

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



Decision

Title of Matter: Fiji Mine Workers and Staff Union (FMWSU) (Applicant)
v
Vatukoula Gold Mines Limited (Employer)

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

Subject: Adjudication of Employment Dispute

Matter Number: ERT Dispute No 24 of 2017

Appearances: Mr A Singh, General Secretary, FMWSU
Ms N Samantha and Ms V Buli, AK Lawyers Ba

Date of Hearing: 4 and 11 September 2017

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 11 June 2018

KEYWORDS: Employment Relations Act 2007; Demotion of employee as a result of claim of negligence and damage to equipment

Background

- [1] This is a dispute that has been brought by the Applicant Union, following the demotion of Mr Shaaral Chand, from his position as Heavy Vehicle Foreman to that of Leading Hand, on 28 April 2016. The demotion comes about following a Disciplinary Hearing conducted by the Employer on 14 April 2016, in which the Worker was charged with condoning substandard and poor quality work. Specifically, the Chairperson of the Disciplinary Hearing Committee advised the Worker that in his role, he had not taken the required action to “ensure maintenance quality and standard”.
- [2] The Worker, through his Union, appealed against the decision of the Committee to demote him in his employment and this was done by letter to the Employer dated 9 May 2016. In response to the appeal, the General Manager of the Employer, wrote to the Union and advised that the decision would not be disturbed. It is following from the communication of this decision to the Union, that the subsequent dispute arises. The grounds that are being claimed in justifying a review of the actions of the Employer, are that the procedure relied upon to make its decision,

were both unfair and unjustified¹. In this regard, within the Applicant's Submissions filed on 25 August 2017, it is claimed that:

- The Worker denies carrying out sub-standard work on the underground (dump loader) vehicle DL 71;
- The machine operated without incident for 6426 hours, before engine failure on 8 March 2016, after which, following a service by technicians, operated for only 620 hours before breaking down again;
- In respect to concerns regarding a second vehicle (Dump Truck) DT 47, the Worker had two statements from underground mechanics to support the fact that proper greasing and servicing had been taking place, despite the grease pumps not been working properly;
- In relation to the DT 49, that there were manufacturing defects and modifications carried out to prevent turbo hoses from damage; and that the hose was not damaged or leaking but only old and worn out;
- That the Technicians report relied upon by the Employer in the case of both vehicles, did not provide the reasons for the DL71 engine failure, nor whether the oscillation for the DT 47 was greased or not.

- [3] On 12 October 2016, the Worker resigned from his employment, "at (his) own accord due to (his demotion) as a heavy vehicle Forman (sic) and (his) health being badly affected (sic) in underground environment."
- [4] Whilst the Worker had continued in his employment up to and until the date of his resignation, he had not accepted the decision of the Employer. The Employment Dispute of the Applicant Union was lodged on 29 July 2016. That is, before the date in which the Worker resigned from his employment. A mediation was conducted by the Mediation Service on 19 May 2017, well after the date of resignation. The matter was thereafter referred to this Tribunal in accordance with Section 194(5) of the Act.
- [5] The remedy that is being sought by the Union, is that of compensation for the difference between the salary and benefits lost from the date of effect of his demotion, to that of his resignation and further compensation for loss of dignity, reputation and unfair treatment.

Mr Akesh Sharma

- [6] The first person to give evidence to the Tribunal was Mr Akesh Sharma, the Human Resource Manager. Mr Sharma provided the Tribunal with a statement from a Mr Alex Liu, then Heavy Mobile Maintenance Engineer, incorporating an email that he had received from an external maintenance technician from the Yantai Xingye Company. Within the incorporated email, the technician purportedly states that in relation to the DL71, that the Worker had not fixed the intake pipe properly and that in relation to the DT47, that it was found to not be greased properly on the swing bearing nipples². The Human Resource Manager gave an account of the various policies and procedures in place governing the operations of the company and provided

¹ Under the legislation, these concepts are more commonly associated with employment dismissals.

² Within that document, it is hard to understand what aspects of it, are a strict 'lift' from the email communication and what are the views of its author.

an insight into the steps taken by the Employer in considering the conduct of the Worker as part of its disciplinary process. During cross examination, much was made of the fact that the Worker did not have Union representation at the disciplinary hearing.

Ms Melaia Nairabe

- [7] The next witness to give evidence was Ms Melaia Nairabe, a Human Resource Officer who further explained the information that was provided to the Worker in relation to the inquiry as to his conduct, that included the Statement provided from Mr Liu. The witness indicated that the Worker's response to the allegations were provided to the Employer on 14 April 2016³. According to the witness, she had been told by the Worker that he had evidence of certain emails in relation to the modifications that had taken place and had indicated that he would provide these, though never did. The witness identified the minutes of the Disciplinary Hearing that was conducted on 14 April 2016⁴, in which it was made clear that the Worker had not provided any further documentation in relation to his claim that the matters pertaining to the machinery maintenance had been raised with his supervisor. The witness was referred to a document Exhibit G2, that was an email sent by the Worker on 17 March 2016 to Mr Faizal Khan and Mr Alex Liu as part of the shift handover⁵. The witness indicated that this email was not included within the deliberations of the Disciplinary Hearing Committee.
- [8] During re-examination, the witness was questioned as to why within the minutes of that disciplinary hearing, there was no mention of any of the damage done to the Dump Loader (DL71) and she replied, because the Chairperson had written the Statement of the Worker (Exhibit E9).

Mr Josaia Tamanibici

- [9] Mr Tamanibici is the Occupational Health and Safety Manager at the Vatukoula Gold Mine. The witness commenced work as the Safety and Training Manager at the Gold Mine in 2015. Mr Tamanibici told the Tribunal that he was the Chair of the Disciplinary Process that was conducted in relation to the complaints levelled against the Worker. The witness stated that as part of that process, the Worker had been given an opportunity to provide any additional information that he wanted to, in order to respond to the allegations of negligent performance, that had levelled against him. The Safety Manager explained the significance of employees not following standard procedures for the maintenance or reporting of defective plant and equipment and indicated that there was no evidence at all, of Mr Shaaral Chand doing so, despite what he later said were his concerns on the job. According to Mr Tamanibici, the Worker told him that he would represent himself in any proceedings before a disciplinary committee. The witness told the Tribunal that during the course of proceedings, a decision was made to adjourn in order to investigate claims made by the Worker that some of the maintenance issues were identified to his supervisors within email communications. Mr Tamanibici said that despite this claim, no such further information was provided by the Worker.
- [10] Mr Tamanaibici said that it was he, who had formulated the proposal that the Worker be demoted for in effect being incompetent in his role, yet conceded that outside of the email provided from Mr Liu, in which he had endeavoured to relay the concerns of one of the external technicians, that there had been no investigation report, as to how either of the vehicles were actually damaged. The Occupational Health and Safety Manager told the Tribunal that he had

³ See Exhibit E9.

⁴ See Exhibit E10.

⁵ See Exhibit G2.

no reason to doubt the statement that had been provided by Mr Liu, in which he had purported to have passed on the views of the Yantai Xingye technician⁶. The witness claimed that the primary reason as to why he had recommended the demotion of the Worker was for the fact that he had failed to escalate concerns that he may have had in relation to the workings of the machinery to his supervisor in accordance with the Grievance Policy of the Employer⁷. The witness told the Tribunal that he had made the recommendation for demotion on the basis that he regarded the failure of the Worker to take the necessary remedial action as serious misconduct given the safety aspects of the machine and the fact that Mr Chand had not followed instructions, which could have led to a serious accident. The witness also clarified the fact that he had advised the Worker that he could return to his previous position if his performance improved.

- [11] During cross examination, Mr Tamanibici was asked about the specific concerns that had been raised by the Worker in relation to the vehicle maintenance issues. In relation to the Dump Loader 71, it was put to the witness that there had been no stock of appropriate hoses available. The witness indicated that he did not verify that fact, nor did he verify that the clamps that were required to be affixed onto the substitute hose, had to be placed over hosing that was both thinner and half an inch bigger. Mr Tamanibici responded, by indicating that this hosing had been approved by the Engineer. It was put to the witness that the clamping on hoses was not fit for purpose and caused clamps to slip. In response, the witness told the Tribunal that he had told the leading hands and mechanics to check this each day. The witness nonetheless conceded that he did not talk to either the leading hands or mechanics as part of his investigation. According to the witness, he had relied on the first bullet point of a translated email communication from Mr Alex Liu, to ultimately inform his principals as to the events that had transpired, that in turn led to the finding of serious misconduct. It was also put to the witness that the fan blades of the dump loader had broken as reported by the Worker, though again the witness agreed that he did not verify that fact. Mr Singh on behalf of the Worker, then asked the witness about the state of the pistol liners at that time. It was put to the witness that these were scratched and marked. Mr Tamanibici in turn indicated that he had not verified that fact.
- [12] In relation to the Dump Truck 47, the witness indicated that the issue of a grease gun not working properly at the Smith Workshop had been reported to the company, however stated that there was another workshop only five minutes further away and there was no effort made to secure the gun from that workshop. Mr Tamanibici stated that at any given time there were approximately 40 machines underground, with 3 or 4 being maintained at any one time and 6 or 7 down at any one time.

Mr Shaaral Chand(Worker)

- [13] Mr Shaaral Chand was the former Service Manager, West at the Vatukoula Gold Mine. The witness initially spoke of what he claimed was his ill preparedness to submit to the investigation meeting when it had been called. The first issue that the witness sought to have addressed through his representative, was that pertaining to the intake hose of Dump Loader (DL 71). Mr Chand stated that the hose for the vehicle should have been 6.5mm in diameter, however instead was 7.2mm and much thinner and weaker. According to the witness this was known to Mr Alex Diu, as the hose would break every second or third shift, at least every 24 hours. The witness told the Tribunal that he had explained this issue to the two Chinese contractors Messrs

⁶ See Exhibit E1.

⁷ See specifically Section 1.9 of the Vatukoula Gold Mines Limited Employee Handbook. (The Tribunal would have high doubts as to whether the purpose of this grievance was for that type of issue).

Chen and Mr Suen, however did not seem to think that they understood what was being said to them.

- [14] Mr Chand stated that the vehicle DL 71 was damaged in February of 2016, when the fan belt broke and claimed that this incident took place two weeks following the hose incident. The witness was of the view that the overheating would not take place because of the poorly fitted hose.
- [15] In relation to Dump Truck (DT 47), Mr Chand told the Tribunal that the greasing problem of this machine, was in part due to the fact that the grease pump was not working properly. According to the witness, at no stage did he indicate that the machine was not working at all. Mr Chand said that the grease pump simply had low pressure, that meant a job otherwise taking 30 seconds to perform, would now take between 4 to 5 minutes. The witness was taken to Exhibits G1 and G2, that indicated that the concerns and repair of the grease pump were raised on two separate occasions of 11 March and 17 March 2016. The witness confirmed that he was demoted from his role of Heavy Vehicle Foreman to that of Leading Hand on 2 May 2016 and subsequently resigned from his employment in October 2016. Mr Chand told the Tribunal that due to his demotion that he had incurred a loss of approximately \$6,000.00 per annum, as well as a reduction in status where he was formerly responsible for approximately 60 staff and 4 workshops. Mr Chand advised that the remedy he seeks is to be compensated for the loss of income during the period of his demotion.
- [16] During cross examination, the witness was shown his resignation letter and told the Tribunal that he was keen to have the disciplinary investigation completed as soon as possible. Mr Chand conceded that he had been shown the relevant documents setting out in effect the complaints against him (Exhibit E1) and the request to attend the meeting (Exhibit E4). Mr Chand also confirmed that an appeal against the decision had been made by him. (See Exhibit E5).
- [17] Mr Chand reiterated the fact that he didn't believe that the technicians engaged by the Employer, understood the issues that he was flagging in relation to the state of the vehicles. The witness was adamant that the intake pump on DL 49 was worn out and not broken and stated that each and every shift that the machine underwent a service and was signed out with a checklist of action items⁸.
- [18] During cross examination, Mr Chand conceded that he could have called witnesses to give evidence in relation to the quality of his work and the instructions that he gave whilst employed, yet he failed to do so.

Analysis of the Issues

- [19] The case of the Employer is that the Worker was negligent in the discharge of his duties by failing to take necessary preventative and remedial action to avoid machinery breakdowns and damage. Interestingly in this regard, the Employer's own notes of the Disciplinary Hearing on 14 April 2016 provide the following exchange:

⁸ It should be noted that the Employer failed to produce any evidence pertaining to these records. Records, that would have been central to the case of the maintenance of the vehicle and the issues that were noted as warranting attention by the Employer.

Mr Tamanibici: Have you raised these issues on the modifications and grease gun with Alex or Leslie to see that such issue are avoided. These frequent breakdowns are costing VGML.

Worker: Yes, Alex is aware but we still modify parts to be used to fix machines underground.

Mr Tamanibici: After raising with Alex and still modification continues, why wasn't it raised to the level above Alex?.. Sharaal, do you have anything to say?

Worker: No

[20] The Tribunal is of the view that there can be a real danger in attempting to read too much into interview notes, particularly when there is some concern as to whether or not they represent a fair and true account of the exchange that took place and the emphasis placed on various issues. For example, the notes record that in attendance was the Chairperson, Mr Tamanibici, the HR Officer, Ms Nairabe and as witnesses, Yantai Technicians and a translator. Yet, the interview notes make mention of a participant called Frank, presumably one of the technicians, who appears to have been making the allegations against the Worker. What is also unclear, is why the Employer makes no real attempt to explain whether or not Mr Alex Liu, the technician had been aware of these issues and what efforts he had made to resolve them on behalf of the company. The further suggestion by the Employer, that the Grievor should have taken out a grievance against Mr Liu for failing to act up on his concerns, appears somewhat hard to accept, when one peruses the language used within that provision within the Workplace Policy Manual.

[21] Equally as concerning, was the fact that Mr Tamanibici had made no attempt to understand the maintenance history of either vehicle and had not perused the maintenance records as part of his inquiry. To this end, the Worker appears to have been made a scapegoat. That is not to say that he was not without fault, as clearly there needs to be no room for error where maintenance is concerned, particularly given the dangerous operating environment of an underground mine. The language barriers that existed between the Worker and the Technicians also appears to have played a part in the lack of resolution of some of these issues and to that end, the Employer needs to be alert to that fact. Communication with workers needs to be clear and those who are in charge of operations, also need to understand the feedback being provided by the workers. This is critical, particularly where safety issues are concerned.

Relief being Sought by Worker

[22] The Worker is no longer employed with the Employer, having been 'demoted'⁹ and then subsequently resigning from his employment. The relief that is being sought is therefore a claim for the wages lost during the period whilst demoted in his role from Heavy Vehicle Foreman to Leading Hand. Within the Applicant's Closing Submissions¹⁰, it is said that the monetary loss arising from this situation, saw the Worker's earnings decrease from \$16.00 per hour to \$8.73. Mr Singh on behalf of the Fiji Mine Workers and Staff Union, correctly points out that nowhere within the disciplinary procedures of the Employer can it be said that there is a unilateral right of the Employer to demote a worker for performance or conduct issues¹¹. Nonetheless, there is

⁹ This phrase means for this purpose, had a new employment contract brought about.

¹⁰ Filed on 27 March 2018

¹¹ See for example Exhibit E3, the VTGM Workplace Policy Manual (Version 1.1). Clause 1.8.12 of that Manual is lacking sufficient clarity as to enable a demotion in employment. The language is vague and ambiguous.

evidence of a variation to the contractual terms between the parties, where a reclassification of position and remuneration came about¹².

- [23] Whether the variation was such a significant change to the terms and conditions of employment, that it represented a new employment contract rather than an adjustment to the earlier one, is a salient issue. A slight variation to wages and duties may lead to one conclusion, however a substantial adjustment in remuneration, may lead to another. The better view would be that this was a new employment contract. That it could not amount to a variation of the earlier one, as the adjustment was far too significant.
- [24] This has an interesting consequence. The Worker continued in the employment relationship for a further five months, until such time as he resigned on 12 October 2016¹³. Having said that, he did lodge a dispute with the Permanent Secretary on 29 July 2016, albeit that it was not dealt with in mediation until 19 May 2017. It is therefore not a case, that the Worker had been somehow complicit in the position taken by the Employer. It was the case that he did not accept what had taken place.

Conclusions

- [25] The Employer does not appear to have followed its own disciplinary procedures set out within the *Workplace Policy Manual*. The disciplinary code is said to be a “step by step progressive program to endeavour to modify errant Employee behaviour”¹⁴. The code is designed to give” an Employee an opportunity to correct behaviour or actions that are unacceptable to VGML”.
- [26] Yet, there is no evidence that this took place on this occasion. The driving force behind the disciplinary sanction appears to have been the email that had been received by Mr Liu, sent to him by a representative from Yantai Xingye on 17 March 2017. There does not appear to be any evidence of the issues being put to the Worker and thereafter giving him the opportunity to remedy the breach. That is, what the Employer’s contractual obligation required it do within its Workplace Policy Manual¹⁵. The Employer provides no insight as to what action it had taken to ensure that the appropriate intake pipes were made available for the Dump Loader (DL 71), or what actions it had taken to replace the defective grease pump in the case of Dump Truck (DT 47).
- [27] The Employer was unable to demonstrate its own system for maintenance and repair and provided the Tribunal no records to ascertain, whether these issues had been known by the company for some time and simply not acted upon.
- [28] In light of the above, the position of the Worker and his representative is preferred to that of the Company. The response by the Employer was not consistent with its own policy arrangements. And it is important to keep in mind, that the Employer’s Workplace Policy Manual formed an integral part of the Worker’s contract of employment¹⁶. As a result, the demotion of the Worker in effect gave rise to his termination of his contract and the entering into of a new one. The Tribunal believes in such circumstances that the principles that should be applied would be the

¹² See Exhibit E 12

¹³ See Exhibit E7.

¹⁴ See Clause 1.8.4

¹⁵ That is, the obligations within the Manual become contractual terms, as they are incorporated by reference. (See *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889)

¹⁶ See Exhibit E2 at Clause 1.4.

same as those to be considered in the case of an unjustifiable dismissal. As this Tribunal has said in the case of *Kumar v Nanuku Auberge Resort Fiji*¹⁷

...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.

¹⁷

[2017] FJET 2; ERT Grievance 122.2016 (10 February 2017)

[29] The decision to demote the worker, in circumstances where his remuneration was effectively halved was neither sound nor defensible. It appears to have been a knee jerk response to a situation, that should have been investigated more thoroughly to understand what had earlier taken place. The Tribunal did seek to have the email that was sent to Mr Liu translated for verification¹⁸, however notes that the translated Statement, includes the following pertaining to the Worker:

His body is not fit, applies Sick-leave often, which is not suitable to be a Foreman.

[30] If these are the comments of the Yantai Xingye technicians, it is unclear how they could have made their way to the disciplinary process of the Employer. Even if it was claimed by Mr Tamanibici that they were not relied upon within the deliberations of the Disciplinary Meeting, they cannot be viewed as being immaterial. Clearly, the proponents of this view, had a perception, that Mr Chand should not have held his position. Whether or not the issues flagged were valid or not, one questions the appropriateness and capacity of third party technicians to make comments about a worker's suitability to remain employed with an employer and for them to make their way through to the paper work of the Employer. They appear prejudicial from a number of fronts and perhaps show a less than objective approach taken in the reporting of the technical issues to the Employer.

[31] Having regard to the above, the Tribunal is satisfied that the termination of the Worker's contract as a Foreman was not justified.

What is the Appropriate Remedy

[32] This is an unusual case, insofar as the claim for compensation is one seeking an adjustment for the wages differential between the two roles. Additional compensation is claimed for loss of dignity, reputation and unfair treatment. Based on the yearly salary of a Heavy Vehicle Foreman, the hourly rate for that position is calculated at \$15.65 per hour. The hourly rate in the 'demoted role' paid to the Worker was \$7.27 per hour. (The difference being \$8.38 per hour)

[33] Recognising that neither side's case was without flaw, the Tribunal intends to award the Worker compensation in the amount of 12 weeks payment (being the adjustment of the two hourly calculations for that period). The nett sum equates to \$4826.88.

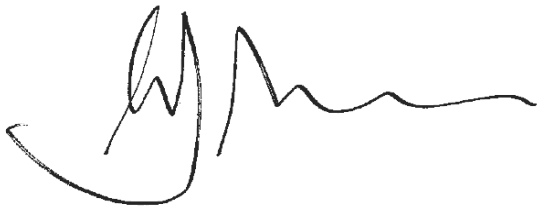
[34] This calculation, recognises that the Worker could have been more forthright with the Employer at the outset and taken advantage of the opportunity to provide all information to it, in order that a fair evaluation of all facts and factors could take place. It is unclear why there appeared to have been a lack of enthusiasm on the Worker's part to do this. For the Employer moving forward, the issue of ensuring foreign workers and consultants communicate effectively with nationals, is an obvious lesson arising.

¹⁸ It is understood that this email dated 17 March, forms the basis of the Statement that he provided on that same date (Exhibit E1).

Decision

It is the decision of this Tribunal that: -

- (i) The Worker Mr Shaaral Chand was unjustifiably dismissed in his employment as a Heavy Vehicle Foreman and re-engaged in a position as Leading Hand.
- (ii) The Employer was unjustified in terminating the Worker's role in the manner and for the reasons in which it did.
- (iii) By way of compensation, the Employer pay to the Worker the sum of \$4826.88 within 21 days from today's date.



Mr Andrew J See
Resident Magistrate