness, stated, "No".

#### Recalling of Acting Inspector Belo

30. At the conclusion of the case for the Grievors, the Tribunal indicated to the parties that it was not satisfied in relation to the evidence made available, pertaining to the Manager's Office door and asked whether or not photographs of that door were taken by the police photographers at the crime scene, coinciding with the initial investigative response. The Tribunal had considered the photos already tendered as Exhibits E1(a)(b) and (c) and understood from Counsel Mr Krishna that these were taken following the incident, when a new door lock was installed. For that reason, the Tribunal was keen to see the photos contemporaneous to the robbery incident. Specifically, the Tribunal wanted to understand whether or not, the door at the relevant time, did in fact have a tower bolt attached to it, as appeared to be suggested within Exhibit E1(b).<sup>26</sup>

31. When recalled to give evidence the following day, Acting Inspector Belo told the Tribunal that the official investigation file, did include digital photographs taken of the door by Corporal Kamal

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<sup>25</sup> These four holes are so obviously shown within the Exhibit. This is an example, of the witness simply being obstructive and dishonest.

<sup>26</sup> Note the four holes slightly above the door handle in that photograph.

from the Ba Police Station at the time in which the police initially were called to the crime scene. The Acting Inspector was asked to retrieve those photos. Acting Inspector Belo provided the Tribunal with a photo of the Manager's Office door, that upon closer examination, revealed that it did have affixed to it a tower bolt lock.<sup>27</sup>

*Photo of First Floor Window Knob*

32. The Tribunal further took the opportunity to ask the Acting Inspector as to whether or not he had any photographs of the First Floor window that was said to have been ajar on the Sunday morning as discovered by Mr Kumar. Exhibits T2 and T3 were shown to the Tribunal, that revealed the broken window handle on the tiled floor of the Boutique Section and the remaining part of that handle affixed to the open window. Acting Inspector Belo was of the view and the Tribunal accepts this evidence, that the break of the metal handle, is consistent with it occurring from inside the building and not outside. The Acting Inspector had indicated from his file notes, that there was no visible sign of entry from outside the window.

**Evaluation of the Evidence: The Case Against Mr Rakesh Kumar**

33. The Tribunal does not accept the version of events that has been provided by Mr Kumar that he had no knowledge of the robbery that had taken place. Mr Kumar went to great lengths within his evidence to give the impression that he was concerned over the lack of security in relation to the missing store 'safe key'. This he says was the first thing that came to his mind when he was transferred to Ba as the Branch Manager in 2014. Mr Kumar said that he also raised the issue in 2015 at a meeting of Store Managers in Lautoka. If that was the case, Mr Kumar's conduct was certainly totally inconsistent with any such claim. Firstly at least insofar as his evidence was concerned, there was no refuting the statement made by the Regional Manager that a chain and padlock had been provided to secure the safe door as an extra precaution. Mr Rakesh Kumar made no mention of that fact and more importantly provided no evidence that he sought to adopt that practice as an extra safety procedure.<sup>28</sup>

34. More importantly, Mr Kumar denied the fact that there was any 'tower bolt' lock on the door to his office. As the photograph produced by Acting Inspector Belo established,<sup>29</sup> there was a tower bolt lock on the door. The Tribunal finds that this would have been well known to Mr Kumar. It was obviously a daily precaution that could have been instituted as an extra safeguard to protect the Manager's Office from easy access. To say that one did not adopt that method would have been one thing; yet to say that the 'tower bolt' was not in place is quite another. In this regard, the Tribunal considers Mr Kumar's evidence as deliberately misleading and as a result demonstrative of the likelihood on balance, that his version of events pertaining to the store robbery were merely a fabrication. Unfortunately, as the security officer Mr Kemueli Tumalevu was not subpoenaed by the Grievors to give evidence, it is difficult to completely understand what part of the closing of the store process he actually attended to on the evening of Saturday 29 October 2017.

**The Case Against Ms Ambilika Mani**

35. The Tribunal accepts that Ms Mani would have been the person who had responsibility for the 'mini bulk' storage area within the Boutique Section, in which the sum of cash and cheques was subsequently uncovered by a police search. The Tribunal also accepts that Ms Mani would not

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<sup>27</sup> This photograph has been provided to the parties and downloaded from that computer by Registry staff and is marked as Exhibit T1.

<sup>28</sup> It is noted that Mr Praneel Chand also stated that no such procedure was in force at the relevant time.

<sup>29</sup> See Exhibit T1.

have had exclusive use of that storage area and that other staff would have been required to access it as well. Ms Mani had no responsibility for store keys, nor cash. To that end, it is difficult to comprehend what it is alleged her role in any of the collusion would have been. Ms Mani gave evidence that she and other female staff left the store around 10.30pm on Saturday 29 October 2016. It would seem unlikely, at least based on the various versions of events and evidence before the Tribunal, that Ms Mani would not have detected a broken window handle, up and until that point.

### **The Case Against Mr Praneel Chand**

36. Mr Chand's evidence in relation to the Managers Office and the Tower Bolt lock, is particularly suggestive of a less than truthful version of events and an attempt to mislead the Tribunal in relation to the true state of affairs at the time. The Tribunal cannot accept the evidence of this witness was anything other than untruthful. It is the view of the Tribunal, that Mr Chand was more likely than not, the person who had engineered the theft at the closing time on the Saturday night in question. It is likely that the money was taken from the store, by being concealed in clothing or other personal items and that it was simply not physically possible to remove all of the money in that way on that evening. This is more likely the reason why some money was left stored for later collection in the Boutique Section of the store.

### **Balance of Proof in Civil Proceedings**

37. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd and Others*<sup>30</sup>, Mason CJ., Brennan, Deane and Gaudron JJ stated:

*The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud ((1) See, e.g., Hocking v. Bell [1945] HCA 16; (1945) 71 CLR 430, at p 500; Rejfeek v. McElroy [1965] HCA 46; (1965) 112 CLR 517, at pp 519-521). On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear ((2) Briginshaw v. Briginshaw [1938] HCA 34; (1938) 60 CLR 336, at p 362; Helton v. Allen [1940] HCA 20; (1940) 63 CLR 691, at p 701; Hocking v. Bell (1944) 44 SR (N.S.W.) 468, at p 477 (affirmed in Hocking v. Bell (1945) 71 CLR, at pp 464, 500); Rejfeek v. McElroy (1965) 112 CLR, at p 521; Wentworth v. Rogers (No.5) (1986) 6 NSWLR 534, at p 539 or cogent ((3) Rejfeek v. McElroy (1965) 112 CLR, at p 521) or strict ((4) Jonesco v. Beard (1930) AC 298, at p 300; Briginshaw v. Briginshaw (1938) 60 CLR, at p 362; Helton v. Allen (1940) 63 CLR, at p 711; Hocking v. Bell (1944) 44 SR (N.S.W.), at p 478 (affirmed in Hocking v. Bell (1945) 71 CLR, at pp 464, 500); Wentworth v. Rogers (No.5) (1986) 6 NSWLR, at p 538) proof is necessary "where so serious a matter as fraud is to be found" ((5) Rejfeek v. McElroy (1965) 112 CLR, at p 521). Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct ((6) See, e.g., Motchall v. Massoud [1926] VicLawRp 43; (1926) VLR 273, at p 276) and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J.*

<sup>30</sup> [1992] HCA 66; (1992) 67 ALJR 170; (1992) 110 ALR 449 (16 December 1992)

commented in *Briginshaw v. Briginshaw* ((7) (1938) 60 CLR, at p 362; and see, also, *Helton v. Allen* (1940) 63 CLR, at p 711):

*"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ..."*

### **Dealing with the circumstantial evidence**

38. There are some findings or accepted facts that need to be considered.

- (i) Firstly that the Saturday's takings were stored in the First Floor safe, along with some of the Friday afternoon's takings. The monies and cheques were housed together in two cloth bags. The total sum of money was \$154,896.65.
- (ii) The 'spare' store safe key had been in use at least for several years and that there had been no allegations of any theft during that period.
- (iii) The Employer contends that Mr Rakesh Kumar was told in response to his concerns regarding the unaccounted safe key that he was to "have a chain with a padlock" as an extra precaution to tie around the safe,<sup>31</sup> though there was no evidence that this instruction was taken up.
- (iv) Mr Arun Chand gave a padlock to Praneel Chand to lock the Manager's Office door and that had he had been provided with a key.
- (v) The conclusions of the police investigating officers, was that the 'broken window' that had been located on the First Floor of the building, had its handle broken from the inside of the building and that the window had not been forced open from the outside.<sup>32</sup>
- (vi) There was no sign of any other forced entry into the building.
- (vii) That Messrs Kumar and Chand could only access the building when both persons were present, in order that they could utilise their respective keys to access the 'grill' and 'main door'.
- (viii) That both Messrs Kumar and Chand repeatedly told the Tribunal that the Manager's Office door had no 'tower bolt' attached to the door, when in fact the police photographs revealed that clearly it did.

39. In *Shepherd v The Queen*<sup>33</sup>, Dawson J said:

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<sup>31</sup> It is recognised that this is likely hearsay evidence and is not the best evidence that could be relied on in such circumstances.

<sup>32</sup> In this regard, it was noted that Mr Rakesh Kumar claimed that a female police officer who was initially at the crime scene, was of the view that there were pinch marks that could be detected and that the window had been opened from outside. Crimes Officer Belo was clear in his evidence that this was not the conclusion that had been reached by investigators.

<sup>33</sup> [1990] HCA 56; (1990) 170 CLR 573 at 579.

*"Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved. The inference which the jury may actually be asked to make in a case turning upon circumstantial evidence may simply be that of the guilt of the accused. However, in most, if not all, cases, that ultimate inference must be drawn from some intermediate factual conclusion, whether identified expressly or not. Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference. More than one intermediate fact may be identifiable; indeed the number will depend to some extent upon how minutely the elements of the crime in question are dissected, bearing in mind that the ultimate burden which lies upon the prosecution is the proof of those elements. For example, with most crimes it is a necessary fact that the accused was present when the crime was committed. But it may be possible for a jury to conclude that the accused was guilty as a matter of inference beyond reasonable doubt from evidence of opportunity, capacity and motive without expressly identifying the intermediate fact that the accused was present when the crime was committed.*

*On the other hand, it may sometimes be necessary or desirable to identify those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt. Not every possible intermediate conclusion of fact will be of that character. If it is appropriate to identify an intermediate fact as indispensable it may well be appropriate to tell the jury that that fact must be found beyond reasonable doubt before the ultimate inference may be drawn. But where - to use the metaphor referred to by Wigmore on Evidence, vol 9 (Chadbourn rev 1981), par 2497, pp 412-414 - the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give such a warning. It should not be given in any event where it would be unnecessary or confusing to do so. It will generally be sufficient to tell the jury that the guilt of the accused must be established beyond reasonable doubt and, where it is helpful to do so, to tell them that they must entertain such a doubt where any other inference consistent with innocence is reasonably open on the evidence."*

40. The Tribunal has had regard to the totality of this evidence. This included, the fact that there was no sign of break in at the store; that the store needed to be opened by two persons; that monies were located in a storage facility within the store, presumably to be retrieved at some later time and that two of the Grievors had denied that the Manager Office door had a 'tower bolt' attached to it, during the relevant time. In the latter case, this is a particularly influential piece of testimony, as it would make no sense whatsoever, for a person to otherwise deny the presence of such a lock, unless its existence would be prejudicial to the position that they had taken. In *R v Hillier*<sup>34</sup> a Full Bench of the Australian High Court said

*It is of critical importance to recognise, however, that in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence.*

41. The Tribunal believes that a reasonable inference can be drawn that the Messrs Chand and Kumar colluded in relation to the theft of monies from the store. The Tribunal believes that their dishonesty in proceedings allows for an inference other than innocence, to be drawn.

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[2007] HCA 13; (2007) 233 ALR 634; 81 ALJR 886 (22 March 2007) at 637

### Was the Dismissal of the Grievors Justified?

42. In *Kumar v Nanuku Auberge Resort Fiji*<sup>35</sup>, this Tribunal has set out the basis on which a dismissal decision can be justified as follows:

*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<sup>[24]</sup> 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 68<sup>th</sup> 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,<sup>[25]</sup> 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, 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.*

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[2017] FJET 2; ERT Grievance No 122 of 2016 (10 February 2017) at [24] to [27].



A comparable set of criteria for setting out the “test for justification” is located within Section 103A of the Employment Relations Act 2000 (NZ), that provides:-

*103A Test of justification*

*(1) For the purposes of [section 103\(1\)\(a\)](#) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*

*(2) The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

*(3) In applying the test in subsection (2), the Authority or the court must consider—*

*(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

*(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

*(c) whether the employer gave the employee a reasonable opportunity to respond to the employer’s concerns before dismissing or taking action against the employee; and*

*(d) whether the employer genuinely considered the employee’s explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

*(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*

*(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*

*(a) minor; and*

*(b) did not result in the employee being treated unfairly.*

*As can be seen in the New Zealand case, issues of procedural fairness are intertwined within the notion of whether or not the decision to terminate, is justifiable. Be that as it may, 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.*

43. The question for this Tribunal is whether or not, based on the conduct of the Grievors, that the Employer is justified in dismissing them from their employment. Messrs Kumar and Chand were in positions of responsibility. They had failed to act in a professional manner in their indifferent approach to the security of the monies stored on the Employer’s premises, after probably one of

the largest trading days of the financial year. Mr Chand and to a lesser extent Mr Kumar, lost all credibility when their account of the state of affairs as to the locking device on the Manager's door, was revealed as a bold face untruth. The question for this Tribunal is whether or not, based on the conduct of the Grievors, that the Employer is justified in dismissing them from their employment. There is no argument that has been developed by Counsel that is of a type identified as unfair for the purposes of *Yanuca Island Limited trading as Shangri Law Fiji Resort and Spa v Vani Vatuaruku*<sup>36</sup> and on that basis and in the absence of any obvious evidence to the contrary, this is not a case that warrants any further exploration of that issue.

## Conclusions

44. Having regard to the totality of the evidence and because of the dishonest account from both Messrs Kumar and Chand in relation to critical evidence before the Tribunal pertaining to the 'tower lock' on the Manager's Office door, produces a strong likelihood that other aspects of their evidence are also untruthful. The Tribunal is satisfied that on the balance of probabilities that Mr Chand did facilitate the removal of monies from the Rups store safe and that he did so in concert with Mr Kumar, whether before or after the fact. There is no great circumstantial evidence to link Ms Mani as a person who would have been party to any conspiracy to steal. Only the fact that a bag containing approximately \$48,000 was concealed in a storage area of a clothing section of which she was in charge. As the Regional Manager, Mr Kumar rightly pointed out, Why would someone from outside of the store, steal all of the money from the store safe, only to leave behind \$48,000 in a storage area? The money was clearly left behind to be recovered at a subsequent time. If someone wished to recover the money, they would not have wanted to leave it in a place that could be discovered by a person not involved in the conspiracy. It would make no sense whatsoever. To that end, it is possible that Ms Mani was aware of the location of the monies hidden in the store. The monies were probably left at that location, as the person or persons responsible for the theft were unable to physically carry out all of the monies without being detected. As to which of the three Grievors or combination thereof were intending to retrieve the monies is of little importance to this Tribunal. It is also possible that Ms Mani knew of the monies being stored in that location after the theft took place following the store closure on the Saturday evening.
45. And even if that conclusion ultimately proved incorrect, it would nonetheless be more probable that Ms Mani would have been made aware of events following the arrest and detention of her husband for questioning. Whilst the Tribunal is not required to determine beyond reasonable doubt that Messrs Kumar and Chand committed theft of monies the property of Rups Investment Limited, it nonetheless is of the view that the circumstantial evidence when taken as a whole, coupled with their dishonest giving of evidence, is sufficient to satisfy the Tribunal that they did conspire to do so. The Tribunal is unable to make the same determination insofar as the evidence of Ms Mani is concerned. In any event, at the end of the day, the primary question for the Tribunal in each instance is whether or not the dismissal is justified or not. The Tribunal is of the view that Messrs Kumar and Chand have been dishonest. They were dishonest in their giving of evidence and cannot expect to thereafter be regarded as truthful witnesses when they themselves have tainted their own credibility. The conclusions of the Employer to justify the dismissal decision on the basis of some form of collusion must be regarded as validated on that basis. For that reason, their grievances have no merit and must be dismissed.

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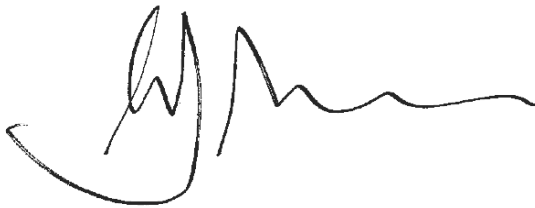
<sup>36</sup> [2017] FJHC92; ERCA 9 of 2014 (8 February 2017)

46. In the case of Ms Mani, she may well be an innocent casualty arising out of the conduct of her husband and the Assistant Manager. Having said that though, it would be highly unlikely with the effluxion of time that she was not now privy to some relevant information that arises out of the circumstances of the case. Whilst arguably the Employer may be in breach of Section 75 of the Act if it made a decision to dismiss Ms Mani primarily on the basis of her relationship status with her husband, there needs nonetheless to be some practical application of what is sustainable for the maintenance of an ongoing employment relationship, where issues of this type arise. The Employer dismissed Ms Mani for what it believed was colluding with other senior staff in a bid to steal monies from the company. As there is no evidence of collusion in her case, such a dismissal cannot be justified. That being said, reinstatement will not be an order contemplated in the circumstances of this case and the only remedy that will be contemplated is that of compensation. In that regard, the parties are requested to provide written submissions in relation to the appropriate compensatory remedy, if any, to be awarded. These written submissions are required to be received both manually and in electronic copy form, within 28 days from the date of this decision.

#### **Decision**

47. It is the decision of this Tribunal that:-

- (i) The grievances of Messrs Kumar and Chand should be dismissed.
- (ii) That the parties must file further written submissions in relation to the appropriate compensatory remedy in the case of Ms Mani, within 28 days hereof.



**Mr Andrew J See**  
**Resident Magistrate**