

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



## Decision

**Title of Matter:** Peni Koro Lagi (Grievor)  
v  
Calm Fire Professionals (Employer)

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

**Subject:** Adjudication of Employment Grievance

**Matter Number:** ERT Grievance No 183 of 2017

**Appearances:** Mr J Kumar, for the Employer  
Mr N Tofinga, for the Grievor

**Date of Hearing:** 11 December 2017

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

**Date of Decision:** 4 January 2018

**KEYWORDS: Employment Relations Act 2007; Pre contractual representations; Unjustifiably and unfairly dismissed; Section 24 Duty of Employer to provide work**

### 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 claims to have been dismissed in his employment on or around 5 May 2017, for what he says amounted to a failure of the Employer to provide work. The Employer on the other hand, claims that the Grievor was not dismissed in his employment, instead that he had agreed to perform project based work and that at the relevant date, he was unable to be utilised as there was no work for him to be deployed into at that time.

### The Case of the Employer and Justification for the Dismissal

2. The Director of the employing company, Mr Jitendra Kumar, told the Tribunal that there was no written contract of service that he had entered into with the Grievor and that the employment relationship was based upon a verbal agreement between the parties, where the Grievor had agreed to work on a project basis at the rate of \$7.00 per hour. According to Mr Kumar, after the first four weeks of the Grievor's employment, the project work that he had been working on had completed and thereafter the Grievor was asked to work at a reduced rate of \$5.00 per hour. Mr

Kumar claimed that some of these monies were paid directly into the bank account of the Grievor and on other occasions, he was paid cash in hand. Mr Kumar told the Tribunal that the Grievor had approached him looking for work and said that he was told by him, that he was resigning from his previous employer. Mr Kumar stated, "So I gave him a part time job" on projects.

3. Mr Kumar said that Calm Fire Professionals was a registered company, although he had no employees at the present time. In response to a question from the Tribunal, Mr Kumar stated that he had not terminated the Grievor, as he was a "casual worker", although he recognised he was paid weekly and should have been paid daily. The witness told the Tribunal, that the Grievor would sign for wages. Under cross examination from Mr Tofinga, it was put to Mr Kumar that he had entered into a 12 month written contract with the Grievor, however he had not provided him with a copy of that contract. Mr Kumar rejected that proposition. The witness was shown an Identification Card that had been issued to the Grievor by the Employer, in which it had shown his job title to be that of 'Services Manager'. Mr Kumar indicated that this was simply done for prestige purposes and that he himself was referred to as a Systems Engineer, even though this was not an accurate depiction of what he did. The witness was asked whether or not, had the Grievor continued in employment, he would have been entitled to annual leave and sick leave. Mr Kumar responded that he was not sure about the annual leave entitlement, however agreed that the Grievor would have been entitled to sick leave payments. Mr Kumar told the Tribunal that after the meeting that was conducted with a Labour Officer, that he was aware that the Grievor was classified as a casual worker.
4. It was put to Mr Kumar that he changed the role of the Grievor after only four weeks in his role. Mr Kumar stated in response, that the Grievor was aware of the requirement to undertake sales prior to taking up his appointment. According to the witness, when the Grievor undertook sales work, he was able to access only two clients and on that basis, was advised not to return to work until a new project was available to him. When asked to clarify what was the status of the Grievor prior to accepting his employment with the Employer, Mr Kumar stated, "First he said I didn't have a job and then he said I am resigning".

#### **Evidence of Peni Kori Lagi**

5. The Grievor is 45 years of age and at the time of his dismissal, had worked for the Employer for approximately two months. Prior to that time, he had worked with Fire Solutions Limited for a period of 18 years. According to the Grievor, Mr Kumar came to his work site and asked him if he could work for him for \$7.00 per hour. At that time, the Grievor says he was only earning \$5.00 per hour. According to Mr Lagi, he had signed a 12 month contract with the Employer and was told that he would receive a copy of the contract document later. The Grievor stated that he worked as a Fire Technician and was asked to bring all of his previous customers from his former employer to the new employer. One such example that was provided by the Grievor, was in the case of the business from Ba Holdings. According to the witness when he commenced work with the Employer, there was only one supermarket project that was being undertaken by the business and after that, no work available to the Grievor. The Grievor clarified that he was not asked to undertake sales for his new Employer thereafter, but claimed to have been asked to secure the business from his previous employer's clients. Mr Lagi told the Tribunal that he had not agreed to be paid at the reduced rate of \$5.00 per hour. Ultimately, the Grievor says that he was asked by Mr Kumar to remain at home, where he waited to be assigned further work, although nothing ever eventuated.
6. The Grievor was shown a Wages Record that had been produced by the Employer, as evidence of the payments made during the working period (Exhibit 1) and told the Tribunal that three of

those signatures on that document, were not his and appear to have been forged by the Employer.

7. The Grievor told the Tribunal that he had not been a Service Manager in his previous employment and was enticed by the Employer to assume the role. Mr Lagi gave evidence of the financial impact from accepting the employment with Mr Kumar and the impact that the loss of employment has had on his family. The witness stated that recently he had reconciled with his former employer and that he had now returned to work with that company. As a result, the period of unemployment arising out of the dismissal decision, was from 15 May 2017 to 27 November 2017.

### **Closing Submissions of the Parties**

8. Mr Kumar reinforced that the arrangements entered into with the Grievor had all been agreed by him and claimed that it was the Grievor who had approached him looking for work.
9. Mr Tofinga directed the Tribunal to Part 5 – Contract of Service of the *Employment Relations Act* 2007 and said that whilst his client had claimed that the parties had entered into a written contract, that in any event Section 23 of the Act would nonetheless apply and that a contract of employment would have been deemed to have been in place. In his submissions, Mr Tofinga said that Section 24 of the Act would also impose a requirement that the Grievor should have been provided for work by the Employer, on the basis that the legislation states:

*24. An employer must—*

*(a) unless the worker has broken his or her contract of service or the contract is frustrated or its performance prevented by an act of God, provide the worker with work in accordance with the contract during the period for which the contract is binding on a number of days equal to the number of working days expressly or impliedly provided for in the contract; and*

*(b) if the employer fails to provide work to the worker the employer, pay to the worker, in respect of every day on which the employer so fails, wages at the same rate as if the worker had performed a day's work.*

10. The Grievor submitted that he should have been entitled to FNPF payments, as well as accrued annual leave entitlements. Mr Tofinga stressed that there was clearly a distinction between someone offering services as an independent contractor, as opposed to being an employee and submitted that the Grievor was on all accounts, an employee for the purposes of the legislation.
11. The case of the Grievor was that if the Employer had intended to make Mr Lagi redundant because of the fact that the job he was doing was no longer required by the company, then the redundancy provisions within Part 12 of the Act, could have easily been called upon for that purpose. In his final submissions for the Grievor, it was submitted by Mr Tofinga that the Grievor should have been compensated for the lost earnings during the period to 27 November 2017 and that this should also include an adjustment for the altered hourly wage rate that had unilaterally been introduced by the Employer in the final four weeks of employment.
12. Mr Tofinga stated that the Grievor should be compensated by the Respondent Employer for disrupting the good working relationship that had been in place between Mr Lagi and his

previous employer and for encouraging him to entice clients away from that business and thereby damaging and undermining any relationship that had previously existed between those parties. It was submitted by Mr Tofinga, that this case should serve as a signal to other employers who sought to make careless or negligent representations to workers that had significant consequences to their livelihood. By way of response, Mr Kumar indicated that the Grievor had advised him that he did not wish to receive any FNPF contributions as part of the contract arrangement between the parties. It was also submitted by the Employer that the Grievor had overstated the financial damages that occurred as a consequence of what he claimed to be his job loss and that evidence pertaining to having to ask other family members to mind children because of the financial strain that the family had faced, was simply not true.

### **Findings of the Tribunal**

13. Having regard to all of the evidence before the Tribunal and the demeanour of both the Grievor Mr Lagi and his former Employer Mr Kumar in the witness box, the Tribunal is satisfied that an employment relationship had existed between the parties and that this came about due to representations that had been made by Mr Kumar to the Grievor, whilst he was still engaged with his former employer. Whilst the Tribunal recognises that the Grievor's complaint is as much about the representations that were made to him prior to commencing employment with the Employer, any claim based on tort, would have to be agitated in that way. The grievance before this Tribunal, is only one arising out of what would be said to have been an unjustifiable dismissal in employment.

14. In *Kumar v Nunuku Auberge Resort Fiji*<sup>1</sup>, this Tribunal stated:

*As a starting point, at least in the context of 'unjustifiable dismissal', the question needs to be asked, having regard to the Statement of Reasons provided, whether a termination based on those reasons was justified. The question post Central Manufacturing v Kant, where a new regulatory regime is installed, must be, Can the dismissal be justified? The initial question to ask is not how the dismissal takes place, or what is relied on as part of that process, but whether the reasons for giving rise to the decision to terminate are justifiable. The concept of whether or not a termination or dismissal at work is justified or not, has been enshrined in international labour law for many years. The Termination of Employment Convention, 1982 (No. 158) adopted at the 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>2</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:

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<sup>1</sup> [2017] FJET 2

<sup>2</sup> See [1995] IRCA 333;62 IR 371 at 373

*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.*

15. The Tribunal is of the belief that the Grievor was dismissed in his employment, as a result of the Employer failing to provide ongoing work. As Mr Tofinga indicated to the Tribunal, there would have been a simple way for an employer to have brought an end to the employment relationship in the case where a position was no longer required, for business reasons. What is not acceptable however, is for an Employer who has offered an employee a full time work role, to then assume that it is appropriate to 'send the worker home' after only a short number of weeks, until such time as there is an upturn in business. That may be appropriate on occasions, where it is done by agreement in an emergent situation, or where there may be other leave options that could be considered as a buffer to having received no income whatsoever. Yet in circumstances for a new employee who had relinquished a secure long term job reliant on a promise that was not realised, to then be 'stood down' without pay, is unacceptable from a number of fronts. For example, there may never be an upturn in the Employer's business.
16. While ordinarily the Tribunal is reluctant to intervene in what amounts to the pre-contractual discussions of the parties and their capacity to enter into an employment contract, it needs to also make clear that where an employer entices a worker to employment, such conduct needs to be nonetheless taken into account, should a claim for unjustifiable dismissal ultimately come about. The conduct of the Employer in these circumstances cannot be justified. There were no reasons for termination provided, as was required for the purposes of Section 114 of the Act. It was a situation as if, the Employer felt no obligation whatsoever to the person to whom he had just recruited into his company. Whilst on many measures, the manner in which such a dismissal took place would be viewed as unfair, insofar as that expression is set out within her Honour Wati's judgment in *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani*

*Vatuaruku*<sup>3</sup>, the Tribunal is reluctant to characterise the natural hurt and disappointment that the Grievor would have felt, with those other notions of humiliation and degradation that are described within that decision.

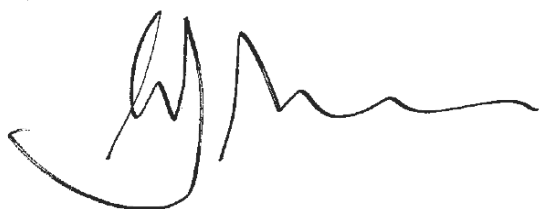
### **What is the Appropriate Remedy?**

17. There are a variety of considerations that can be relied upon when making a determination as to what would be an appropriate amount of compensation to be awarded to a Grievor in the case where it has been established that they have been unjustifiably dismissed in employment. These would include: the length of service with an employer; the likely remuneration received if the employment had continued; attempts made to mitigate any loss of income; any other income received by the Grievor prior to any decision being reached by the Tribunal; the capacity of the employer to pay; and any other special features of the case. What constitutes special features will no doubt vary, however in the present case, the manner in which the worker was enticed to leave a good job and the inability of the Employer thereafter to provide the Grievor with any work are two such examples.
18. Having regard to those relevant considerations and the special features of this case, the Tribunal believes that a compensation amount of two month's wages equivalence is appropriate. That amount has been calculated in the amount of \$2240.00. The Employer should also be required to pay the relevant FPNF employer contribution on that amount, calculated at the rate of ten percent (\$224.00).<sup>4</sup> In reaching this amount, the Tribunal is also of the view that the Grievor too had to assume some responsibility for the fact that he had of his own free will, elected to resign from a long term and steady job, based on the promise of higher income.

### **Decision**

It is the decision of this Tribunal that:-

- (i) The Grievor Mr Peni Lagi was unjustifiably dismissed in his employment.
- (ii) Calm Fire Professionals pay the Grievor a compensation amount in the sum of \$2240.00, within 21 days hereof.
- (iii) Calm Fire Professionals pay into the Grievor's Nominated FPNF Account, the amount of \$224.00, within 21 days hereof.



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

<sup>3</sup> [2017] FJHC92 at [61].

<sup>4</sup> The Grievor's Representative should ensure that this information is provided to the Employer, in order that such an arrangement can be made.