



Employment
Relations Tribunal

DECISION

Title of Matter:	Reginal Karan v Land Transport Authority
Section:	Section 211(1)(a) <i>Employment Relations Act 2007</i>
Subject:	Adjudication of Employment Grievance
Matter Number:	ERT Grievance No 40 of 2018
Appearances:	Mr R Karan, Self Represented Mr N Chand, and Ms E Dauvere, for the Employer
Date of Hearing:	6 August 2018, 7 August 2018, 21 August 2018
Before:	Mr Andrew J See, Resident Magistrate
Date of Decision:	31 October 2018

KEYWORDS: Section 33 *Employment Relations Act 2007*; Breach of Trust and Confidence; Inciting Unlawful Industrial Conduct; Justifiable Dismissal

CASES CONSIDERED

Blyth Chemicals Ltd v Bushnell [1933] HCA 8; (1933) 49 CLR 66 (3 April 1933);
Concut Pty Ltd v Warrell [2000] HCA 64. 75 ALJR 312; 176 ALR 693.(14 Dec 2000).
Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2
Maritime Safety Authority of Fiji v Narayan. [2016] FJHC 1; ERCC13.2013 (4 January 2016)
Shangri La Fiji Resort and Spa v Vani Vatuaruku [2017] FJHC 92

Background

[1] This is a grievance that has been referred to the Tribunal from the Mediation Service in accordance with Section 194 (5) of the *Employment Relations Act 2007*. The Grievor was dismissed in his employment by letter issued to him on 8 December 2017, for a series of allegations that included: a failure to follow LTA Board and Management directives in relation to

the opening hours of LTA offices and more relevantly, attempting to incite staff to take unlawful industrial action by the proposing of a stop work meeting and attempting to bring the LTA office into disrepute as a result of that conduct. It is perhaps also useful by way of background, to add that the Employer being a statutory authority, is an essential services and industries 'employer', for the purposes of Section 185 of the *Employment Relations Act 2007*.

[2] In undertaking this task, the Tribunal has had regard to the following material:-

- Preliminary Submission For The Grievor, filed on 12 June 2018;
- Employer's Preliminary Submission, filed on 25 June 2018;
- Affidavit in Chief of Abhishek Chandra, dated 25 June 2018;
- Affidavit in Chief of Kinisalote Naicegulevu, dated 25 June 2018;
- Affidavit in Chief of Faiyum Ali, dated 25 June 2018;
- Affidavit in Chief of Irimaia Rokosawa, dated 25 June 2018;
- Affidavit in Chief of Harik Raj, dated 25 June 2018;
- Affidavit in Chief of Sakeasi Tawaketini, dated 25 June 2018;
- Affidavit in Opposition of Reginal Karan, dated 17 July 2018;
- Affidavit in Opposition of Carmine Piantedosi, dated 20 July 2018;
- Closing Submissions of the Grievor, filed on 15 October 2018;
- Closing Submissions of the Employer, filed on 25 September 2018;

The Grievor and the Disciplinary Charges

[3] Up and until the date of dismissal on 8 December 2017, the Grievor held the position of Manager Customer Services, Land Transport Authority. The Grievor was suspended from his employment on 13 November 2017, when he was provided with the particulars of four disciplinary charges levelled against him and asked to provide a response to the same within 14 days.

[4] The particulars of those charges are extracted verbatim as follows:

1. Failure to adhere to Board and Management directives when you were advised to inform all LTA offices to open the office from 8am to allow the public inside the office, rather than 8.15am. Customers at all times are exposed to the rain during rainy weather.
2. Disrespectful behaviour to immediate Supervisor on numerous occasions when responding to emails and verbal discussion where respect to his line GM was not accorded in a professional manner.
3. Lack of prompt follow up on Board and Management decisions when you were requested to provide an update on the Accident Compensation Act, however you failed to adhere to this, even after having received an email on the same from your line GM.
4. Failure to use mobile communication for effective discussions when your immediate Supervisor and line GM was contacting you, however you failed to promptly answer nor acknowledge your reasons for failing to take calls during official working hours.

[5] By letter sent to the Acting Manager, Human Resources, dated 20 November 2017, the Grievor denied all four charges and requested further and better particulars from the Employer and asked that he be reinstated in his employment without loss of pay. What transpired beyond that point will be canvassed later within the course of this decision, suffice to say that by letter dated 8 December 2017, the Grievor was summarily dismissed from his employment. Though it should be noted at this juncture, that the scope of reasons for dismissal had been expanded at this point

in time and had included an allegation that the Grievor had been inciting staff to take unlawful industrial action, in a manner inconsistent with the provisions of the *Employment Relations Act 2007*.

Mr Abhishek Chandra

[6] The first witness to be called for the Employer was Mr Abhishek Chandra. Mr Chandra had been working as a Team Leader, LTA Call Centre and had been employed with the Authority for the past 2 years. Mr Chandra told the Tribunal that on 13 November 2017, he had been in a team meeting, when he was asked by the Grievor to go to a 'break out' room¹. According to the witness, he was told by the Grievor that there was to be a planned 'walkout' on 14 November and not to report to his designated work station, but to meet at the Nasinu main office. Mr Chandra said that initially he did not pass the message on to his staff, but later on did advise them of what he had been instructed, however the workers had decided not to participate. During cross examination, Mr Karan asked of the witness, whether he had been told to tell his team to go to Valelevu and the witness emphatically responded, that yes he was asked to inform and advise his team of this proposed 'walkout'.

[7] It was put to the witness, by Mr Karan, "Do you recall I said you have to make your own decision?" and Mr Chandra replied, that he could not recall. The witness stated in re-examination that he had only raised the issue with his staff, after being approached by one staff member who had heard of the rumour that the employees were going to undertake industrial action.

Ms Kinisalote Naicequlevu

[8] Ms Naicequlevu has been employed with the Respondent Employer for the past 13 years and for the last three of those years, had been engaged as a Team Leader. Ms Naicequlevu had provided an Affidavit to the Tribunal that had become the Evidence in Chief of the witness and she also reaffirmed that on 13 November 2017 that along with Mr Chandra, she had been called into a meeting in the kitchen and stated that Mr Karan had advised of a proposed walkout for the following day. The witness said that she had asked of the Grievor whether there was "anything in black and white", such as an email communication, that set out this instruction. According to Ms Naicequlevu, she told her colleague Mr Chandra, that she would not be letting her staff walk out.

[9] During cross examination and in response to questioning from the Tribunal, the witness also rejected the proposition from the Grievor, that he had presented the proposal to walk out, as an option, rather than as an instruction.

Mr Falyum Ali

[10] At the time of these proceedings, Mr Ali was the General Manager, Technical Operations. As is evident within the Affidavit that had been prepared and submitted for this witness, it was Mr Ali who had ultimately prepared a memorandum to the Manager, Human Resources, recommending that the Grievor be suspended in his role pending an investigation into some of the allegations that had been made against him. During the giving of his evidence, the witness was taken to a memorandum that he had issued to the Grievor dated 28 June 2017², together with a further

¹ A 'break out' room is the term referred to a small meeting room that is often used in open plan office accommodation, as a more private environment in which to hold meetings.

² Exhibit E2.

Memorandum that he had prepared to the Manager Human Resources, setting out various concerns that ultimately appear to have formed the basis of the suspension letter³.

Mr Irimaia Rokosava

[11] Mr Irimaia Rokosava is the Authority's General Manager, Finance and Administration and told the Tribunal that in this role, he was responsible for the information technology, property, quality, finance and human resources functions. The witness spoke of the management arrangements in place. The witness explained the way by which the Authority was governed and within his Affidavit that was admitted into evidence, recalled the circumstances that gave rise to the Core Management Meeting of 27 November 2017 being convened, that specifically included the concerns expressed over the Grievor's attempts to coerce employees to participate in unlawful industrial action.

Mr Harik Raj

[12] Mr Harik Raj is the LTA Manager Audit and Compliance. The witness told the Tribunal that he was the author of a Special Investigation Report that had as its purpose to investigate the conduct of the Grievor⁴. Mr Raj spoke of the scope and manner in which he investigated the allegations levelled at the Grievor in relation to the proposed 'walkout' and acknowledged that whilst he did not undertake a thorough investigation into the 'email traffic' between the Grievor and others, nor did he ultimately get the opportunity to put the allegations to the Grievor. Mr Raj told the Tribunal that he had attempted to contact the Grievor on his personal mobile phone to no avail. The witness said that he also attended the Grievor's residence and left a message for him to make contact urgently, although received no response to that request.

Sakeasi Tavaketini

[13] Mr Tavaketini is currently the Manager Corporate Governance and the LTA Board Secretary. According to the witness, he was made aware of the investigation into the allegations that the Grievor had been attempting to encourage a 'walk out' of staff and had requested that the Corporate Management Team be briefed on that issue. The witness clarified the process that was followed by the team in reaching the views that it did and also elaborated upon the various breaches of conduct, both serious and less serious that were assessed as part of the investigation. During cross examination, the witness agreed that on 9 November 2017, he had asked the Grievor, "are you planning a walkout?", to which he acknowledged, Mr Karan replied, that it was "just a rumour".

Kenneth Veu

[14] Mr Veu was called at the request of the Tribunal. According to the witness, he had been engaged as a Customer Services Officer for 13 years and had told the Tribunal that he had provided the investigators a statutory declaration, explaining the fact that he had heard from Mr Karan that there was to be a proposed 'walkout' and on the strength of that discussion, had shared the information with other staff. Mr Veu said that he had shared that information because of the industrial environment at that time, where there was a dispute at Air Transport Services (ATS) and where people were worried about losing their jobs. Mr Veu informed the Tribunal that he was a member of the Fiji Public Service Employees Union and that in discussions that he had held with his colleagues in relation to the proposed walkout, they had come to the

³ See Exhibit E3.

⁴ See Folios 93-95 of the Employer's List of Exhibits.

conclusion that this was not the way that the Union did business and that they should not cooperate with that request.

Reginal Karan

[15] At the commencement of the Grievor's Evidence in Chief, the Tribunal referred Mr Karan to his Affidavit in Opposition and the claims made by Mr Abhishek Chandra and Ms Kinisalote Naicequlevu, that they had been directed to participate in a 'walkout' as a form of industrial protest. Mr Karan denied those claims. Instead the essential thrust of the Grievor's evidence in this regard, was that upon being made aware of the rumours of a walkout that he was attempting to conduct his own inquiry in relation to the possibility that some workers were considering to undertake industrial action. The Grievor intimated that subject to what was ultimately uncovered in all of this, that he would have referred the matter to senior LTA officials, but that he did not see the need in doing that prior to having a good understanding of what was going on. During cross examination, Mr Karan stated that he did no more than give his staff the knowledge of what had been mooted and the option of either participating in the industrial action or not. The Grievor acknowledged that he made no effort whatsoever to encourage employees not to participate in the walkout.

[16] During the course of the giving of his evidence, the Grievor spoke of the work that he had done and the improvements that had been effected through his management. The witness distanced himself from the allegations that had been levelled against him that were contained within the suspension letter and otherwise suggested that the basis for the claims were unsubstantiated and reliant on ulterior motives.

Vijay Maharaj

[17] Mr Maharaj is the Chair of the Land Transport Authority and is a prominent senior legal figure in Fiji. The witness was subpoenaed by the Grievor to attend to give evidence and of his own volition and at short notice, made himself available. The issues that were canvassed during the giving of his evidence, were largely of an administrative character, although Mr Maharaj when pressed, explained the rationale that underpinned the dismissal decision. That is, that in effect it relied on the direct evidence of three persons who had given written statements, where they had been advised by the Grievor to participate in unlawful industrial action.

Was this a Justifiable Dismissal Decision?

[18] As mentioned at the outset of this decision, the Tribunal has had regard to all of the relevant materials when considering and evaluating the merits of the case. From an analysis of that material and after hearing the evidence of all witnesses, there are several issues that need to be raised. Firstly, it would be fair to say that the process that was adopted by the Employer in undertaking its investigation, suspending the Grievor and then dismissing him, is not without its weaknesses. That is not such a novel state of affairs for many employers in such cases and irrespective of that fact, the Tribunal never wants to give the impression that after forensically scrutinising the processes *ex post facto*, that the exposed shortcomings are an attack on the conduct of the employer. It is much easier for a Tribunal to say how things should have been after an event. It is always much more difficult to execute an employment relations process, when there are many tensions and pressures at play. Clearly some of the reasons that gave rise to the Grievor's suspension were of a minor nature, although if it was the case that Mr Karan had deliberately disobeyed a directive to open the LTA customer service centre to better meet the needs of its customers, such a situation would be more than a minor conduct infringement. The issues regarding the use of a mobile phone or the manner, in which he had spoken to a

manager, would ordinarily hardly give rise to the suspension of a worker from work without pay. It is for that reason, such issues have not really featured in any weighing up of the relevant factors that would give rise to a dismissal decision being taken.

[19] That being said, what seems to emerge from the evidence, is a lack of judgement on the part of the Grievor. The Grievor gave the impression of a person who for some albeit short period of time, had gained favour with the former Chief Executive Officer of the Authority and upon that person's departure, found himself in a situation where as often is the case happens, his standing and responsibilities within the organisation had somewhat diminished. It is probably also worth recording that at the time in which the planned walkout was to take place, was a period within the country where there had been some pockets of industrial unrest. Whilst that in some senses is a separate issue to the specific case before the Tribunal, given that some comments have been made by at least one of the witnesses in this regard, it is worthwhile making the point quite clear. The employees of the Land Transport Authority are part of what the parliament of this country have determined to be an essential service. Whilst the rights of workers to participate in industrial action and to have their grievances vented is well recognised within the Part 19 provisions of the *Employment Relations Act 2007*, for the sake of all parties, these laws need to be observed by all parties. Any attempts made by persons to subvert the law, by calling on people to take unlawful industrial action by walking out and staging a protest, or holding a meeting, or whatever, can never be countenanced. Such conduct is not only unlawful, but it is foolish in the extreme. Unsurprisingly, none of the staff lent their support to such a call. The Grievor appeared to be running his own agenda and perhaps because he no longer had the support of his former Chief Executive Officer, had attempted to pursue his own issues via another means. The result of his actions is now self- apparent.

[20] The fact that the Authority is an essential service is also a matter that warrants some comment from a service delivery perspective. There have been some very tragic road traffic accidents in the country over the last 12 months. The work of the Authority and its responsiveness to all of the issues that impact on road safety, are critical to the community and its road users. Attempts to sabotage an essential service such as the Authority, could have major consequences on the safety of members of the public, where customer service centres were forcibly closed or where other actions taken unlawfully by employees jeopardised day to day operations.

[21] In *Kumar v Nunuku Auberge Resort Fiji*⁵, this Tribunal stated:

...The question post Central Manufacturing v Kant, where a new regulatory regime is installed, must be, Can the dismissal be justified? The initial question to ask is not how the dismissal takes place, or what is relied on as part of that process, but whether the reasons for giving rise to the decision to terminate are justifiable. The concept of whether or not a termination or dismissal at work is justified or not, has been enshrined in international labour law for many years. The Termination of Employment Convention, 1982 (No. 158) adopted at the 68th International Labour Convention session in Geneva, sets out within Part II, Division A, a framework for assessing whether or not a dismissal is justified. Article 4 for example, provides that "The employment of a worker shall not be terminated unless there is a valid reason for such termination concerned with the capacity of conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Articles 5 and 6 thereafter provides additional illustrations of circumstances that would not constitute a valid reason for termination. These include union membership, filing a complaint or

⁵ [2017] FJET 2.

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,⁴ 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.

...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.

[22]The Tribunal believes that attempts made by the Grievor to have LTA employees participate in unlawful industrial action, demonstrates a fundamental repudiation of the employment contract, insofar as it is illustrative of a lack of fidelity and an unwillingness to be bound by the contractual terms of contract. (*See Blyth Chemicals Ltd v Bushnell* [[1933] HCA 8; (1933) 49 CLR 66 (3 April 1933); *Concut Pty Ltd v Worrell* [[2000] HCA 64. 75 ALJR 312; 176 ALR 693. 14 Dec 2000). This absence of fidelity, coupled with or without the other misdemeanours that are contained within the Employer's dismissal letter, provides sufficient justification for the termination of the employment contract.

Was the Employer Entitled to Summarily Dismiss the Grievor?

[23]The term dismissal at Section 4 of the Act means "any termination of employment by an employer including those under section 33". Section 33 of the *Employment Relations Act* defines 'summary dismissal' as follows:

⁴ See [1995] IRCA 333;62 IR 371 at 373

Summary dismissal

33.—(1) No employer may dismiss a worker without notice except in the following circumstances-

- (a) where a worker is guilty of gross misconduct;
- (b) for wilful disobedience to lawful orders given by the employer;
- (c) for lack of skill or qualification which the worker expressly or by implication warrants to possess;
- (d) for habitual or substantial neglect of the worker's duties; or
- (e) for continual or habitual absence from work without the permission of the employer and without other reasonable excuse.

[24] In *Fiji Public Service Association and Satish Kumar v The Arbitration Tribunal and Another*, under the earlier provision that was Section 28 of the *Employment Act* (Cap 92), a Court of Appeal endorsed the lower court view, that:

"Section 28 provided that an employer should not dismiss an employee summarily except in the circumstances specified therein... (referring to the decision of the lower court) His Lordship said that the section did not confer an unfettered right to dismiss an employee where any of the matters specified in section 28 was found to exist, rather it removed the common law right to dismiss except where paragraphs (a) to (e) applied. He added that if any of the paragraphs applied, the common law right continued and there was no statutory or other objection to that right being fettered by an agreement between the employer and its employees".

[25] A similar approach should be assumed to exist in the interpretation of the existing Section 33 provision. And whilst a definition of what constitutes 'gross misconduct' would have assisted in this regard, there is a growing area of jurisprudence that can signpost what may or may not be captured by that expression. An illustration of the characteristics of a case of this type, is found in the decision of Wati J. in *Maritime Safety Authority of Fiji v Narayan*.⁷ The facts of the case are as follows:

Mr Narayan was employed as a clerical officer with the Authority. He was accused of:-

- *Acting outside his authority when he had provided his personal bank account to vessel owners to deposit funds/ fees and other dues. (That is, he requested the owner of a vessel to deposit fees due to the Authority into his personal bank account).*
- *Manipulating and/or doctoring Authorities records and documents when he had deposited Authority's income into his personal bank account and then issued receipts three (3) working days after the actual deposit.*
- *Misrepresenting to the Authority for personal gain, when he had requested fuel from a Boat Master in return for him sorting out his expired survey certificate.*

⁷

[2016] FJHC 1; ERCC13.2013 (4 January 2016)

- *Requesting extra sums of money from vessel owners when they requested assistance in matters pertaining to their vessel and licensing.*

[26] In this case, Her Honour found that:

... it is open to this court to make a finding (of gross misconduct) on the available evidence and I repeat that the employer's evidence was largely not contradicted based on which it is established that the employee used to ask vessel owners for fuel favours and asked them to directly deposit the employer's money in his personal account. All this amounts to dishonesty and theft and should not be condoned by any employer.

[27] This Tribunal regards the attempt to coerce others to take unlawful industrial action as being serious misconduct, particularly in circumstances where the person pursuing that agenda is the supervisor of employees and has an appreciation of the disruption that would be caused to the business operations by such behaviour. The Tribunal accepts that the Grievor did not take advantage of the opportunity to respond to these particular allegations, however this appears to be in part due to his own doing. That is, it would seem that the Grievor may have been deliberately not wanting to make himself available to respond to these more substantive allegations. The Respondent had obviously sought to contact the Grievor and put the allegations to him. Mr Karan's strategy of not making himself available to an interview, or to at least to place on record his version of events appears to be of his own choice. It is a little late to say now, that there has been a denial of natural justice. And in any event, in the case of summary dismissal, providing that the employer is of the reasonable belief that the serious misconduct has taken place, that would seem to be sufficient to justify immediate termination, rather than to facilitate a more lengthy inquiry in relation to the conduct. See for example, *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuaruku*⁸.

Conclusions

[28] While the human resource processes adopted by the Respondent have not been without flaw, there was nonetheless sufficient evidence to justify the course of conduct that was ultimately adopted by the Employer. The conduct of the Grievor was serious misconduct. It was subversive, unlawful and naïve. The specific provisions of Part 19 of the Act make it quite clear the manner in which grievances and disputes between the parties must proceed. There is no scope or tolerance for deliberately venturing out of the specific statutory requirements. This is a justifiable termination in the circumstances. Regardless of all of the other conduct issues levelled against the Grievor, some of which appear trivial in nature and most of which have not been canvassed directly within this judgment, the fact of the matter is that the relationship between employer and employee could no longer be sustained. The Employer was within its rights to summarily dismiss the Grievor in accordance with Section 33 of the Act. The grievance is hereby terminated on that basis and there will be no entertainment of any costs application. Finally, the Tribunal is concerned that the decision to suspend the Grievor without pay on the strength of the suspension letter, was unlikely to be warranted. For that reason, the Tribunal will order that the Grievor is paid for the period in which he was under suspension from 13 November to 8 December 2017. There was simply no basis for suspending the Grievor at that time. The most significant of the issues that forms the main reason for dismissing the Grievor, that is, his

⁸ [2017] FJHC 92

conduct pertaining to the walkout, was absent from that suspension letter. The Employer must calculate and pay the Grievor for the working days that fell within that suspension period. That parties should jointly prepare Consent Orders to give effect to this decision.

Decision

It is the decision of this Tribunal that:-

- (i) The Grievor Mr Reginal Karan has been justifiably dismissed in his employment.
- (ii) The Employer must reimburse the Grievor for any working days unpaid, during the period 13 November 2017 to 8 December 2017, within 21 days.

The image shows a handwritten signature in blue ink on the left, which overlaps with a circular official stamp on the right. The stamp is purple and contains the text "EMPLOYMENT RELATION TRIBUNAL" around the top inner edge, "OFFICIAL" in the center, and a small star at the bottom. The signature is a cursive-style name that appears to be "A. J. See".

**Mr Andrew J See
Resident Magistrate**