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

Decision

Title of Matter:	**Umu Tuifagalele** **v**	**(Grievor)**
	South Seas Cruises	**(Respondent)**
Section:	**Section 211(1)(a) Employment Relations Promulgation**	
Subject:	**Adjudication of Dismissal Grievance**	
Matter Number:	**ERT Grievance No 167 of 2017**	
Appearances:	**Mr J Seniroga, Nawaikula Esq Lawyers, for the Grievor** **Ms S Buksh, for the Respondent**	
Dates of Hearing:	**25 October 2017; 12 January 2018**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**8 February 2018**	

KEYWORDS: Employment Relations Act 2007; Absence without leave; Duties of Employee to Advise Employer of Absence; Incorporation of Policy by Reference.

CASES CONSIDERED:
Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2
Maritime Safety Authority of Fiji v Narayan [2016] FJHC 1; ERCC13.2013 (4 January 2016)
Riverwood International Australia Pty Ltd v McCormick [2000] FCA 889; 177 ALR 193; (2000) 48 AILR 4-304

Background

1. This grievance was referred to the Tribunal by the Mediation Service in accordance with Section 194(5) of the *Employment Relations Act* 2007. The grievance arises out of the dismissal of the worker by the Employer on 31 January 2017, as "a result of being absent from work without notification to (his) superior". The letter of termination purports to have terminated the Grievor with an effective date of dismissal of 6 January 2017.

2. In accordance with the *Preliminary Submission by the Employer*,[1] the Grievor had been engaged as a relieving Boson and Deck Watch Rating since November 2002. The Grievor went on annual leave on 22 December 2016 and was due to return for duty on 2 January 2017. The Grievor did not return from leave until 30 January 2017 and was terminated on the following day.

The Case of the Grievor

3. Within the Statement of Claim made by the Grievor, it is alleged that:-

    - The Grievor did not travel from Viti Levu to his home in Vanuabalavu until 28 December, because he missed the earlier boat that he was due to travel home on, for the reason that the employer required him to defer the commencing of his annual leave from 20 December to 22 December 2016; and

    - That he was unable to make contact with the employer until 11 January 2017, because of the lack of telephone reception on the island, brought about by Cyclone Winston;

4. The Grievor also claims that from 11 January 2017, that the Employer was aware of his absence.

The Case of the Employer

5. The Employer contended that:-

    - The boat that the Grievor sailed on to Vanuabalavu, left Suva on 23 December and not 28 December as claimed[2];

    - That the boat returned from Vanuabalavu on 27 December;

    - That the Grievor would have been aware before he left on leave, that there was only one boat a month leaving from Vanuabalavu and that the next return date would have been 24 January 2017;

    - That the Grievor made no effort to make additional arrangements, either so as to extend his period of leave, or at least alert his employer to the fact that he would not be returning to duty as scheduled on 2 January 2017; and

    - That the Grievor had been absent from work following the taking of annual leave, in December 2013, 2014 and 2015[3].

Analysis of Issues

6. The Tribunal sought to resolve this matter, initially by way of mediation, then determinative conference and later by calling additional evidence and submissions from the parties. During the

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1 Filed on 16 October 2017.

2 See Annexure F to the Employer's Preliminary Submission filed on 16 October 2017.

3 See Annexure C to the Employer's Preliminary Submission filed on 16 October 2017.

conduct of these proceedings, several representatives of the company provided evidence in relation to the events that had transpired on or around 11 January 2017.[4] Mr Serevi Serekilevu, a member of the operations team, did for example, indicate that he had received a text message from the Grievor, not to say that there was any problem with the boat, but that the Grievor's father had been ill.[5] According to Mr Serekilevu, he thereafter informed the Grievor that he was to call the Operations Section, as they were wanting to talk to him. The Grievor confirmed that he also had spoken to Captain Turuva, on or about 11 January to inform him of his delay.

7. The question does not really turn on what transpired after that date, because whatever the discussion, there was no real way that the Grievor could have returned to work any earlier. The issue really is, what was the intention of the Grievor when he went on leave? Did he have a true intention of returning to the workplace on 2 January 2017? Even if it was the case that the Grievor claims that his 'father' was unwell, he could not have returned to work on time, unless he organised for some other means of doing so.[6] There is simply no evidence of that whatsoever. There is also no evidence that the worker sought to apply for any form of leave from work and he certainly did not do so, having regard to the fact that he was scheduled to work.

8. Within a document entitled *Affidavit of Umu Tuifagalele in reply to the Employer's Final Response,*[7] it is suggested that Grievor's annual leave if taken from 20 December 2016, excluding Christmas and New Year holidays, should have expired on 12 January 2017. Firstly, the Grievor was only entitled to two week's annual leave. That is, the equivalent of 10 working days leave, exclusive of any public holidays. If that date was to commence on 20 December 2016 and taking into account public holidays for Christmas,[8] Boxing Day[9] and New Year's Day[10], then the 10 working days leave would have concluded by 5 January, not 12 January. In any event, the Employer says that the Grievor was scheduled to work on 2 January 2017 and that he was aware of that obligation. If this meant that he did not take the full amount of annual leave that was otherwise due because of work commitments, then so be it. There is no satisfactory explanation for why the Grievor sought to travel to another island knowing that he could not return on that date. It was irresponsible and jeopardised the operations of the Employer.

Was the Dismissal Justified?

9. For the sake of completeness, it is worthwhile looking at the test as to what constitutes justification or whether a worker is justifiably dismissed, as set out in *Kumar v Nanuku Auberge Resort Fiji*[11]. In that case, the 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 [24] at work is justified or not, has been enshrined in international labour law for*

4 Including Captain Vatili Turava and Mr Serevi Serekilevu.

5 It is understood that the Grievor's father had passed away two years earlier and that there is some suggestion that the expression may have a meaning within Lauians, that extends beyond a person's immediate paternal father.

6 That is by travelling other than reliant on the monthly boat.

7 See document filed on 2 February 2018.

8 Gazetted public holiday was Monday 26 December 2016.

9 Gazetted public holiday was Tuesday 27 December 2016.

10 Gazetted public holiday was Monday 2 January 2017.

11 [2017] FJET 2 at [24] to [27].

many years. The Termination of Employment Convention, 1982 (No. 158) adopted at the 68th International Labour Convention session in Geneva, sets out within Part II, Division A, a framework for assessing whether or not a dismissal is justified. Article 4 for example, provides that "The employment of a worker shall not be terminated unless there is a valid reason for such termination concerned with the capacity of conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Articles 5 and 6 thereafter provides additional illustrations of circumstances that would not constitute a valid reason for termination. These include union membership, filing a complaint or participating in proceedings against an employer, discriminatory grounds based on attribute, absence due to maternity leave or temporary absence from work because of illness or injury.

Northrop J in Selvachandran v Peteron Plastics,[25] 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."*
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> *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*
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> *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.

10. The Employer was justified in dismissing the Grievor on the basis that he showed complete disregard for his responsibilities as an employee. He could have sought to negotiate an extension of time to accommodate his travel plans, prior to departing from Suva, but he did not do so. He did not contact the Employer for in excess of one week after when he was required to return to work. The Tribunal does not accept that there was simply no means of making any contact prior to that time. The Grievor clearly thought that he would return on the next available boat and that the Employer would not mind. The Employer did mind and the Tribunal believes that it was justified in dismissing the worker on that basis.

11. Having said that and based on the circumstances of this case, the Tribunal is of the view that notice of termination should have been provided. The facts of this case do not sit squarely into the categories of case that make up Section 33 of the Act.[12] Whilst abandonment of employment, may of itself, be regarded as termination of the employment contract, it is possibly conduct more akin to gross negligence as an employee. It was certainly a neglect of duties. But it probably does not fall into the same category of case of gross misconduct, such as in in *Maritime Safety Authority of Fiji v Narayan.*[13] It is also noted that the Employer alleges that within its own policy, that unexcused absences of two consecutive days, constitutes abandonment of employment and habitual absenteeism. Further, the Employer asserts that unexcused absenteeism from work, is regarded as a serious offense warranting instant dismissal.

12. The problem for the Employer, is that it has not been able to provide the Tribunal with any contractual understanding as to how such arrangements come about. At the very least, the policy would have to be made a term or condition of the employment contract, ordinarily incorporated by reference so as to give it effect.[14] It would also have had to been a policy that was understood by the Employer to have been in force. There is no evidence of this. For that reason, whilst the Tribunal is of the view that the dismissal is justified, it is of the belief that a four week notice period would be appropriate in the circumstances.[15]

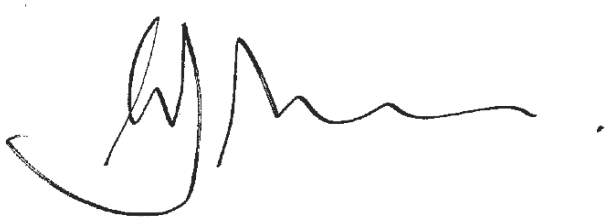
Decision

It is the decision of this Tribunal that:-

(i) The dismissal was not unjustified or unfair.

(ii) The Employer should pay the Grievor, four week's salary equivalence, as compensation for a reasonable period of notice that would other justify the dismissal, based on the circumstances provided.

(iii) Each party should bear their own costs.



Mr Andrew J See
Resident Magistrate

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12 It does not appear to be a case of habitual absenteeism for the purposes of Section 33(e) of the Act.

13 [2016] FJHC 1; ERCC13.2013 (4 January 2016)

14 *Riverwood International Australia Pty Ltd v McCormick [2000] FCA 889; 177 ALR 193; (2000) 48 AILR 4-304*

15 Having regard to the Grievor's length of service, the fact that the Employer provided no real evidence of steps It took to caution the worker for being absent from work following leave, on previous occasions.