Employment Relations Tribunal

Decision

Title of Matter:	**Parmanand Sharma** **v** **Fiji Development Bank**
Section:	**Section 211 (1)(k)*Employment Relations Act 2007***
Subject:	**Adjudication of Grievance Arising Out of Dismissal**
Matter Number:	**ERT Grievance No 155 of 2017**
Appearances:	**Mr S Naidu, Fiji Bank and Finance Sector Employees Union for the Grievor** **Mr D Sharma, R Patel Lawyers and Ms C Panikar, for the Employer**
Date of Hearing:	**Tuesday 29 January 2019**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**20 March 2019**

KEYWORDS: Dismissal arising out of employment; Section 41 *Employment Relations Act* 2007; Inability to fulfil contract owing to accident or illness; Section 77 (1)(c) *Employment Relations Act* 2007 - Discrimination in Employment Matters

CASES CONSIDERED

Australian National Airlines Commission v Robinson [1977] VR87 at 91
Bailey v Baltoro Holdings Pty Ltd (Western Australia Court of Appeal), Unreported, No. 21 of 1998, 25 September 1998
Blackadder v Ramsay Butchering Services Pty Ltd [2002] 118 FCR 395 (10 May 2002)
Cocks v State of Queensland [1994] QADT 3 (2 September 1994)
Finn v The Roman Catholic Trust Corporation (Townsville) [1997] 1 Qld Rep 29
K v N School [1997] QADT1 (7 January 1997)
Lal v The Warehouse Limited [2017] NZEmpC 66 (1 June 2017)
Marshall v Harland & Wolff Ltd [1972] 2 All ER 715
Murphy v Westpac Banking Corporation [2014] FCA 1104 (14 October 2014)
Paris v Stepney Borough Council [1951] AC 367
Peni Koro Lagi v Calm Fire Professionals [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)
Purvis v New South Wales (Department of Education & Training (2003) 217 CLR 92; [2003] HCA 62 (11 November 2003)
Silverton Research Pty Ltd v Lindley [2010] NSWCA 357 (17 December 2010)
Taylor v Air New Zealand Limited AC61/04 [2004] NZEmpC 114 (28 October 2004)

INTERNATIONAL CONVENTIONS AND LEGISLATION

Section 77(1)(c) *Employment Relations Act* 2007
United Nations Convention on the Rights of Persons With Disabilities (UNCRPD) A/Res/61/106 (13 December 2006)

Background

[1] This is an employment grievance that has been referred to the Tribunal in accordance with Section 194(5) of the *Employment Relations Act* 2007. The grievance concerns the termination of Mr Sharma's employment with the Fiji Development Bank by letter dated 4 April 2017. Within that dismissal letter the Employer stated inter alia:

> *The Executive Committee at its meeting held on 29/03/2017 deliberated on the Medical Report submitted by Medical Practitioner Dr Preetika Payal of MIOT PACIFIC Hospital. The report articulates that you have developed high Steepage gait. It is a form of gait abnormality characterised by foot drop due to loss of dorsiflexion.*
>
> *Furthermore, the medical practitioner and physiotherapist have both recommended light duties.*
>
> *Your medical condition will not allow you to perform to the Bank's expectation and we cannot continue to employ you in any other role on light duties.*
>
> *In view of the above, we regret to advise henceforth that your employment with the Bank has been terminated on medical grounds with effect from 31 March 2017.*

[2] Mr Sharma claims that the dismissal is "*harsh, unreasonable, unjustified and unfair*" and had initially sought as the appropriate remedy, either reinstatement in his employment, or compensation. Within the complaint raised initially with the Ministry, the Grievor alleges that his dismissal was a form of discrimination. An additional issue raised within the grievance documentation, related to the fact that Mr Sharma had earlier made application to his Employer to be considered for a Voluntary Early Retirement package, however claims that this was ultimately denied, when the Employer instead chose to have him attend a compulsory medical assessment, as a precursor to considering the issue.

[3] As part of the deliberation process, the Tribunal has considered the following materials provided by the parties:-

- *The Workers Preliminary Submission* filed on 17 November 2017;
- *Employer's Responding Submissions* filed on 7 December 2017;
- *Affidavit in Evidence of Christine Panikar* filed on 13 April 2018;
- *Affidavit in Response to Employers Affidavit in Evidence* filed on 18 May 2018;
- *Affidavit in Evidence of Christina Panikar (No 1)* filed on 13 July 2018;
- *Affidavit in Evidence of Christina Panikar (No 2)* filed on 13 July 2018;
- *Affidavit in Response to Employers Affidavit in Evidence (No 1)* filed on 22 August 2018;
- *Affidavit in Response to Employers Affidavit in Evidence (No 2)* filed on 22 August 2018;
- *Employer's Submissions* filed on 29 August 2018;
- *The Worker's Further Submissions* filed on 3 September 2018;
- *Workers Closing Submissions* filed on 22 February 2019.
- *Employer's Closing Submission* filed on 15 March 2019.

The Case of the Grievor

[4] At the time of hearing, Mr Parmanand Sharma was 54 years of age and prior to his dismissal in employment, had been engaged with the Employer for a period of 28 years. In his oral evidence, the Grievor told the Tribunal that initially he commenced employment with the bank as a Handyman[1]/Driver and later became a Clerical Officer, then Loans Officer and later Manager Tender of the Asset Management Unit. In more recent times, the position of Manager Tender, was reclassified as part of a job evaluation exercise undertaken by the Employer, after which a Special Committee agreed to hold Mr Sharma's salary as a Grade 8 Officer, despite the fact that the role was at that time evaluated at the Grade 6 Level[2]. According to the witness, the onset of his illness came about in 2007, when he was absent from work for one month and thereafter on two further occasions, prior to again becoming ill in October 2016.

[5] In his *Affidavit in Response* filed on 18 May 2018, the Grievor stated that in early May 2016, he was called by Human Resource Officials to discuss an early retirement redundancy package[3] and that he had indicated to them at the time, that he would need to consult his family prior to making a decision as to whether he should formally apply. On 7 December 2016, the Grievor had been on sick leave and having exhausted all his paid sick leave, he approached his Employer to allow him to take "advance(d) annual leave or leave without pay[4]. Several days later, by letter addressed to the Chief Executive Officer, the Grievor made application for early retirement[5]. According to the Grievor, thereafter he was advised by the Acting Team Leader Human Resources that he would be required to submit to a compulsory medical assessment on 4 January 2017[6]. Mr Sharma told the Tribunal that he later provided to the Employer a medical certificate anticipating that he would be fit to resume light duties by 31 January 2017, although claims that he was advised by the Employer that he could not return to work because the Employer wished to gain "medical clearance"[7]. In the interim, the Grievor was required to attend a physiotherapist as a precondition to submitting to a further medical review[8].

[6] On 6 February 2017, the Grievor received a further communication from the Manager Human Resources & Training, who advised that his position as Team Leader Tender, had been reclassified (downwards) and that because of his absence from work, the bank intended to advertise the position[9]. Mr Sharma returned for a follow up medical examination on 22 March 2017 and unknown to him, the results of that medical report were relied upon by the Employer in bringing his employment to an end by letter dated 4 April 2017.

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1 The gender neutral title should be Handyperson, if that was the title to be used.

2 See Paragraph 2.12 of the Memorandum to Executive Committee dated 29 March 2017 at Tab 9 to the *Affidavit of Christina Panikar* filed on 13 April 2018.

3 The evidence of Mr Abdul Shahfeel was that there was no formal record of any such discussion having taken place, albeit when questioned by the Tribunal conceded that he was made aware from his Manager, Mr Kumar, that informal discussions had taken place.

4 See Annexure 1 to the *Workers Preliminary Submission.*

5 The Tribunal notes here, that there is a very long gap between when the Grievor held his informal discussion to the time of making application.

6 The Tribunal did not explore the legal basis by which the Employer made that request.

7 See letter to the Grievor from Mr Kishore Kumar, Manager Human Resources and Training dated 26 January 2017.

8 It should be noted here, that the Physiotherapist's Report dated 10 February 2017 recommended that Mr Sharma would be able to resume his normal office duties and attend meetings with the assistance of his walking cane and that he would need to continue with his physiotherapy neurological rehabilitation exercises.

9 The Tribunal subsequently heard from Mr Kishore that the position had been reclassified downwards from a Grade 6 to a Grade 5 Officer.

Mr Surendra Prasad

[7] The second witness called on behalf of the Grievor, was Mr Surendra Prasad, a former employee of the bank for 28 years, who ceased employment in December 2017. Mr Prasad told the Tribunal that he was the Grievor's immediate supervisor up and until Mr Sharma took ill in October 2016. The witness told the Tribunal that he was aware of two other former employees[10] who were able to take advantage of the Voluntary Early Retirement scheme. During cross examination, it was put to the witness by Mr Sharma, that the scheme was underpinned by a discretionary consideration of the Employer and that there was no obligation to accept any application made. That proposition was accepted by the witness.

The Case of the Employer

Mr Abdul Shahfeel

[8] Mr Shahfeel is the current Team Leader, Teller Management and during the relevant period was Acting Team Leader, Human Resources. Mr Shahfeel stated in his evidence, that in relation to any earlier discussions between the Employer and the Grievor regarding an offer for voluntary early retirement, that there were "no discussions" between HR and the Grievor in writing and that there was "nothing official" and "nothing on file". The witness stated that the Grievor had applied for leave to travel overseas around October 2016, but that he subsequently learned instead, Mr Sharma had remained in Fiji and was at home, ill. Mr Shahfeel told the Tribunal that together with another Human Resource Officer, he visited the Grievor at his home in December 2016 and on that occasion found him "lying face down on the floor, being treated by a massage therapist". In his evidence, Mr Shahfeel stated that during the visit, the Grievor remained lying on the floor and appeared immobile. The Witness stated that upon returning to work, he reported his observations to his Manager and a decision was made to prepare a submission to the Employer's Executive Committee requesting that the Grievor be required to submit to a medical assessment.

[9] During cross examination, the witness provided his understanding of the VER application process and spoke of his previous involvement with an earlier VER submission of another employee, that had been dealt with by the Employer in 2016. Mr Shahfeel spoke of the relieving arrangements that were put in place to 'backfill' the Grievor's role in his absence and made the point that when the decision had been taken to terminate Mr Sharma, that the Grievor had been absent from work for a continuous period of 85 days[11]. The witness also clarified his views as to his understanding of the Grievor's fitness for work and stated:

If someone couldn't get up and turn around .. that was enough for me to report to management

[10] Mr Shahfeel confirmed that the Grievor's substantive position of Supervisor Tender, had been re-classified to a Grade 5 level role, as a result of a further job evaluation exercise. The Tribunal questioned the Witness in relation to his involvement in the preparation of the Memorandum prepared for the Executive Committee (EXECO), particularly as it referred to the final report of the Medical Officer recommending that the Grievor undertake 'light duties'. Mr Shahfeel conceded that no contact was made with the Medical Officer to ascertain what was meant by that expression in the context of Mr Sharma's role. When questioned further upon what was relied upon within Paragraph

10 Mr Ramendra Chand and Ms Rebecca Lu Mon.

11 Keep in mind here, that some of that absence was as a result of the Employer forbidding the Grievor to return to work until such time as a second medical examination had been conducted.

4.1 of the Memorandum to form the view that "*the officer is unable to perform satisfactory (sic) the duties of their position for medical reasons, thus there is no alternative for light duties as recommended by the Medical Specialist*", the witness stated, that "this was drafted by Mr Kishore".

[11] It is important to note here, that when further asked by the Tribunal in relation to what discussions were held with Mr Kishore regarding the possibility of modifying the duties to accommodate Mr Sharma's disability, the witness stated, that he had "no discussion at all" with his Manager, Mr Kumar.

Mr Kishore Kumar

[12] Mr Kishore Kumar is presently the Manager, Talent Management and Development for the Employer. Mr Kumar has been employed at the bank since 1988 and was previously in the position of Manager Human Resources and Training. Mr Kumar commenced his evidence by indicating that he had been involved in earlier discussions with the Grievor in relation to the bank's VER Policy. The witness indicated that these discussions arose out of an earlier grievance that Mr Sharma had made, regarding the rate of pay that was to be used in calculating his bonus entitlements[12]. Mr Kumar described for the Tribunal, the guidelines that he said applied when determining whether a worker should be approved for voluntary early retirement. These included, strategy; training and development already provided; whether a successor was available; and that they should not be used for staff who were medically unfit. Mr Kumar's attention was drawn to the Memorandum that was prepared for the Executive Committee on 29 March 2017, that sought approval to pay the Grievor a modified VER package. Within that submission, the witness identified earlier occasions when VER applications had been made by other staff and gave his views as to the rationale for why those were either rejected or accepted by the Executive Committee at that time.

[13] Mr Kumar indicated that Paragraph 4.1 of that submission to the Executive Committee, dealt with the Grievor's unfitness for work, that he said was based on his own judgement and the fact that there were renovations being undertaken at that time that may present some difficulties for Mr Sharma. The witness also claimed that there may have been possible costs issues that also needed to be considered, if there was any requirement to modify the workplace. The witness went on to clarify, that the Grievor had been given nearby parking access in 2008 to assist with his access to the building, although this space was no longer available due to building scaffolding being located on that site. The witness was asked by Counsel Sharma, what was his intention within Paragraph 4.1 of his Memorandum to the Executive Committee, to which Mr Kumar stated, that "the only position for light duties (was) the switchboard operator". The Talent Management Manager expressed the view, that activities such as "*carrying around files, attending meetings (and) walking around,"* were things that the Grievor could not do. When asked, did you consider other positions? Mr Kumar stated, that the bank had considered which other positions could be classified as light duties, but added that he "couldn't change his salary" and "couldn't find a position in like salary that would suit him."

[14] The Tribunal heard that the Employer did not respond to the Grievor's request for an early retirement, as the bank had already made the decision to rely on a medical report to assess Mr Sharma's ongoing suitability[13]. During cross examination, it was put to the Witness that the systematic downgrading of the Grievor's position from Grade 8 to Grade 5 within the organisational classification structure,

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12 The Grievor at the time was retaining the rate of a Grade 8 Officer, even though by this time, his position had been reclassified downwards to that of a Grade 6 Officer.

13 There is no evidence of this. The VER application was made on 12 December 2016. The request to the Chief Executive Officer seeking approval to require the Grievor to attend a compulsory medical examination was made on 15 December 2016 and had contained a reference to that request.

constituted a redundancy. Mr Kumar did not accept that proposition and stated that the Bank had guidelines that it would never make a person redundant and it would find a suitable position for that person in the bank. The witness conceded that in relation to the Grievor's performance, that he had achieved above satisfactory performance ratings and was a good performer. It was put to the witness that the application for VER by Mr Sharma was analogous to that of another person who had been named within the Memorandum to the Executive Committee. According to Mr Kumar, the two cases could be distinguished. The witness stated in the case of the earlier employee, he had remained at work whilst ill, whereas in Mr Sharma's situation he remained absent from work. The witness also conceded that the six month notice period required under the VER policy, had been waived in the case of the former employee.

[15] In cross examination, Mr Naidu drew the Witness's attention to the Physiotherapist Report prepared by Munesh Gounder on 10 February 2017, in which it stated that the Grievor was able to resume normal office duties and attend meetings with the assistance of a cane. According to Mr Kumar, "we were not aware of that report" and "relied on the report of MIOT"[14]. The Witness stated that "Dr Gounder's report was not provided." In his evidence, Mr Kumar indicated that he did not make any recommendation that the Grievor be terminated on medical grounds, but that this was the instruction provided by the Chief Executive Officer after consideration of the memorandum. During re-examination, the Witness's attention was drawn to the *Affidavit in Evidence of Christina Panikar* filed on 13 July 2018, in which the business case for the way in which the VER policy was considered for three separate employees was contained. At this juncture, the Tribunal asked of the witness, what was the process that took place when considering whether or not the Grievor was no longer fit to undertake his position? Firstly, the Witness was asked if he had gone through the evaluation of alternative or modified roles with the other Human Resource team members. Despite the fact that Mr Shafeel had specifically said that he was not involved in such an activity, Mr Kumar claimed that he had done so with Mr Shafeel and another staff member, Atunaisa[15].

[16] The Tribunal thereafter drew the witness's attention to the *Affidavit in Response to Employers Affidavit in Evidence*[16] in which the principal responsibilities of the position of Manager/Team Leader were set out[17]. It is perhaps useful at this point, to clarify those responsibilities, that are not in dispute between the parties as being:-

a) To manage the recovery actions from Demand And Seizure to advertisement, liquidation and disposal of securities are (sic) necessary so as to minimize losses to the Bank
b) Sets targets for the team and ensure achievement of the targets is in line with the Department objectives.
c) As Secretary of the Head Office Tender Committee, ensure minutes of meetings are properly compiled.
d) Ensures formalization and dissemination of Tender Committee decision to the Lending centres and other relevant parties in a timely manner.
e) Supervise issue of refund of Tender Deposit to unsuccessful Bidders.

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14 That is simply untrue. Paragraph 1.4 of the Memorandum that Mr Kumar prepared for his Executive Committee made clear that "HR collected the physiotherapy report ..and the same was emailed to the medical doctor at Suva Private Hospital on 23/02/2017".

15 The Tribunal does not accept that evidence as being truthful.

16 See document as filed on 18 May 2018 at Paragraph 14.

17 There was no challenge by the Employer in relation to the reliability of this set of responsibilities as reflecting the job requirements of the position that the Grievor had formerly held.

f) Co-ordinate timely execution of Offer letter, Sales & Purchase Agreements and Transfer by successful Bidders.

g) Notifying the Mortgagors on the sale of their properties and advising them to exercise their right or redemption within next 14 days.

h) Organize settlement upon request by Legal Department.

[17] In relation to these duties, Mr Kumar was specifically asked by the Tribunal, whether or not the Grievor could have undertaken these activities despite his physical impairment and the following responses were recorded:-

DUTIES AND RESPONSIBILITIES	RESPONSE FROM WITNESS
To manage the recovery actions from Demand and Seizure to advertisement, liquidation and disposal of securities are (sic) necessary so as to minimize losses to the Bank	Mr Kumar stated that the Grievor could not perform these responsibilities and said that it required a lot of movement; that getting the security documents required movement between the ground floor and first level of the building.
Sets targets for the team and ensure achievement of the targets is in line with the Department objectives.	It was the Talent Manager's view, that the Grievor could undertake the tasks underpinning this responsibility.
As Secretary of the Head Office Tender Committee, ensure minutes of meetings are properly compiled.	The witness was of the view that the witness could not perform the tasks associated with these responsibilities, as the tender opening took place near the cashier's booth on the ground floor and this would require movement of the Grievor.
Ensures formalization and dissemination of Tender Committee decision to the Lending centres and other relevant parties in a timely manner.	Mr Kumar indicated that he would have concerns that the Grievor would not be able to perform this activity in a timely manner.
Supervise issue of refund of Tender Deposit to unsuccessful Bidders.	The witness agreed that the Grievor would have been able to fulfil these responsibilities.
Co-ordinate timely execution of Offer letter, Sales & Purchase Agreements and Transfer by successful Bidders.	The view of Mr Kumar was that the Grievor would have difficulty in executing these documents as it would require liaison with stakeholders, movement to the customer service to meet the various persons involved and handover of Sales and Purchase Agreements.
Notifying the Mortgagors on the sale of their properties and advising them to exercise their right or redemption within next 14 days.	The witness accepted that the Grievor could undertake this activity.
Organize settlement upon request by Legal Department.	Mr Kumar believed that Mr Sharma could not fulfil these responsibilities, although later conceded that there was a Settlement Officer who was employed to attend settlements on behalf of the bank.

[18] Finally, the Tribunal sought to clarify what the Talent Manager had said earlier on, in relation to the consideration of alternative or modified duties. The Witness conceded at this juncture, that he had in mind the 'reception position', as it required minor movement. Mr Kumar admitted that he didn't look at alternatives, nor did he consider any adjustments. When pressed as to why the bank had taken the position it had in relation to not allowing the worker to resume duties, despite having a medical

certificate that in effect suggested that Mr Sharma would be fit to return to light duties by 31 January[18], the witness stated that he wanted to see the medical report from the compulsory medical before allowing him back to work. Mr Kumar admitted that he had no discussions with the Grievor during the period 4 January to 29 March 2017; that is from the time the Grievor presented himself to the CWM Hospital for examination, until the time in which the Executive Committee had made its decision to terminate the Grievor's employment. Mr Kumar conceded that he made no effort whatsoever to discuss with the Grievor alternative or adjusted work arrangements, so as to accommodate his impairment in the workplace.

The Issues

[19] There are several important themes that arise out of this grievance and hearing. Firstly, what are the respective rights of the parties in relation to the ongoing employment contract? A subset of that question would be, in what circumstances can an employer request a worker to submit to a compulsory medical examination? The second question that in some ways follows on from the first, would be, what are the rights of a worker suffering a physical impairment to have an employer make a reasonable adjustment of duties or accommodation of the worker's impairment, in circumstances that may or may not require the aid of special services or facilities? And finally, what is the test for determining direct discrimination in employment, based on the attribute of disability. This last question deals with the claim by the Grievor that the employer discriminated against him when considering his application for a Voluntary Early Retirement, consistent with the terms of the *Memorandum of Agreement* entered into between the Fiji Development Bank and the Union on 18 March 2004.

<u>The Right of An Employer to Request An Employee Undertake Compulsory Medical Examination</u>

[20] During proceedings and in submissions, the Employer has not been able to identify any express contractual or statutory right that it claims to enable it to have an employee submit to a compulsory medical examination. At common law, it is accepted that an employer can direct an employee to undertake a medical examination where it has been alerted to the need for such an examination to take place. For example, Madgwick J in *Blackadder v Ramsay Butchering Services Pty Ltd*[19] stated:

> *It is my opinion essential for compliance….. that an employer, be able, where necessary, to require an employee to furnish particulars and/or medical evidence affirming the employee's continuing fitness to undertake duties…… (and that)*
>
> *That there now should be implied by law into contracts of employment terms such as those set out …on the basis that such terms pass the test of "necessity" accepted by McHugh and Gummow JJ in Byrne v Australian Airlines Ltd (1995) 185 CLR 410 at 450.*

[21] In the present case, before the Tribunal, the Grievor had obtained a medical certificate indicating that Mr Sharma could "possibly resume light duties" by the end of January 2017[20]. It would seem based on the strength of Mr Shafeel's observations when visiting the home of the Grievor, that he was of the view that Mr Sharma was not fit to resume duties. On 22 December 2016, Mr Kumar emailed the Grievor and advised that "we are currently arranging for a medical check at the Bank's costs." On 4 January 2017, Dr Payal assessed the Grievor and referred him to a physiotherapist for "evaluation and

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18 See Exhibit E2.

19 [2002] 118 FCR 395 [68]-[69]. This decision was reversed on Appeal by the Full Court of the Federal Court and then reinstated by the High Court of Australian in [2005] HCA 22

20 See Exhibit E2.

treatment"[21]. The subsequent physiotherapist report prepared on 10 February 2017 had indicated that the Grievor "would be able to resume normal office duties and attend meetings with the assistance of the cane".

[22] For some reason, it was not until 16 March 2017, that the referring Dr Payal had examined and then later completed the medical report for the Employer, that concluded that she "recommend Mr Parmanand for light duties only in light of his present disability"[22]. The Tribunal accepts that in undertaking the test of necessity to give efficacy to the employment contract, it is essential that the Grievor would be ready, willing and able to undertake his duties as a Team Leader Tender.[23] Certainly it would seem that as early as 10 February 2017, that there was at least a view from the evaluation taken by the physiotherapist Muneshparamsivam Gounder, that the Grievor could return to light duties. There was certainly no suggestion identified in either the reports of Dr Payal or Mr Gounder, that the Grievor was medically unfit to be able to perform his role as Manager Tender, without exposing himself to a greater risk of injury or disease. That is, there was no suggestion that other than some weakness of his left leg and a high steepage gait, that the Grievor would expose him or others at the workplace to any risk of injury or disease. This is perhaps one of the most important of the issues to consider. The compulsory medical examination that was undertaken, was done by a General Practitioner, not a neurologist or specialist occupational health physician. As Dr Payal appears to have conceded, in the circumstances where she was not best equipped to make any evaluation of the functional impact of the cerebrovascular accident **(**the stroke) that had taken place, a functional capacity evaluation (FCE) of the worker was required, to ascertain his fitness to return to work. Those test results set out within the report of the physiotherapist were not challenged by the Employer, yet they appear to have been disregarded by it nonetheless, when it refused to allow the Grievor to return to work. But it is hard to understand on what basis, the Employer had embarked upon such a task.

[23] In *Paris v Stepney Borough Council*[24], the House of Lords considered the question of what common law duty an employer owes to an employee in the case where the worker's own health and safety may be at risk. The question asked of the court in that circumstance was :-

> *(if) a workman is suffering, to the employer's knowledge, from a disability which, though it does not increase the risk of an accident's occurring while he is at work, does increase the risk of serious injury if an accident should befall him; is the special risk of injury a relevant consideration in determining the precautions which the employer should take in fulfilment of the duty of care which he owes to the workman?*

[24] Lord Normand, citing the kind of evidence that was necessary to establish neglect of a proper precaution, stated:

> *If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstance. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.* [at 382]

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21 See Tab 3 to the Affidavit in Evidence of Christina Panikar filed on 13 April 2018.

22 See report dated 23 March 2017 and note it contains a received stamp by the Employer bearing the date 22 March 2017. (See Tab 3 to the Affidavit of Christina Panikar filed on 13 April 2018)

23 See *Australian National Airlines Commission v Robinson* [1977] VR87 at 91

24 [1951] AC 367 at 379

[25] It was the majority view that

> *The known circumstances that a particular workman is likely to suffer a graver injury than his fellows from the happening of a given event is one which must be taken into consideration in assessing the nature of the employer's obligation to that workman.* [at 389-90]

[26] In *Finn v The Roman Catholic Trust Corporation (Townsville)*[25], a Queensland Court of Appeal recognised that the basis for the interrogation of a prospective employee's medical records or the requirement to submit to pre-employment medical, should not as a right normally lie, "unless some fact, circumstance or state of affairs exists which should put an employer upon special enquiry" is in place. The decision in *Finn* was followed by the Full Court of the Supreme Court of Western Australia in *Bailey v Baltoro Holdings Pty Ltd*.[26] In that decision, Ipp J said:

> *the critical issue is whether any fact or circumstance should have alerted the respondent to any need for a further medical examination of the first appellant. In the absence of such a fact or circumstance the respondent had no duty to make any further enquiries as to the first appellant's state of health."*

[27] It follows, that where an Employer has been put on notice, then a duty arises to make further enquiries and, in this case, to direct the employee to undertake the relevant tests. In the case of the Grievor, it is arguable that the Respondent Employer has been put on special enquiry. Mr Shahfeel had returned from the Grievor's residence, concerned at the time with his mobilisation and claiming that in effect, he could not lift his body from the floor, following a session of massage therapy. The Grievor denied that he was debilitated to that extent and there is certainly no medical evidence whatsoever to support that claim. Certainly what is clear, is that between the period in which Mr Shahfeel had prepared a recommendation to the Chief Executive Officer that the Grievor be required to submit to the bank compulsory medical and the time of that assessment being conducted on 4 January 2017, that the Grievor had obtained a medical certificate indicating that he had "marked improvement" in his condition.[27] Further, that by the time the functional capacity evaluation was undertaken, there seemed no reason why the Grievor could not have returned to work. That was the professional opinion of the physiotherapist who had undertaken the relevant physical assessments of the worker. It should also be pointed out at this juncture, that the initial request made by Mr Shahfeel to the Chief Executive Officer endorsing the approach to have the worker submit for a compulsory medical, appeared to be underpinned by the claim that the person who would be undertaking the test would be an Occupational Medical Specialist. Dr Payal is noted as a General Practitioner. There is no evidence before the Tribunal that she was an Occupational Medical Specialist and the language of both of her reports provided to the Employer, appears to make that reasonably clear.

[28] In relation to these matters, the Tribunal is of the view that the rationale underpinning the Employer's request to have the Grievor submit to a compulsory medical examination was misconceived and without a proper understanding of the issues associated with such matters. If it was the case that the Employer was concerned that the Grievor's ongoing work as Manager Tender, was likely to bring about or exacerbate a further neurological event, then of course it may be the case that the Employer was correct in exercising what may in such circumstances give rise to a common law right. Yet on its face, even that may be arguable at one level. What seems to be the case, is that the Employer was concerned as to whether a worker who presented with a high steepage gait was fit to continue his work. That concern in itself, may not be enough to unilaterally claim the right to direct an employee to

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25 [1997] 1 Qld Rep 29 at 35

26 Unreported, No. 21 of 1998, 25 September 1998, Malcolm CJ, Ipp, Steytler JJ

27 See Exhibit 2.

submit to a medical examination, in a manner consistent with either *Paris v Stepney Borough Council* or *Finn.* The worker and his co-workers and those exposed to the workplace, did not appear to be in any imminent risk as a result of Mr Sharma's impairment of the left leg.

What Were the Responsibilities of the Employer During and Following the Medical Review Process?

[29] Within the *Employer's Closing Submissions,* the Employer relies on the decision of *Lal v The Warehouse Limited*[28] and *Canterbury Clerical Workers Industrial Union of Workers v Andrews and Beaven Limited*[29] to support the view that was expressed by her Honour Inglis in *Lal's case,* where she stated, "that it is well established that an employer is not bound to hold a job open for an employee who is sick or prevented from carrying out his duties indefinitely". Of course, so much is true, but the facts of those cases are easily distinguished. For example, in *Lal's* case, the employee who had been injured in August 2012, refused to participate in any return to work program, refused to be redeployed to work in another area of the business and was ultimately terminated in October 2014. That is 26 months after the initial absence[30]. In the present case before this Tribunal, the Employer went about pursuing the worker after only less than two months absence from work.

[30] Mr Shahfeel's memorandum to the Chief Executive Officer sets out within Paragraph 2.1, the fact that between the time of the Grievor's stroke and 29 November 2016, that Mr Sharma had been absent from work for a combined total of 26 days annual leave and sick leave. Within the Human Resource Officer's request seeking that a compulsory medical examination be conducted, Mr Shahfeel states that this "is of great concern to HR." Whilst there is evidence that HR did take Mr Sharma to the CWM Hospital for his medical examination on 4 January 2017, outside of that and up to the date of the dismissal decision, there appeared to be no other special attention provided to Mr Sharma in relation to his fitness for work and his medical condition. Of course the Employer wrote to the Grievor on 26 January 2017 and now advised of the further requirement that he was to attend a physiotherapist, but this is possibly because of the fact that Dr Payal was not an occupational physician in the first place and was not competent to undertake the functional capacity evaluation. The Employer wrote within that correspondence, that "any costs associated with physiotherapy will be borne by yourself." Such an approach is hard to reconcile with the fact that it was the Employer, not the Grievor, who had initiated this activity. Why should a Worker be required to pay for these medical costs, when they were being required by the Employer to submit to an examination that was ostensibly outside of the terms of the employment contract?

Letter of 6 February 2017 Advising of Position Reclassification

[31] It was also during this period of time, that the Employer by letter dated 6 February 2017, advised the Grievor that his position of Team Leader be redesignated and reclassified downwards, when it wrote:

> *Your current medical condition and prolonged absence has affected your ability to fully perform the requirements of the role and as such Human Resource Department is in the process of advertising the position. The appointment of the Supervisor Tender at the earliest is to ensure continuity of work, accountability and service to our customers is not affected. ……*

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28 [2017] NZEmpC 66 (1 June 2017)

29 A.C 195/83 (22 December 1983)

30 In the case of Mr Rynsburger, he had been absent for 5 months.

The bank will review the status of your employment once the full medical report is received[31].

[32] There are a couple of issues that immediately jump out from this. Firstly, four days later, Mr Gounder's physiotherapist's report had determined that the Grievor would be able to resume normal office duties. That report was in the hands of the employer on 23 February 2017, yet during proceedings, Mr Kumar gave evidence to claim that this report was not known to the Employer at the time that the Memorandum dated 29 March 2017 was sent to the Executive Committee seeking that the Grievor be paid out a modified VER package. It is also highly unlikely that between the period of the letter being sent on 6 February and receiving Mr Gounder's report, that a recruitment process would have been well on the way to backfill the position at this point in time. Despite that, the Employer backfilled the position with an internal applicant, knowing that Mr Gounder had deemed that the Grievor was fit to return to normal duties.

[33] The greater indictment against this Employer, is that nobody liaised at all with Mr Sharma to ascertain his views as to whether he felt that he could still return to the position, or whether there should be an exploration of issues to see if it could be modified somewhat to accommodate his impairment. After 28 years of service, it really is astounding that one's contribution to an Employer and worth following an event such as a stroke, can mean so little. The Tribunal had been told that another member from the Tender Team had been backfilling in Mr Sharma's role during his absence. Why that situation could not continue until such time as Mr Sharma's medical status was known, is really hard to understand. But what is clear is that the Employer had by this stage and of its volition, unilaterally deemed that the Grievor should no longer hold the position of either Team Leader or Supervisor Tender. He was entitled to return to that position, unless it could be determined that in accordance with Section 41 (b) of the Act, that "owing to any sickness or accident the worker (was) unable to fulfil the contract." Yet as will be made clear shortly, even that provision would need to be considered (and read down) within the context of any broader and later legislative direction that is imposed within the anti-discrimination provisions of the Act.[32] The point is, that the decision of the Employer to determine that the Grievor was no longer fit to undertake his role, was taken prior to its own medical report being provided and prior to the Grievor and his own medical examiners being able to input into the process.

[34] One of the purposes of the *Employment Relations Act* 2007 is that the legislation creates a statutory framework that is:

(b)Helping to Prevent and Eliminate Direct and Indirect Discrimination in Employment on the Basis of .. Physical Disability[33] *and*

(f)Complying With International Obligations[34].

[35] The relevant International Obligation is the *United Nations Convention on the Rights of Persons with Disabilities* (UNCRPD)[35] to which Fiji became a signatory on 2 June 2010, giving formal confirmation to the instrument on 7 June 2017. Specifically within Article 27 to the Convention, under the heading of 'Work and employment', as a signatory, Fiji recognises the right of persons with disabilities to work on an equal basis with others and includes the commitment to ensuring that reasonable

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31 This version of events seems quite at odds with the manner by which the Employer has portrayed the Grievor as a person who showed no interest in returning to work to position. (see Paragraphs 28 and 29 of the *Employer's Closing Submissions*)

32 Note the syntactical presumption that is *leges posteriores priores contrarias abrogant.* See for example, *Ross v R* (1979) 141 CLR 432 at 434-435.

33 See subparagraph (b) to the preamble of the legislation.

34 See subparagraph (f) to the preamble of the legislation.

35 See United Nations Convention A/Res/61/106

accommodation is provided to persons with disabilities in the workplace[36] and to promote vocational and professional rehabilitation and return to work programmes for persons with disabilities[37].

Interpreting the Obligations of Part 9 Against that Backdrop

[36] The principles contained within the UNCRPD are reflected in the current *Employment Relations Act* 2007[38]. Part 9 of the Act is entitled Equal Employment Opportunities and it has as its object to prohibit discrimination based on specific attributes, including that of discrimination. Specifically, Section 77(1) of the Act states:

> *If an applicant for employment or a worker is qualified for work of any description, an employer or a person acting or purporting to act on behalf of an employer must not—*
>
> *(a) refuse or omit to employ the applicant on work of that description which is available;*
>
> *(b) offer or afford the applicant or the worker less favourable terms of employment, conditions of work, or other fringe benefits, and opportunities for training, promotion, and transfer that are made available to applicants or workers of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description;*
>
> *(c) terminate the employment of the worker, or subject the worker to any detriment, in circumstances in which the employment of other workers employed on work of that description would not be terminated, or in which other workers employed on work of that description would not be subjected to such detriment; or*

[37] The Part 9 provisions also proscribe what constitutes lawful discrimination and in relation to disabled workers, Section 84(1)(a) of the Act provides for such where

> *the position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities.*

Special Services and Facilities

[38] There is no definition of what constitutes special services or facilities within the Act, though it is fair to say that the term is one that is embraced within anti-discrimination laws in other jurisdictions.[39] For example, in the case of *Cocks v State of Queensland,*[40] the concept of 'special facility' was to include the installation of a lift worth $298,000 at the front entrance of the Brisbane Convention and Exhibition Centre to accommodate the approximate 10.2% of the population, that would have difficulty otherwise climbing the 27 stairs that gave access to the centre. In that case, despite the fact that construction of the building had commenced, the installation of the lift was deemed not to cause unjustifiable hardship to the owner of the premises, having regard to the total cost of the project. In *K v N School*[41] a Member of the Queensland Anti-Discrimination Tribunal considered 'special services' required to assist with a 'special needs' child suffering from what may have been rhetts syndrome,

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36 See Paragraph (d) to Article 27 of the Convention.

37 See Paragraph (k) to Article 27 of the Convention.

38 See the General Obligations of State parties as contained at Article 4 of the Convention.

39 See for example Section 51 of the *Anti Discrimination Act 1991* (Qld)

40 [1994] QADT 3 (2 September 1994)

41 [1997] QADT1 (7 January 1997)

whose parents sought to have her retained in a mainstream primary school. In that case, for the child to have been able to function and not disrupt other children, would have required at least the support of an educational consultant and a special education teacher who could assist with the implementation of an individualised education program and provide some continuing consultation to the teacher for a couple of hours per week and a full time teacher's aide. In that situation, having regard to the financial state of the school, its low level of income and the fact that there were other options for the child that could be reasonably considered, rendered the provision of such special services as creating unjustifiable hardship. In its *Closing Submissions,* the Employer relies on the case of *Taylor v Air New Zealand Ltd*[42] to come to a conclusion that it is fair to dismiss a worker where he was unlikely to be rehabilitated within a reasonable time. Again though, the circumstances of that case were far different. In *Taylor's* case, Mr Taylor was a licensed aircraft tradesperson, who suffered a stroke in December 2000 and was dismissed in August 2002. Mr Taylor was unwilling to be redeployed into other work. The case of Mr Sharma is far different to that, he was simply not presented with any alternatives.

[39] Within the *Employer's Closing Submissions*[43] it is claimed that "the Griever was in a senior position with a high salary band". That is not entirely correct. The position that Mr Sharma held, had been re-evaluated downwards over the last several years and by letter dated 6 February 2017, he was advised that it was to downgraded once again to a Grade 5 role. In the present case, the Employer has done nothing to illustrate what types of adjustment could have been made to accommodate the ongoing employment of the Grievor. Issues raised by Mr Kumar during the course of his questioning by the Tribunal, such as the difficulty for Mr Sharma to move from one level of the building to another, particularly when the building had a passenger lift, have largely demonstrated that any serious analysis of the issues has simply not been undertaken. Whilst during Mr Shahfeel's evidence, he sought to give the opinion that the Grievor's role would require him to go into the field and assist in such things as the seizing of property and attendance at auctions, such views were not repeated by Mr Kumar and the Tribunal is of the view that many of the issues flagged by the Talent Manager were neither insurmountable or likely to cause a bank unjustifiable hardship[44]. The impression of the evidence given on this point, was that Mr Shahfeel may have overstated the physical requirements of the role and certainly did not turn his mind, whether some of the more physical demands associated with the responsibility, could not have been shared with other team members.

[40] As a result, the Tribunal finds that the conduct of the bank was discriminatory and unlawful insofar as it sought to firstly 'spill' the Grievor's reclassified position in his absence, due to what was said was his "(in)ability to fully perform the requirements of the role" and then further, by virtue of the decision taken by the Chief Executive Officer that:

> *Parma's disabilities will not allow him to perform to the level we expect, obviously. Henceforth his employment with the bank will sadly be terminated under medical grounds.*

[41] The dismissal on that basis and for the above reasons lacks justification and is unlawful.

Other Issues – Discrimination in the Application of the VER Policy

[42] The final issue that needs to be canvassed is whether or not the decision of the Employer to not proceed with the Grievor's application for a VER when it was made on 13 December 2016, was discriminatory. Just to restate the evidence in this regard, the Tribunal heard from the Grievor, that in

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42 *AC61/04* [2004] NZEmpC 114 (28 October 2004)

43 See Paragraph 22.

44 Refer also to the *Employer's Closing Submissions* at Paragraph 22.

May 2016, the bank had offered him a VER, albeit informally. Mr Kumar was well aware of that fact, although made it clear, that the Grievor did not follow up the informal discussion until December of that year. Both parties to these proceedings sought to rely on the precedents of former employees, who had been accepted or rejected under the policy, to support the claim that the approach taken against the Grievor was either discriminatory or not.

The Position of the Employer

[43] On 20 June 2018, prior to the hearing of this matter, the Tribunal issued Directions that required of the Employer to provide *"the criteria that is relied upon in exercising its discretion under the (VER) policy and recent illustrations of the circumstances in which the policy has been applied (both rejection and acceptance of the policy)."* The specific policy that provides for the entitlement is located within the *Memorandum of Agreement* between the Employer and the Union at Clause 6(c) where it states:

> *Voluntary Early Retirement Option*
>
> *Any salaried office reaching the age of 45 but less than 55 and having served continuously for not less than 10 years in the Bank may, if so desire request for voluntary retirement. The Bank may at its option accept the request, provided that at least six(6) months' notice is given.*
>
> *These officers will be eligible for the following voluntary retirement benefit:*
>
> *1) Two (2) weeks pay for each completed year of service*
>
> *2) Allowed one (1) year to repay any staff loans owing at normal staff loan rates: normal lending interest rates will apply after the one year period.*

[44] For the bank, the key words for administering its policy, or at least argued at various stages leading to trial, was that this option described above, placed any decision that was undertaken by the bank outside of normal scrutiny. That is, that such a discretion is an unfettered one. Such a view is not consistent with the contemporary treatment of the law in this regard. As was said in *Silverton Research Pty Ltd v Lindley,*[45] in the case of discretionary employee benefits:

> *The relevant discretion should be understood against the proper scope and content of the contract. This was a bargained for bonus to be assessed against set objectives. Such a clause should receive a reasonable construction and not permit the appellant to choose arbitrarily or capriciously or unreasonably that it need not pay money (once) the set objectives have been satisfied……*
>
> *The discretion is to be exercised honestly and conformably with the purposes of the contract. There may be many circumstances in which it would be legitimate, and conformable with the purposes of the contract, not to pay the bonus. … If these parties wished to make payment under the clause entirely gratuitous and voluntary such that payment could be withheld capriciously, notwithstanding the compliance with solemnly set objectives they needed to say so clearly.*

[45] Such an approach similarly was endorsed by Griffiths J in *Murphy v Westpac Banking Corporation.*[46] For present purposes however, through the Affidavit of Ms Panikar, the Employer has provided the criteria that is applied in assessing a request for VER as follows:-

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45 [2010] NSWCA 357

46 [2014] FCA 1104 (14 October 2014)

a. Dedication to the Employer's business. The Employer does not consider long service as reason enough to approve a request for VER.

b. The applicant's capability to continue his or her employment with the Employer until retirement age – this includes physical fitness and capacity to learn and develop further skills.

c. Assessment of medical and mental fitness by medical professionals – the cost of which is paid by the Employer.

d. Circumstances of the applicant.

e. Performance and achievements with the Employer.

f. Cost of retirement package payable to the applicant in accordance with Clause 6 as well as deductions applied to the said retirement package such as staff loans etc and balance payable to the worker and financial impact to the Employer.

g. Whether the decision is in line with the Employer's current strategic plan, ie will this decision assist the Employer in meeting certain objectives or targets set out for the relevant department/section, ensure flow of service delivery and assist with the overall growth and success of the Employer[47].

[46] Unfortunately Ms Panikar was not called as a witness, so no further inquiry could be made of her knowledge in relation to this criteria. Certainly, the Employer was unable to point to any specific policy decision that had been made that enshrines these criteria as the guidelines that were to be consistently applied. Be that as it may, the evidence of the Employer provides several examples of how the policy had been applied. In the case of Mr V, his position and services were still required by the Employer.[48] The second illustration give was that of Mr M and in this case too, his application was rejected because "strategically there was no real value to the Employer and the worker's position and services were still required by the Employer[49]. In the case of the third example, Mr C, his application was approved as there "was uncertainty about the future of the department in which the worker was to be employed[50]."

[47] A broader canvas of previous applicants, was contained within the Memorandum prepared by Mr Kumar to his Executive Committee on 29 March 2017. In that document it states at Paragraph 4.0:

In the near past VER considered consist of the following[51]:

1. *NT*
2. *RP*
3. *RLO*
4. *ML*

VER decline include:

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47 See Affidavit in Evidence of Christina Panikar filed on 13 July 2018.

48 See Tab A to the Affidavit in Evidence of Christina Panikar filed on 13 July 2018.

49 See Tab B to the Affidavit in Evidence of Christina Panikar filed on 13 July 2018.

50 See Tab C to the Affidavit in Evidence of Christina Panikar filed on 13 July 2018.

51 Names of the individuals have been withheld by the Tribunal.

1. *IK*

2. *SV*

The prerogative to approve/decline the VER rests with Management. The Bank does not have any other separation package on medical grounds. In (Mr) K's case the value of the outstanding loans, approx. $20,000 was expected to be written off. For (Mr V) the poor performance of the officer was considered when declining the request.

[48] So it would seem that the bank treated Mr Sharma's application as an application reliant on medical grounds. But that is simply incorrect. The justification for the application for VER was set out Mr Sharma as follows:

Justification

- **My work involves of grade 6, while I am being remunerated for grade 8 level, hence a cost to the Bank**

- **My early retirement will enable the Bank to save cost by giving a chance to other staff, who will be remunerated at grade 6 levels.**

[49] In his application, Mr Sharma had identified savings of $134,576.92 should the bank consider favourably his request[52]. Instead of considering the request, what transpired is that the bank decided to 'put on hold' the application and compel the Grievor to submit to a compulsory medical. Despite the fact that the Grievor had been deemed fit by the physiotherapist to return to his normal duties, albeit with the assistance of a cane, the Employer did not make any contact with the Grievor, but instead awaited for a further medical report from a General Practitioner and not an Occupational Physician, that the Employer had requested Mr Sharma to attend. It also has not gone unnoticed that this final Medical Report was not signed by Dr Payal and purports to have been made on 23 March 2017, despite the fact that it has the received date stamp from Human Resource dated 22 March 2017. The Tribunal cannot and will not view such a document as being particularly reliable in such circumstances.

[50] The Tribunal also takes issue with the Affidavit of Ms Panikar filed on 13 July 2018, where it states at Paragraph 22:

Upon receipt of the Griever's written request for VER, the Employer requested the Griever to provide his latest medical report. There were subsequent delays in this and therefore the Employer's HR Team had visited the Griever at his residence where it was discovered the Griever was bedridden and had been for quite some time.

[51] Firstly, the VER request was made on 13 December 2018. The day before (12 December), Mr Sharma had emailed Mr Deve Toganivalu and attached his sick sheet and requested that he "be offered an advance annual leave or leave without pay". Further, there was no evidence whatsoever before the Tribunal from any of the Employer's witnesses, that Mr Sharma had been bedridden "for quite some time".

Reliance on Medical Report to Assess Eligibility for VER, is Discriminatory

[52] The Tribunal holds the view that the request to have a worker submit to a medical examination and then rely on those medical reports when assessing whether an Employer should exercise its option and

[52] Whether those figures were accurately assessed is neither here nor there for present purposes.

accept an application for Voluntary Early Retirement, is direct discrimination for the purposes of Section 77(1) of the *Employment Relations Act* 2007. The failure to process the application for VER in a manner similar to other employees without the attribute of being physically impaired, is a breach of Section 77(1)(b) of the Act, as the Employer has "*afford(ed).. the worker less favourable terms of employment, conditions of work, or other fringe benefits… that are made available to … workers of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description"*

[53] The comparison for treatment in the first instance, is comparing Mr Sharma, a person with a physical impairment (disability) with that of a person without such attribute[53]. In *Purvis v New South Wales (Department of Education & Training)*[54] the High Court of Australia held:

> *The circumstances of the person alleged to have suffered discriminatory treatment are excluded from the circumstances of the comparator in so far as those circumstances are related to the prohibited ground. The contrary view would seriously undermine the remedial objects of the Act. The Commissioner did not err, therefore, in holding that the characteristics of the disabled person cannot be imputed to the appropriate comparator.*

[54] Like in *Purvis,* the test should be whether the bank would have delayed the progressing of the application and then denying it, in the case of another employee without the attribute, in the same or similar circumstances. Whether or not the applicant was a person with a disability, should have absolutely nothing to do with the fair evaluation and consideration of the application. As that Court further went on to say at [160] to [164]:

> *The reasoning in discrimination cases in this Court is consistent with the view that, while it is necessary to consider the reason why the discriminator acted as he or she did, it is not necessary for the discriminator to have acted with a discriminatory motive. Motive is ordinarily the reason for achieving an object. But one can have a reason for doing something without necessarily having any particular object in mind.*
>
> *Subsequent decisions have applied this approach to the question of causation. In Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd Lockhart J said:*
>
> > *"The plain words of the legislation ... necessarily render relevant the defendant's reason for doing an act, that is the reason why the defendant treated the complainant less favourably."*
>
> *His Honour also said that the presence of intention, motive or purpose relating to health does not necessarily detract from the conclusion that there is discrimination on the prohibited ground - in that case, sex.*
>
> *In University of Ballarat v Bridges, having considered the decisions in Banovic and Waters, as well as dictionary definitions, Ormiston J concluded that both "ground" and "reason" connote a basis that actuates or moves a person to decide a matter or to act in a particular way. His Honour said:*

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53 It is immaterial if the Employer may have considered a previous VER application of another employee, having regard to that person's health status or medical records. That approach would also be discriminatory. And as will be made clear further on, if that approach was adopted across the board for all applicants, it would amount to indirect discrimination in any event, as it would constitute the imposition of a term, of which only persons without the attribute would likely benefit.

54 (2003) 217 CLR 92; [2003] HCA 62 (11 November 2003)

> *"[N]otwithstanding that it has been said on many occasions that the Act should be given a broad interpretation, the object of the legislature was to look at the reasoning process behind the decision, conscious and unconscious, at least so far as direct discrimination is concerned."*
>
> *His Honour said that motive and purpose should be treated as largely irrelevant so long as it can be shown that the person charged intended to do an act that in fact amounts to unlawful discrimination.*

[55] Alternatively, if it is accepted that the bank relies on the criteria identified by Ms Panikar's Affidavit as the relevant considerations, then the establishment of a criterion that relies on medical fitness where it does not exist as a genuine occupational requirement, such as the case of a Firefighter or Emergency Services worker, is also a form of indirect discrimination. The criterion creates a circumstance where a person with an attribute will be prejudiced more so than a person without the attribute, in the case where a higher proportion of people without the attribute would otherwise comply or gain the benefit from having such a term. It is simply not a reasonable term to be included in that policy, particularly given the nature of the fact that the real consideration is whether a person should retire, not remain within the organisation.

[56] And whilst it is noted that at the time in which the submission was made to the Executive Committee, six months' notice of the application had not been provided by the Grievor, that is simply a function of the fact that it was the Employer that brought forward the application. Keep in mind here, that on 6 February 2017, whilst the Grievor remained on leave, the Employer had already decided to advertise the reclassified position of Supervisor Tender and told Mr Sharma, that it "will review the status of your employment once the full medical report is received."

[57] In effect, the Employer had terminated the contract of employment at that stage. Whilst the employment relationship may have been ongoing, Mr Sharma can hardly be said to have been still in his position at that time. There was no attempt to canvas employment options with him, no attempt to modify his position and no attempt to discuss the question of what would constitute reasonable accommodation in the circumstances. The termination of the Applicant on that basis would have amounted to another breach of the *United Nations Convention* and Section 77(1)(c) of the *Employment Relations Act* 2007, as the Employer had

> *Terminate(d) the employment of the worker, or subject the worker to any detriment, in circumstances in which the employment of other workers employed on work of that description would not be terminated, or in which other workers employed on work of that description would not be subjected to such detriment.*

[58] As has been mentioned earlier, the Employer had already made a unilateral decision whilst the Grievor was on leave, that he could no longer perform the inherent requirements of his position. This is despite the fact that there was no evidence that Mr Sharma could have only performed the duties of the position satisfactorily with the aid of special services and facilities and that it was not reasonable to expect the employer to provide those services or facilities[55].

[59] The ultimate decision to dismiss the Grievor, ostensibly on the back of his VER application, in circumstances where the Employer had earlier advised him that his position was to be advertised and filled, was both direct and indirect discrimination. It was direct discrimination based on the way in which he was required to relinquish his position whilst on leave, because the Employer claimed he was no longer able to fulfil its duties. And likely both direct and indirect discrimination, based on the

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[55] See Section 84(1) of the Act.

manner in which the application for VER was processed and assessed by the Employer. The worker was unjustifiably[56] and unlawfully[57] dismissed in his employment, for the subsequent reasons that were provided to him. The actions of the employer in such a circumstance are far different from that identified in the case of *Marshall v Harland & Wolff Ltd*[58] where on appeal, and this seems to be a point lost within the Employer's reliance of this case, that

> *there was no medical evidence that the employee was permanently incapacitated or as to the duration of any incapacity to be expected in the future. In such circumstances, there are no grounds for holding that further performance of the employee's obligations in the future would be either impossible or a thing radically different from that undertaken by him and accepted by the employers under the terms of his employment*

[60] An employer simply cannot say to a worker of 28 years standing, that the employment contract is frustrated after only 26 days of absence due to illness on paid leave and 16 days on unpaid leave, without giving that person the reasonable opportunity to return, or at least be heard on the situation as to whether or not he will be able to return in the foreseeable future.

Conclusions

[61] At the time of making his application for VER on 13 December 2016, the Grievor was 52 ½ years of age. By the time that Mr Gounder had certified that the Grievor was fit to resume his normal duties he was only 52 years and 8 months old. Even if Mr Sharma intended to retire from the workplace at 55 years of age, he clearly had a desire to continue working. At the time of the dismissal decision, the Grievor still had two years and two months of potential working time with the bank. At the time of dismissal, Mr Sharma was earning an annual salary of $56,918.37. The jurisdiction of this Tribunal in matters of this type is limited to claims up to $40,000.00. This is a case that would in other circumstances render the Employer to be liable to pay damages and compensation in an amount far greater than this.

[62] The Worker has been humiliated through this process, he has been treated unfairly and it is very doubtful that the Employer had a right to compulsorily request the Grievor to attend a medical examination, in the circumstances and reasons that it did. Furthermore, the Employer showed a complete lack of knowledge pertaining to employee health management, particularly ensuring that the rights of all workers regardless of their physical attributes have equal footing to all other persons. Claims that a worker could not perform certain functions because it would require movement between levels of a building that is serviced by a passenger lift, are quite demeaning and have no merit. The Grievor presented as a person with a very clear mind and sharp disposition. After 28 years of service, his case should have been approached far differently. Mr Sharma has been unjustifiably dismissed. Most likely the dismissal was also unfair, although for the fact that the Tribunal also holds that the Employer has acted unlawfully in discriminating both directly and indirectly against the worker, it seems pointless examining issues of fairness as well.

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56 There was no justification in the decision that was taken.

57 ` Based on the various grounds set out within Section 77 (1) of the Act. It is recognised that an unlawful dismissal would be an unjustifiable dismissal.

58 [1972] 2 ALL ER 715

[63] In *Peni Koro Lagi v Calm Fire Professionals*[59], the Tribunal found that 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. Mr Sharma had given his life to the bank, he had in excess of two years wages to still earn. The employer paid Mr Sharma one month's notice and other than that, only made good wages for the period of time in which he was on leave without pay, in circumstance that in part were brought on by the Employer's unwillingness to allow him to return to work. The Tribunal believes that this is a case that warrants the award of $40,000.00 compensation.

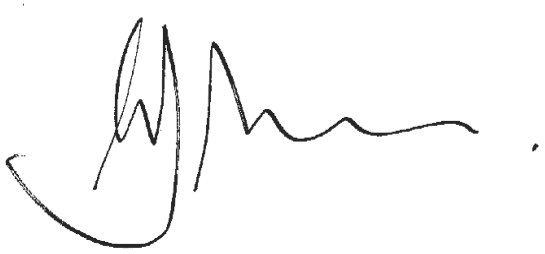
[64] The Employer should also ensure that it changes its employment practices and policies relating to these such issues.

Decision

[65] It is the decision of this Tribunal that:-

(i) The Grievor has been unlawfully, unjustifiably and unfairly dismissed.

(ii) The Employer should pay the Grievor the sum of $40,000.00 as compensation, within 21 days.



Andrew J See
Resident Magistrate

[59] [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)