

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



## Decision

**Title of Matter:** Taniela Kepa (Grievor)  
v  
Nasinu Town Council (Respondent)

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

**Subject:** Adjudication of Dismissal Grievance

**Matter Number:** ERT Grievance No 157 of 2017

**Appearances:** Mr A Singh, FICTU for the Grievor  
Ms C Kant, In-house Counsel for the First Respondent

**Dates of Hearing:** 29 November 2017; 1 December 2017

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

**Date of Decision:** 7 February 2018

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**KEYWORDS: Employment Relations Act 2007; Indefinite Suspension of a worker; Repudiation of Employment Contract; Misappropriation of monies as an employee.**

**CASES CONSIDERED:**

*Air Terminal Services (Fiji) Ltd v Federated Airline Staff Association*, [2018] FJET 2; ERT Miscellaneous Action 01 of 2018 (20 January 2018)

*Chatterton v Maclean* [1951] 1 All ER 761

*Koompahtoo Local Aboriginal Land Council & Anor v Sanpine Pty Ltd & Anor* (2007) 233 CLR 115

*Kumar v Nanuku Auberge Resort Fiji* [2017] FJET 2

*Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245

### 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 that was lodged on 30 May 2017, relates to what is said to be the summary dismissal of the Grievor by Nasinu Town Council on 10 May 2017.

2. The Grievor's case is that he was summarily terminated on the strength of a letter issued to him by the Employer on 10 May 2017, in which he was advised that he would be suspended from his duties for an indefinite period, while the Council wrote to the Ministry of Local Government to seek their approval to terminate his employment contract. The reason why Council sought to do this, was on the basis that it was alleged that the Grievor had misappropriated \$300 the property of the Employer, being monies paid by a ratepayer for 'special pick up' rubbish collection services, undertaken on 8 April 2017.

### **The Case of the Employer**

3. The Council called three witnesses to give evidence before the Tribunal in these proceedings. They were the Manager Human Resources Ms Filimoni Waqa Varea; the then Team Leader Litter Prevention, Mr Elia Lalama and the ratepayer who it is claimed by Council to have paid \$300 for the collection services, Mr Paras Ram. It is a matter of record that in the case of Mr Lalama he initially did not attend the Tribunal, despite being issued with a summons to appear.

### Ms Waqa Varea (Manager Human Resources)

4. Ms Waqa Varea provided the Tribunal with a brief understanding of the nature of the allegation of misconduct as it applied to the Grievor. In short, the case of the Employer is that the ratepayer Mr Ram, had come to the Council Office to pay his rates and at the same time, had asked if the Council would clear rubbish from within his compound. Mr Elia Lalama went and assessed the property and according to the first witness, then organised for that works to be undertaken through the Grievor the following day. It was alleged by Council that at the conclusion of the works undertaken on that day, that the ratepayer paid to Mr Lalama the sum of \$300.00. It is alleged that Mr Lalama later came to the Council Depot and handed that money to the Grievor. The case of the Council was that upon receiving that money, that the Grievor gave Mr Lalama \$100.00 and retained the rest. It is also accepted by the Employer, that the Grievor did purchase and provided some of the workers who had attended the job site at Nasole, with 'lunch money' at the conclusion of work that day. The witness told the Tribunal, that during the course of the investigation that Mr Lalama resigned and repaid in full the \$300 amount.
5. During the giving of evidence, Counsel for the Employer took the witness through a series of documents obtained from the Grievor's Personal History File, that were in effect a history of minor disciplinary infractions that had taken place over the 2009 to 2016 employment period.<sup>1</sup> Ms Waqa Varea told the Tribunal that whilst she personally did not participate in the interviews conducted as part of the investigation process, she had spoken to various persons and had facilitated the suspension of the Grievor. In response to the questioning from the Tribunal, Ms Waqa Varea advised that no-one had asked Mr Lalama why he himself had not paid the \$300 directly to Council, nor did it seem did that the Employer pursued the claim made by the ratepayer, that Mr Lalama had asked for the \$300 from him, on the basis that he had to "pay the Council staff overtime".<sup>2</sup> The witness told the Tribunal, that Mr Lalama was not authorised to quote for special 'pick up' works, without authority. The Tribunal challenged the witness as to why within the suspension letter issued to the Grievor,<sup>3</sup> that it made reference to the Grievor having given \$100 back to Mr Lalama, when no such reference to that was included within the

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<sup>1</sup> See Annexures A to I of the Respondent's Bundle of Documents, filed on 23 November 2017.

<sup>2</sup> See Statement of Mr Paras Ram, at Annexure L of the Respondent's Bundle of Documents, filed on 23 November 2017.

<sup>3</sup> Refer to *Preliminary Submissions To The Employment Tribunal On Behalf of the Applicant*, filed on 25 October 2017, at "U1".

Statement Provided to the Employer by Mr Lalama. Ms Waqa Varea claimed that this information was provided to her at the Management Meeting held to discuss the issue. The witness also told the Tribunal that the person ordinarily in charge of the supervision of quoting for works of this type, Mr Shelvin Narayan, was not interviewed as part of the investigation, to ascertain whether he was aware of the works to be carried out, the fact that no payment had been received prior to the works being undertaken and whether the overtime works for that activity had been approved in advance. In that regard, all the witness could advise, was that she had been informed by Mr Narayan that the job quoted for the rate payer was under-priced.

### **Mr Paras Ram**

6. Mr Ram is a company director and owner of a meat wholesaler business. According to the witness he attended the Council offices some time on or around 5 April 2017, in order to see if he could have rubbish removed from his residence. The witness claimed that he was quoted \$300 for that works. He said that the works were undertaken on Saturday 8 April and that during that time, someone had called Mr Lalama and had asked him to collect the \$300 from him, in order that the “boys could get paid”. According to the witness, he had no earlier dealings with Mr Lalama and the job had not been completed. Mr Ram said that he went back to Council to report the issue and was advised that the rest of the rubbish would be removed.
7. During cross examination, the witness told the Tribunal that it was on Wednesday 5<sup>th</sup> April that he had gone to the Council reception and had been guided to Mr Lalama’s office. Mr Ram said that Mr Lalama came to his home on the Friday morning 7<sup>th</sup> April and quoted for the works. According to the witness, he was initially told that once the rubbish was removed that he would have to pay, but on that day was told that “my boss is asking for money to pay the boys, we will give you receipt on Monday”. The witness acknowledged that he had never made payment before to Council, without having been issued with a receipt.
8. The Tribunal brought to Mr Ram’s attention some inconsistencies between his evidence and that of the earlier statement he had signed and provided to the Council as part of the investigations.<sup>4</sup> In the first place, the statement provided to Council indicated that he had come to the Council office the day before, in order to inquire about a quote, whereas the witness had stated in his evidence that this had taken place earlier that week. More fundamentally, the witness said that he was ultimately quoted for the works, the same day in which the workers had arrived at his compound to clear the rubbish, rather than several days before. Mr Ram stated that he had provided the 7 to 8 workers on that day with some juice and indicated that they could take some roofing iron and pine posts that did not form part of the rubbish, but that could be used again.

### **Mr Elia Lalama**

9. Mr Lalama previously held the position of Team Leader within the Litter Protection Section of the Nasinu Council. The witness said that he had a good relationship with Mr Kepa and that they had known each other very well. According to Mr Lalama, the ratepayer came to the Council and “we talked about his rubbish to be collected”. Mr Lalama said that the arrangement for collection was done on the Friday with the Grievor, whereby it would be collected the following day.
10. The witness claims to have quoted Mr Ram \$300.00 to undertake the job and that his was provided to him verbally on the Friday afternoon where the vehicles were parked. Mr Lalama

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<sup>4</sup> See Annexure L within the Respondent’s Bundle of Documents filed on 23 November 2017.

said that he was taken to Mr Ram's residence in the rate payer's vehicle and also returned to that workplace the following day with him. The witness agreed that the job had not been completed but that he still collected the money from him at around 3.30pm. According to Mr Lalama, after he received the money from Mr Ram, he decided to take the money to Mr Kepa. Mr Lalama conceded that he had received \$100 back from Mr Kepa, albeit that it was not provided within his statement to the investigating officers. This he said took place, as he was walking down the stairs from Mr Kepa's office. The witness claims that he was intending to return the monies, as he was experiencing financial difficulties at the time. Mr Lalama says the he wished to repay the full \$300 in order to reconcile with Council and his God.

11. During cross examination, the witness was asked why he had not asked the ratepayer to make the payment into the Council office as was the normal procedure. Mr Lalama said that he should have done this. The witness said that he was contemplating bringing the money to Council himself, however claims that Mr Kepa told him to bring the money directly to him. In re-examination, the witness conceded that he had been given no instructions from Mr Narayan to either report to Mr Kepa in relation to the removal job, or to give him the monies as collected.

12. The Tribunal sought clarification from the witness, in relation to the various types of rubbish collection undertaken by Council and was advised that there were three primary types; kitchen waste, green waste and white goods. The witness told the Tribunal that he had not organised the workers to be deployed to the site, but that this was done by Mr Kepa. The witness said that he was taken to the job site by Mr Ram and that the other workers were already inside the compound at the time. When asked why the rubbish was not fully collected on that day, Mr Lalama replied, that there was only one back hoe present and it was waiting for the dump truck. The witness also indicated that there was also a quantity of broken cement that they could not take. When asked, whether or not the witness had told Mr Ram that he needed to provide the money for overtime, it was accepted that "maybe I did". Mr Lalama told the Tribunal that normally a written quote would be provided for such works.

**Mr Deo Chand (Backhoe Operator)**

13. The final witness for the Council, was the backhoe operator working at the time of the works, Mr Deo Chand. According to Mr Chand, he was directed to the Nasole residence to assist in the removal of rubbish. The witness said that he normally would not go into a property to collect rubbish, but admitted to doing so, if directed to by his supervisor. On the day in question, Mr Chand advised that he had been directed by Mr Kepa to pick up rubbish. The witness said that the rubbish consisted of green waste and white goods. Mr Chand said that once the truck was loaded, that he returned to the depot, as there was no further dump truck available at that time. Mr Chand said that he arrived at the site between 12 and 1pm and that he had taken 4 workers with him. According to the witness, Mr Lalama was already at the site when they arrived. The witness said that when he returned to the depot, that he had lunch. During cross examination the witness reiterated that Mr Lalama was already inside the compound when he had arrived, with the other workers waiting outside the compound. Mr Chand said that after about half an hour a truck arrived and that it had come empty from the Naboro dump. Mr Chand said this took one hour to load that vehicle. The witness said that he been contacted around 11.00am by Mr Kepa to go to the site. Mr Chand told the Tribunal that at the end of the day, when it was clear that the job would not be completed, he phoned Mr Kepa seeking instructions as to what to do. According to the witness, he was advised that the rest of the rubbish would have to be collected

on another day. Mr Chand said that Mr Lalama does not normally work in supervising this sort of work and that he was involved as a Litter Prevention Officer involved in enforcement activities.

### **Mr Taniela Kepa**

14. Prior to his 'indefinite suspension', Mr Kepa was a Foreman at the Nasinu Town Council Depot. According to Mr Kepa, he had previously done an inspection at the ratepayer's compound to assess the cost of the rubbish removal, in response to a request from a Health Inspector and was of the belief that it would require two trucks. Mr Kepa told the Tribunal that he advised the ratepayer to pay that amount to Council. Mr Kepa said that following this, he advised the ratepayer that he would ask for permission to undertake the works from the Senior Inspector. This he said took place and that he was waiting for the ratepayer to make payment.

15. According to the witness, in relation to the later incident, Mr Lalama came to see him on Friday at around 3 or 4 o'clock in the afternoon and told him to collect rubbish from the ratepayer's compound. The witness agreed that he told Mr Lalama that he could organise the collection on the Saturday, "because the (green waste) boys were working overtime". Mr Kepa said that he called the team leader Luke and asked what time could the team be available. According to the witness, he was told that "they had nearly finished and they would have time".<sup>5</sup> The witness told the Tribunal that he did not go to Mr Ram's place as there was a Team Leader there as well. According to Mr Kepa, the workers came back from the depot around 2.30 to 3.00pm and that he knew the work was completed.

16. Mr Kepa stated that Mr Lalama came to his office before the boys returned and he gave him \$50 and said that this money was for the boys for lunch. According to Mr Kepa, he did not ask where the money had come from. The Tribunal heard that on occasions ratepayers do give small gifts of money for bread and juice and on this occasion, believed that the money given to him from Mr Lalama was from the ratepayer. Mr Kepa denied being given the \$300 amount from Mr Lalama, although said that he had provided Filiomoni and Deo with money for lunch, as "they came and asked for money for their food". Mr Kepa said that he had not asked Mr Lalama if the ratepayer had paid for the rubbish collection. The Tribunal was told that when a work instruction came from the main office, that it was just carried out and that after the day in which the work had been done, had no interest in following up any payment. Mr Kepa advised it was not until he was interviewed by Council later in May, that the issue was again raised.

17. The witness explained the events that subsequently ensued, whereby he was interviewed by his supervisor Mr Shelvin Narayan, together with the Special Administrator and the Chief Executive Officer and ultimately suspended from duties. Mr Singh took the Grievor through the Respondent's Bundle of Documents, in which were set out the previous disciplinary infractions from 2009 to 2016. During cross examination, Mr Kepa confirmed that for cases of this type, payment would need to be made by the ratepayer in advance and agreed that on this occasion he had not sighted any receipt of payment before embarking upon the task. Mr Kepa also confirmed that this was the first occasion that Mr Lalama had ever given him any cash for the workers lunches.

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<sup>5</sup> It is important to note here, that this would have taken place on the Saturday as the response implies that the workers were in fact working at the time and would be nearly finished at their location and could then travel to Nasole.

18. At one stage during the cross examination of the witness, he was asked to withdraw from the hearing room, in order that the Tribunal could clarify the nature of the questioning, the evidence and to ensure that it was taking place in a fair and relevant manner. Upon the Grievor's return the Tribunal explored with Mr Kepa, the manner in which rostering and over-time was worked. Mr Kepa told the Tribunal that he had provided a report to a supervisor by the name of Anasa, who was aware of the requirements for the men to assist in the rubbish removal. It was put to Mr Kepa that he was initially told by Mr Lalama that the rubbish was a "mixture of green waste and white goods". Mr Kepa said that he was just given the address and was only aware that it was rubbish.

19. The Tribunal asked the witness to advise as to which unit within Council, quoted in the case of 'special pick up' work. Mr Kepa gave the impression that this could be undertaken by any unit within the Health Department and gave the impression that it would be perfectly normal for Mr Lalama to quote for those works. Ultimately it was conceded that usually it was the Health Inspectors who provided the quotes. Mr Kepa told the Tribunal that Mr Ram did not advise him how many loads was required in the Nasole job. Again the Grievor was asked about the planning involved in scheduling workers to be available to complete a special pick up job. Mr Kepa said that he advised Luke that there was rubbish to be collected at Nasole. When asked wouldn't there be a need to know whether the collection was green, white goods or kitchen waste, so as to understand whether the work required a backhoe to load the truck, the witness became deliberately evasive. In fact the Tribunal sought to clarify that issue for some time and was met with what could only be described as a resistance to answer directly and honestly. Mr Kepa claimed not to have any knowledge as to how long the job would take, nor whether it involved whitegoods and green waste, so that a backhoe would be required.

#### **Mr Setareki Valecili**

20. Mr Valecili works at the Debt Recovery Unit of Council and says that on 8 April 2017, he had been washing vehicles at the depot, when approached by Mr Kepa in that depot yard. Mr Valecili said that he was aware at the time that some workers had been working overtime. The witness claimed that Mr Kepa asked him to buy some tin fish and was given a \$10 to do so. The witness said in cross examination that he had previously done this for Mr Kepa where he would buy lunch.

#### **Analysis of the Evidence**

21. There are many less than satisfactory aspects concerning this case. Firstly, the Tribunal has not been provided with a particularly useful backdrop to the Council and its procedures. Further the investigation process that took place was clearly inadequate and left as many questions unanswered as it did answered. The evidence of Messrs Ram and Mr Lalama is simply contradictory. Mr Ram claimed to have come to the Council several days earlier and then claims to have received a quote for the works on the same day in which it was undertaken. Mr Lalama claims that he was driven to the property by Mr Ram and returned on the Friday. He also says that he was driven to the property on the Saturday. Mr Ram on the other hand, claimed to have had to open the gate for Mr Lalama, when he arrived with the workers to undertake the works.

22. Mr Kepa claims he made no inquiry as to the nature of the rubbish to be collected, however for the reasons earlier alluded to, the Tribunal finds that very difficult to believe. How would the Council know whether a backhoe should be deployed to a site? It surely would not be required if

all that was being collected was kitchen waste. Mr Lalama claimed that this was the first occasion that he had quoted for any works, although Mr Kepa had sought to imply that this was something that Litter Prevention Officers could easily do. A further question that flows from this, is why did the ratepayer approach Mr Lalama in any event? The ratepayer said he was directed to him from the receptionist at the Council Office. If that is true, what was the reason for this and who otherwise was the appropriate person to deal with such a special request. Equally as concerning is the fact that there was no real clarification offered by the Employer through its evidence as to what constituted 'special pick-up' services, and what type of rubbish it included. It seems to be the case that the workers at the Nasole site, left concrete and other heavy building products that could not be categorised as either whitegoods, kitchen waste or green waste. The question that no one seemed to be able to tell the Tribunal, was whether or not the Council was providing a service that cleared any form of waste, including building products. Mr Lalama claimed that the dump truck that had attended the site, had already come half loaded with a combination of green waste and whitegoods. Mr Chand, the backhoe operator, claimed that the truck had come directly from Naboro Dump and that it had an empty tray.

23. The Tribunal does not accept the evidence of any of the three primary witnesses as particularly reliable. In the case of the ratepayer, it seems likely that he had anticipated that the rubbish would be cleared for \$300 and that some special arrangement had been entered into between himself and Mr Lalama for this to take place. It makes no sense that the Grievor did not inquire from Mr Lalama as to how long it would take to remove the rubbish on the site and how many trucks it would require. The Tribunal is of the view that this was a job that for some reason Mr Lalama had sought to have done, within the ordinary rostering of the collection services. It is likely to that extent, that some collaboration between Mr Lalama and Mr Kepa did take place. There was no authorised quote for the works and no pre-payment as required, in order to have the works undertaken. It also seems hard to understand whether or not the Council's policy was to accept all waste products, or only those categorised as kitchen waste, green waste and white goods. For example, waste such as chemicals, oils and asbestos based building products, hardly fall within the categories of waste collected by the Respondent and it seems difficult to understand why no clarification of the refuse type was made, prior to embarking upon the works. The Tribunal accepts that Mr Lalama likely orchestrated the works and did so in a bid to provide the services to the ratepayer at a cheaper rate, albeit that he had no authorisation for the works to be undertaken whatsoever. Mr Kepa claims that he made no inquiry as to where the \$50 he was given from Mr Lalama came from, however this too appears highly unlikely, particularly since it is claimed that he had never previously done this.

24. While there is no evidence to establish the level of collusion between Messrs Kepa and Lalama, based on the evidence given by both persons and the evasive and less than convincing testimonies given by both men, the Tribunal is satisfied that to some degree, each were involved, whether before or after the event, in this venture. It makes no sense that there be no proper scheduling of works of this type. The Grievor would well have known that fact, but was not prepared to admit it. The Tribunal also finds it hard to accept that the ratepayer understood that Council workers would be paid in cash from monies handed over on a job site and to that end, finds it more probable than not that the works carried out were known by all parties to be unauthorised. Mr Ram was logically more concerned that the work had not been completed after several weeks, despite having paid for the refuse to be collected. If what remained was concrete, perhaps Mr Kepa knew too well that it could not be collected by the services team now, without raising the issue with his own supervisor Mr Narayan. If it was the case as Mr Kepa seemed to imply, that all was well, why didn't he just send a team back on the Monday to finish the job. The only sensible explanation to this, is that he and Mr Lalama knew that the concrete left at the

compound could not be easily collected by Council. The workers could not be deployed back to the worksite without Mr Narayan becoming aware of that situation. Unfortunately for Messrs Lalama and Kepa, the issue was not going to resolve itself.

### **What is the Status of Mr Kepa?**

25. According to the Employer, the Grievor was indefinitely suspended without pay whilst the Council sought approval of the Ministry to terminate his services for misconduct. There is no reason why that disciplinary action could not have taken the form of a suspension with pay, whilst approval was sought from the Ministry to terminate the Grievor's services. After all, the Town Council is a creature of statute.<sup>6</sup> It is an entity created by the State. Yet, the Respondent Employer did not suspend the Grievor with pay and there are consequences for both parties that flow from that fact. In *Air Terminal Services (Fiji) Ltd v Federated Airline Staff Association*<sup>7</sup> this Tribunal set out the circumstances in which a suspension without pay can come about.
26. This indefinite suspension without pay, in the circumstances of this case, is likely to be regarded as an intention of the Employer to fulfil the contract in a manner substantially inconsistent with its obligations.<sup>8</sup> It would be therefore regarded as a repudiation of contract by the Employer. It was a repudiation based on the actions of the Council.<sup>9</sup> From there though, there were two options available to the Grievor. He could have accepted the repudiation and on that basis brought the contract to an end, or alternatively refused to accept the conduct and carried on as if the contract remained on foot. That is, done nothing and remained at home until the outcome of the Ministry decision was known.<sup>10</sup> It is clear by this very grievance, that the Grievor elected to accept the repudiation and claimed to have been summarily dismissed in his employment, effective from 10 May 2017. This renders the case before the Tribunal somewhat unusual, insofar as the Grievor would have otherwise been entitled to have been given notice of his termination. The Employer should have either dismissed the Grievor, or suspended him without pay. Having not terminated him with reasons at the time, renders the dismissal one that is non-compliant for the purposes of the Act. In any event, the Grievor regarded his employment to be at an end upon his suspension from work. The critical issue for the purposes of the legislation, is then whether the Employer was justified in dismissing the Grievor in that way.
27. After considering all of the evidence and particularly the demeanour of the witnesses in the witness box, the Tribunal is of the view that the Grievor did receive monies that were taken by Mr Lalama, purportedly on behalf of Council, for the provision of services. Whichever way one wishes to look at this, the Council deployed plant and labour to a ratepayers location in order to provide services. These services were undertaken and the money paid by the ratepayer, should have been received by Council. Instead, Mr Lalama and Mr Kepa intercepted those monies and spent some or all of them, as if it was their own. This is a violation of the essential feature of trust implicit within the employment contract. The conduct is of a type that would justify the dismissal of the Grievor.

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<sup>6</sup> See *Local Government Act 1972*.

<sup>7</sup> [2018] FJET 2; ERT Miscellaneous Action 01 of 2018 (20 January 2018)

<sup>8</sup> *Koompahtoo Local Aboriginal Land Council & Anor v Sanpine Pty Ltd & Anor* (2007) 233 CLR 115

<sup>9</sup> *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245

<sup>10</sup> See *Chatterton v Maclean* [1951] 1 All ER 761



### What Are the Considerations For Determining Whether Decision Justified?

28. In *Kumar v Nanuku Auberge Resort Fiji*<sup>11</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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<sup>11</sup> [2017] FJET 2 at [24] to [27].

*... 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.*

29. The Grievor could have been dismissed in his employment, with or without notice. He was entitled to be provided with reasons for any dismissal. Whilst it is noted that the Ministry for Local Government had not formally authorised the dismissal of the Grievor, the Tribunal is satisfied that there is now no need to do so. The Grievor regarded the contract to be at an end and for the reasons identified above, it was for all intents and purposes, at an end. The Grievor had accepted the repudiation of contract by the Employer. The Tribunal believes that because of the special circumstances of this case, that the Grievor should receive a payment equivalent to four week's notice period, on the basis of the manner in which the dismissal came about. It was a dismissal that took place by error, rather than design. That being so, it was nonetheless a situation that was accepted by the Grievor. The Employer was justified in bringing the contract to an end, albeit not in the manner in which it did. The Grievor was free to pursue new work opportunities, once he had accepted the repudiation by the Employer. There is no evidence before the Tribunal as to the efforts made by the Grievor to pursue new work opportunities, but in the circumstances of this case, despite the poor management of the case by the Employer, there should be no additional compensation awarded. The Grievor had brought about his own misfortune.

30. During proceedings, the Tribunal had given Directions to the Employer, to make good any claim that the Grievor had for outstanding overtime entitlements and for accrued annual leave that had not been paid at termination. It is assumed that these directions have been complied with as required. Otherwise, this grievance is to be dismissed.

#### **Decision**

It is the decision of this Tribunal that:-

- (i) The grievance be dismissed.
- (ii) The Employer pay to the Grievor, a compensation amount of four week's salary equivalence, in lieu of an appropriate notice period that he should have otherwise received.
- (iii) That the compensation amount is to be paid within 21 days.
- (iv) Each party should bear their own costs.



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