Employment Relations Tribunal

Decision

Title of Matter:	**Daniel Sanchez** **v** **Sheraton Fiji Resorts**
Section:	**Section 211 (1)(k)*Employment Relations Act 2007***
Subject:	**Adjudication of Grievance Arising Out of Dismissal**
Matter Number:	**ERT Grievance No 165 of 2014**
Appearances:	**Ms M Muir and Ms A Tuiwawa, for the Grievor** **Ms M Vasiti and Mr R Singh, for the Employer**
Date of Hearing:	**Thursday 1 November 2018** **Friday 2 November 2018**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**16 January 2019**

KEYWORDS: Dismissal arising out of employment; Jurisdiction of the Tribunal; Section 211 (2) Employment Relations Act 2007; Probationary Period and unsatisfactory performance.

CASES CONSIDERED

Autar v Dame t/a Dame Consultancy & ors [2013] FJHC 409
Food for Less (Fiji) Ltd v Chand [2016] FJHC 323, ERCA 10.2014(26 April 2016)
Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2; ERT Grievance 122.2016 (10 February 2017)
Loty and Holloway v Australian Workers' Union [1971] AR (NSW) 95
Mishra Prakash & Associates v Credit Corporation (Fiji) Ltd [2005] FJHC 603; HBA 0007.200 (18 August 2005)
Peni Koro Lagi v Calm Fire Professionals [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)
Ram Khelawan v Budh Ram 13 FLR 196 (8 December 1967)

Background

[1]Daniel Sanchez is a citizen of Mexico, who was appointed as the Chef de Cuisine for the Flying Fish restaurant at the Sheraton Fiji Resort, Denarau Island on 17 April 2014. Mr Sanchez claims

to have been dismissed in his employment on 3 September[1] and thereafter lodged a grievance with the Ministry of Labour, Industrial Relations & Employment on that same date. The grievance was thereafter referred to the Mediation Service where an attempt to resolve the matter took place on 10 September 2014. The parties were unable to reach an amicable solution to the grievance and so the matter was referred to the Chief Tribunal on 12 September 2014. The details of the Grievance as contained within the *Form 1 Referral of an Employment Grievance to Mediation,* are as follows:

> *I Daniel Sanchez would like to state, that I was employed by Sheraton Fiji Resort as a Chef and I was paid $40,000 per annum. My start date was on 17th April 2014 whereby I signed a contract for three years and on 15th August 2014 I was given a termination letter whereby my last date of employment will be on 14th September 2014. I wrote a reply letter to the hotel but on the 3rd of September 2014 I was given another letter stating that I have been dismissed. I had attached the letters and I think that I was unfairly terminated and I kindly request for the Mediation Unit to assist me in the case. I therefore request that I be compensated as per my letter of reply to the hotel which was attached.*

[2]For the sake of convenience, it is useful to extract from that attached correspondence dated 28 August 2014, the following request for compensation[2]:

> *Should Sheraton Fiji Resorts wish to proceed with the termination of my contract, I require the following compensation:*
>
> 1. *Payment of the Fijian dollar equivalent of my entire family's airfares to and from Mexico estimated to be 17,000 FJD.*
> 2. *Three (3) months full pay to enable me to seek alternate employment opportunities.*
> 3. *Three (3) months accommodation, food and beverage allowance while seeking alternate employment arrangements.*
> 4. *Continuation of the current health insurance for a further three (3) months.*
> 5. *Agreement from Sheraton Fiji Resorts to transfer my three (3) year work permit (including bond) to another employer, should alternate employment be found in Fiji.*

[3]It is unfortunate and certainly not desirable that this matter took so long before it came on for hearing. The fact that the Worker returned to his home country caused some complication,

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1 It is worthwhile noting, he was issued with a notice of termination dated 15 August 2014, with a view of bringing his employment to an end on 14 September 2014.

2 See Annexure DS13 to the Affidavit of Daniel Sanchez dated 16 April 2018.

although the issue should have been resolved in a far shorter time frame and the Tribunal apologises to all parties for this delay.

Materials Filed

[4]For the sake of the record it is useful to identify the documents that have been filed and relied upon by the Tribunal in these proceedings, as follows:-

- Employers Preliminary Submissions filed on 14 October 2014;
- Submissions on behalf of the Grievor filed on 3 November 2014;
- Employer's Reply Submissions filed on 10 November 2014;
- Affidavit of Vishnu Deo filed on 20 February 2018;
- Affidavit of Josefa Ginigini filed on 19 March 2018;
- Affidavit of Daniel Sinuhe Sanchez Padilla also known as Daniel Sanchez filed on 16 April 2018;
- Supplementary Affidavit of Vishnu Deo filed 5 December 2018;
- Employer's Closing Submissions filed 5 December 2018; and
- Closing Submission on Behalf of the Grievor filed on 2 January 2019.

Jurisdictional Issue Raised

[5] It is probably beneficial to address the issue of jurisdiction at this juncture. The issue is well set out within the *Employer's Closing Submissions*, albeit that the matter was not raised until the second day of trial. In any event, for the sake of expedience and context, it is worthwhile flagging the matter at this point in time. Despite the fact that in excess of four years had passed since the matter first came before the Tribunal on 24 September 2014, on the second day of trial, the Employer saw fit to raise a jurisdictional objection to the Tribunal dealing with the grievance on the basis that it is said that the Grievor's "claim" exceeds $40,000 FJ and is therefore outside of the limitation imposed on the Tribunal by virtue of Section 211 (2)(a) of the *Employment Relations Act* 2007.

[6]During the second day of proceedings and now within the Employers Closing Submissions filed on 5 December 2018, the Employer sought to quantify the compensation sought within the letter dated 28 August 2014, by placing monetary values on specific issues as follows:-

Issue Raised	**Employers Quantification FJD**
Payment of the Fijian dollar equivalent of my entire family's airfares to and from Mexico estimated to be 17,000 FJD	17,000
Three (3) months full pay to enable me to seek alternate employment opportunities.	18,399.26
Three (3) months accommodation, food and beverage allowance while seeking alternate employment arrangements.	3,399.91
Continuation of the current health insurance for a further three (3) months.	1,000 (Approx)
Agreement from Sheraton Fiji Resorts to transfer my three (3) year work permit (including bond) to another employer, should alternate employment be found in Fiji.	
	Total $40,199.17

[7] The jurisdictional arguments advanced within the Employers Submissions can be summarised as follows:-

(i) The Tribunal cannot assume jurisdiction to deal with the matter in any other way except to strike it out on the grounds of want of jurisdiction.

(ii) The Employment Relations Act does not allow the Grievor to orally amend his claim.

(iii) The jurisdiction of the Tribunal is confined to a monetary ceiling of $40,000 (*Tabua v Fiji Rugby Union* [2012] FJHC 1441

(iv) A Tribunal that does not have jurisdiction, has no power to amend a claim to bring it within jurisdiction. (*Autar v Dame t/a Dame Consultancy & ors* [2013] FJHC 409)

[8]In relation to the first issue, it needs to be said that the Tribunal never assumes jurisdiction. In the present case, this is a grievance that has been referred to the Tribunal by the Mediation Service in accordance with Section 194(5) of the Act. Insofar as the jurisdiction of the Tribunal is provided, Section 211 (1)(k) of the Act, states that:

> *The Tribunal has jurisdiction to adjudicate on matters referred to it by the Mediation Services or any party to the mediation.*

[9]Under Section 211 of the Act where the jurisdiction of the Tribunal is set out, a dismissal grievance referred to the Tribunal in accordance with Section 211(1)(k) of the Act, can therefore be distinguished from other proceedings that include inter alia:-

(i) Adjudication on (non-referred) employment grievances [Section 211(1)(a)]
(ii) Adjudication on employment disputes [Section 211(1)(b)]
(iii) Adjudication on actions for the recovery of wages or other money [Section 211(1)(d)]
(iv) Adjudication on actions involving entitlements and related matters [Section 211(1)(e)]
(v) Adjudication on actions for breach of an employment contract [Section 211(1)(g)]
(vi) Hearing and determining matters under the Workmen's Compensation Act 1964 [Section 211(1)(p)]

[10]Section 210 of the Act, further provides that the Tribunal may in relation to any matter, assist parties to amicably settle the matter. That is, the Tribunal may elect to exercise its discretion to undertake a mediation of the issue, as a step prior to adjudication.

[11]It is simply not correct to classify a dismissal grievance when first made to the Ministry and referred to the Mediation Service as a claim. It is not a claim at all. It is a grievance that one party brings to the Ministry seeking resolution. It cannot be adjudicated upon, but only and hopefully resolved with the assistance of the Mediation Service and in a manner amicably between the parties. There is no statutory formula or constraint imposed upon an aggrieved Worker when she or he brings a grievance to the Ministry. Whether a grievance is far-fetched or ill-conceived is another matter. But there is no monetary limitation imposed on an individual at this stage, primarily because there is no requirement to specify any quantum amount. It may be the case that a Grievor seeks no financial compensation whatsoever, but merely a retraction of the dismissal decision. So much is made clear by an examination of the requirements set out at

Regulation 3(1) and Schedule 1 of the *Employment Relations (Administration) Regulations* 2008. If at the end of the day the Grievance remains unresolved and the Worker wishes to commence proceedings in the Employment Court for $1,000,000.00 or have the matter referred to the Employment Tribunal and seek compensation for $100.00, that is a matter for the Worker. In both cases, they are nonetheless entitled to have their grievance considered by the Ministry and Mediation Service as a pre-cursor to that transpiring.

[12]The more important issue is this. That a person who seeks a compensatory remedy when the matter of a grievance is referred to the Tribunal in accordance with Section 194(5) of the Act, cannot pursue any claim for compensation in excess of the statutory monetary limit of $40,000.00. The case of *Tabua* v *Fiji Rugby Union*[3] is really not on point for present purposes. In that case, the Tribunal misunderstood its capacity to refer a matter to the Employment Court, after it had made a determination that a dismissal was unjustified and was of the belief at that point in time, that the likely compensatory award should or would be in excess of the monetary limit. There was simply no such power to refer and as Her Honour made very clear, if it was the case that a Grievor sought to pursue a claim for compensation in excess of $40,000, then the only way to do so, would be where the originating claim was made in the Employment Relations Court. In such a case, there would seem no need for a party to firstly have a grievance lodged with the Ministry.

[13] If one looks at the jurisdiction of the Employment Relations Court as provided for at Section 220 of the Act, it is clear that there is no direct reference for it to deal with either the adjudication of a referred matter from the Mediation Service, nor the adjudication of an employment grievance. In the case of the Employment Court, the process for commencing proceedings for a grievance in the case of unjustifiable or unfair dismissal, seems to be characterised as an action founded on an employment contract (See Section 220 (1)(h) of the Act)[4].

[14]The more substantive challenge from the Employer in this regard, appears to come from its reliance on what it suggests is an analogous situation addressed by his Honour Kumar, in *Autar v Dame t-a Dame Consultancy & Ors.*[5] In *Autar*, his Honour stated at 3.18 and 3.19:

> *..the Magistrate and Magistrates Court have no jurisdiction to deal with the matter where the is a failure by the parties to limit the amount of claim…..*

And further,

> *where the Magistrates Court does not have jurisdiction to deal with the matter before the court it had no powers to amend the Claim to bring it within its jurisdiction*

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3 [2012] FJHC 1441

4 Whether other avenues exist within the powers set out at Section 220 is an issue that may warrant further analysis at a later stage.

5 [2013] FJHC 409 (15 August 2013)

[15] So that it is perfectly clear, in that case, it was claimed that the Plaintiff had suffered loss and damage on a quantum meruit, where he sought the following relief:-

(a) Payment of Valuation of Property $250.00
(b) Commission Claimed $12,000.00
(c) Interest @ 13% effective 5 September 2008 to date of payment.
(d) Any other relief the Court deems just.

[16]At the time of the claim being made, the jurisdiction of the Magistrates Court was contained within Section 16(1) of the *Magistrates Court Act* as it is now and is limited to $50,000.00. The fact that the claim provided no express cap to what was being sought, rendered it to be made in a manner that was deemed in excess of jurisdiction. To coin the expression of Finnigan J in *Mishra Prakash & Associates v Credit Corporation (Fiji) Ltd*[6]

> *"There was no limit on the amount of the claim. This may have been in excess of jurisdiction. Who was to say when full payment would be made?*

[17]Within his Honour's decision, he cites the case of *Ram Khelawan v Budh Ram*[7] where it provides that once a claim is made out of jurisdiction, the Magistrate does not have any power to amend or transfer the claim. To use the words of Hammett J,

> *"when the Court below made an order amending the statement of claim it was in fact exercising jurisdiction in a cause which was beyond its jurisdiction.*[8]*"*

[18]For the sake of completeness, it is perhaps worthwhile mentioning that in *Khelawan's* case, the initial claim that had been made was in the sum of £1,200, whereas the jurisdictional limit at that time was £400. The case of *Autar,* was substantially different. In that case, the fact that the claim did not specify that it was limited to the jurisdiction of the Magistrates Court, gave rise to the view that a litigant is not entitled to claim general damages for an unspecified amount. Presumably the argument being, that were the claim not dealt with for several years, it could potentially amass an interest sum that together with the amount claimed, would exceed the statutory limit and therefore exceed jurisdiction[9].

[19]Yet as has been said earlier, a grievance lodged with the Ministry and referred to the Mediation Service is not a claim, it is a statutory right found in Section 110(3) of the *Employment Relations Act* 2007. It requires no identification of any financial remedy being sought, nor does it place a constraint upon who has the right to lodge such a grievance. In this regard it should not go unnoticed that the objects of Part 20 of the Act provide amongst other things:

> "*recogni(tion) that judicial intervention needs to be that of a decision making body that is not inhibited by strict procedural requirements"*[10]*.*

[20]In the present case, where the Grievor is aware that he cannot be awarded more than the monetary limit of $40,000 (if he is entitled to anything at all) and has not quantified a strict money amount, can hardly render the scenario one that is analogous to *Khelawan's* case. From a

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6 [2005] FJHC 603; HBA 0007.200 (18 August 2005)
7 13 FLR 196 (8 December 1967)
8 Ibid at 197
9 An estimate of approximately 12 years was made based on those figures.
10 See Section 192(e) of the Act.

practical point of view, the Tribunal also has great difficulty in reconciling any comparability of a statutory grievance where there is no requirement to particularise any demand, to that of a claim for breach of contract in the civil jurisdiction of the Magistrates Court[11]. There are often occasions in the case of dismissal grievances, where the matter is simply left for the Tribunal to determine what an appropriate amount of compensation would be[12]. There is no requirement to specify the compensation sought and by and large, the majority of aggrieved employees who end up seeking adjudication, are well aware that the jurisdiction of the Tribunal means that no compensation beyond $40,000 is capable of being awarded.

[21] As mentioned earlier, often it is the case that a party may seek more than that amount during a mediation activity undertaken under the auspice of Section 21O of the Act. There is no statutory block to this taking place. The only statutory prohibition, that is made very clear by Section 211(2)(a) of the legislation, is that the Tribunal cannot adjudicate on matters relating to claims in excess of $40,000.00. As Her Honour Wati, stated in *Tabua*[13] :

> *I find this provision to strictly mean that the range of matters over which ERT has jurisdiction is confined to a monetary ceiling of $40,000. I find that this ceiling applies to employment grievance and employment disputes as well.*

[22]The Grievor is aware that there is a monetary ceiling in place and has made so much clear during the second day of the proceedings. It also should come as no shock to anyone, that a Mexican national, who had only been in the country for a short period of time and whose first language was not English, may not be expected to have a complete understanding of Fijian labour laws.[14] There is simply no justification in allowing for the 'derailing' of the matter after four years. To conclude, there would appear no statutory impediment to a person lodging a grievance with the Ministry and having it referred to the Mediation Service, even if the compensation they seek through that process may exceed $40,000.00. The only impediment that does exist, is that if a matter is subsequently referred to the Tribunal in accordance with Section 194(5), the monetary ceiling imposed on any adjudication is $40,000.00 and there is no capacity to transfer a matter thereafter to the Employment Court.

[23]In very simple language, once a grievance is referred to the Tribunal, a Grievor cannot pursue compensation beyond the Tribunal's monetary ceiling. A party who seeks to do so, must withdraw the grievance in accordance with Section 216(6) of the Act and commence proceedings in the Employment Relations Court. In the present case, the Grievor and his Counsel have indicated that they are not pursuing compensation beyond the monetary ceiling. The approach taken is markedly different from a breach of contract claim.

[24]The jurisdictional objection is dismissed.

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11 Compare and contrast Form 2 of the *Magistrates Court Rules* 1945 to that of Form ER1 at Schedule 1 to the Employment *Relations (Administration) Regulations* 2008.

12 That could be categorized as a grievance with an unspecified claim for compensation.

13 Op cit at 13.

14 Not that would give rise to a carte blanche claim of ignorance, but it would be a further relevant factor that should be taken into consideration if necessary.

The Case of the Employer

[25]The reasons for the dismissal of the Employer are contained within the dismissal letter dated 15 August 2014 and extracted as follows:

> *Further to our discussion with Eduardo Jalijali, Director of Food & Beverage and Regina, Human Resource Manager for Sheraton on 14 August 2014, regarding your performance during the probationary period which is unsatisfactory. I write to confirm that your employment with the Sheraton Fiji will cease in four weeks' time ie 14 September 2014…….*

[26]As part of the opening remarks made by Counsel for the Employer, the Tribunal heard that the Grievor had commenced his employment as the Chef de Cuisine, although during his probationary period, was found to be underperforming in his role. As there was not improvement to this situation, Counsel submitted that the Grievor was given one month's notice of his termination in accordance with the terms of the written contract. It was submitted that during the notice period, the Grievor had approached the Employer and requested that he could resign immediately in order that he commence work at another hotel venue. Counsel submitted that in response to this request, the Employer accepted the Grievor's resignation on 3 September 2014.

[27]The only witness called to give evidence for the Employer was the Head of Industrial Relations, Mr Vishnu Deo, who had earlier prepared an Affidavit dated 19 February 2018, that was read into proceedings. Mr Deo claims to have been involved in the 'on-boarding' of the Grievor, a claim that is refuted by the Applicant. Within his Affidavit material, the Head of Industrial Relations chronicles several significant issues, that he says served as the basis for the Employer to ultimately deeming the Grievor to be unsuitable in his role. These issues of unsatisfactory performance included:-

(i) 2 separate allegations of food poisoning in the Flying Fish restaurant on 28 and 29 July 2014.
(ii) The Grievor unilaterally and without authority deciding to reverse the charges of approximately $500 for those meals in a manner which exposed the Employer to potential claims (presumably of negligence)
(iii) 3 counselling sessions and emails dated 2 August 2014 and 4 August 2014 and a further discussion with Mr Peter Kuruvita, the owner of the Flying Fish brand, regarding the Grievor's underperformance.
(iv) Further discussions in relation to food quality and temperature on 11 and 12 August 2014 respectively.

[28]During cross examination, Mr Deo stated that:

(i) The Grievor "maybe" was not aware before entering his contract with the Respondent, that his employment period included a probationary period, although said that the policy was set out within an *Associate Handbook*[15] that was provided to Mr Sanchez upon arrival in the country;
(ii) He had no personal knowledge of the Grievor's underperformance in his role;

[15] The Handbook annexed to Mr Deo's Affidavit was acknowledged as being similar to, but not the exact version that was in place when the Grievor commenced his employment with the Employer.

(iii) He did not investigate the claim made by the Hotel Manager Mr Scott MacDonald that a patron had suffered food poisoning following having eaten in the Flying Fish restaurant[16];

(iv) He would not know whether a food hygienist undertook an inspection and prepared a report for the hotel following the incident[17];

(v) That he would not know if the Grievor either confirmed or denied the allegations;

(vi) Would not know if the Disciplinary Policy located within p35 of the Associate Handbook was followed;

(vii) Could not say if the key principles that underpinned the Disciplinary Process, set out within Section 2.1 of the Handbook, were followed;

(viii) Was not aware if the Grievor was advised of the *Hazard Analysis Critical Control Point (HACCP) Policy*, when he allegedly authorised the reversal of restaurant charges for a guest who had claimed to have suffered food poisoning when eating in the restaurant;[18]

(ix) Conceded that the alleged food poisoning incident was not proven;

(x) Would not know who reversed the charges in the restaurant pertaining to that incident;

(xi) "Wouldn't really know" if any disciplinary procedure were followed as a result of the reversal;

(xii) Could not say if he was in attendance at the meeting with the Grievor on 14 August 2014, to discuss his underperformance at work[19]

(xiii) Did not investigate the complaint regarding the Grievor not being in attendance when a New Zealand food critic had attended the restaurant and did not ask the Grievor for a response in relation to the allegation[20]

(xiv) Wouldn't know whether the monthly reviews required to be undertaken under the Probationary Policy located at page 20 of the Associate Handbook, were performed in the case of the Grievor;

(xv) Could not recall "The issue (that) remain unresolved" as set out within Paragraph 11 to his Affidavit.

(xvi) Could not recall giving the Grievor a written response to his letter he forwarded to the Employer, following his notice of termination;

(xvii) Could not recall why the Employer called a meeting with the Grievor on 2 September 2014, but claims not to have remembered the Grievor asking for a response to his letter of concern;

(xviii) Had received contact from the Labour Office in relation to Mr Sanchez prior to providing him a further letter accepting his resignation of employment;

(xix) Accepted that the Grievor was walking to work on 3 September, despite the claim by the Employer that he had already resigned[21];

(xx) Denied that Mr Sanchez was escorted from the premises by Security Officers

(xxi) Could not recall providing the Grievor with a Certificate of Service;

(xxii) Reinforced the basis for the dismissal decision and the policies in place of the Employer pertaining to the justification of approach.

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16 Refer to Annexure VD3 to the Affidavit of Vishnu Deo dated 19 February 2018

17 The Tribunal notes that a *Notice to Produce* was prepared by Solicitors for the Grievor requesting that the kitchen hygienist report prepared by Ms Mariamma Mani be produced at hearing, but was not aware of any such production.

18 Refer to Annexure VD4.

19 Refer to Annexure VD7

20 Refer to Annexure VD5

21 See Paragraph 16 to the Affidavit of Vishnu Deo dated 19 February 2018.

[29]In re-examination, the witness:-

(i) Confirmed that the Associate Handbook had been provided to the Grievor;
(ii) Indicated that the Grievor did not dispute or challenge the contents of that Handbook;
(iii) Claimed that the version of the probationary policy located in the different versions of the Associated Handbooks contained in the Annexures of his own and the Grievor's Affidavits, were identical in their terms;
(iv) Restated that the Grievor's knowledge in his role did not improve with time;
(v) Restated that the reversal of charges in the restaurant, would have required the authorisation from the Hotel Manager;
(vi) Confirmed that the Grievor sought to be released from the notice period by asking that he resign on 3 September 2014.

Evidence of Grievor Mr Daniel Sanchez

[30] The Grievor had prepared an Affidavit that was signed on 15 March 2018 and admitted into proceedings as his Evidence in Chief. According to the Grievor, he had been working in Mexico in 2014, when approached by Mr Kuruvita, to consider whether he would come and work at the Flying Fish restaurant located at the Sheraton Resort, Denarau. Mr Sanchez, said that he was approached by Mr Kuruvita, who had been eating at the restaurant where the Grievor had been working at the time and so much liked the food, that he wished him to work at the Flying Fish in Fiji.

[31]In his oral testimony provided by way of Skype video conference facility from Mexico, the witness gave the following evidence:-

(i) That he had been sent an employment letter of offer to Mexico and upon accepting the contract and arriving in Fiji, he was provided with the Associate Handbook and various other documents from a Mr Paul Hanfrio;
(ii) He did not undergo any performance reviews on a monthly basis as part of a probationary policy;
(iii) That the reversal of restaurant charges for a customer was done by the Duty Manager and not him, after the Duty Manager had sought and gained approval of the financial officers;
(iv) Was not aware of previous allegations of food poisoning at that restaurant;
(v) Could have easily been in the restaurant the day a New Zealand food critic had come to undertake a magazine review, however nobody told him that the reviewer was at the hotel;
(vi) That he had a meeting with Mr Deo, who indicated that the hotel had taken a decision that was irreversible, that he would be terminated for poor performance and that it would be better that he resigned;
(vii) That in response to receiving a termination letter from the Respondent on 15 August 2014 that he spoke to friends who advised him to go to the Labour Office;
(viii) He provided the Sheraton HR Office with a letter in response to the termination letter in which he sought to be compensated for the manner in which he had been terminated;[22]

[22] See Annexure DS12 to the Affidavit of Daniel Sanchez dated 15 March 2018

(ix) That in a meeting with Mr MacDonald he sought that he be provided a response to his request and was advised that "this is not good for you" suggesting that if he sought future work, he would have a negative reference from the hotel;
(x) That in a subsequent meeting with Mr Deo, he had put to him, "you said you were resigning", to which the Grievor had disagreed;
(xi) That he claimed to have returned to work for approximately an hour on 3 September after which he was confronted by the Hotel Manager, Security Chief, Mr Jalijali and another security officer, who in front of kitchen staff, asked that he leave the workplace.

[32]During cross examination, the Grievor stated:

(i) That he was not aware of a probationary period;
(ii) He had not been lying about the events relating to the food poisoning incident;
(iii) Rejected the claim that he had reversed meal charges without authority;
(iv) Indicated that he had been advised that the food critic's planned time for attending the restaurant had changed and he had not been advised;
(v) That he acknowledged various discussions with Mr Kuruvita regarding his performance and was taken to Annexures DS7 and DS8 to his Affidavit;
(vi) Acknowledged that Mr Kuruvita came to the restaurant following complaints and went through each dish showing how to prepare it;
(vii) Denied that he said he was leaving the restaurant to go and work at another hotel;
(viii) Disputed the version of events given by Mr Deo, that he had been approaching the restaurant when he was intercepted, rather than had been working in the restaurant when confronted by the Hotel Manager and others seeking that he leave;

[33]In re-examination, the witness made clear he was not pursuing housing or insurance allowances that were initially flagged within his letter of complaint to the hotel and attached to his Form ER1 as lodged with the Ministry. Mr Sanchez said he was of the belief that in relation to his performance, that he "was getting there." The Grievor did not accept that Mr Kuruvita had specifically spent the time in September at the restaurant, rectifying behaviour or performance, but more showing new dishes and reinforcing preparation. When questioned by the Tribunal, the Grievor re-clarified the way in which he was initially approached to come and work at the restaurant and indicated that it was Mr Kuruvita who approached him, after he had eaten in a restaurant that the Grievor had been working in at the time. According to Mr San chez, Mr Kuruvita indicated that he was offering him a three year contract and never spoke about the position being subject to a probationary period.

[34]It is fair to say that there were other less germane issues that have been raised in proceedings, dealing with matters such as the air fare tickets that were provided to the Grievor upon termination and whether they were provided all the way to Cancun Mexico, or just to Los Angeles, United States of America. These are not significant issues in the totality of the case, albeit that there appears to be issues of unfairness that are being agitated in relation to the manner in which the dismissal was executed.

Analysis of Issues

[35]There are some fundamental issues that flow out of a case such as this. Firstly, the case of international labour contracting is a matter that requires careful consideration for both parties; that is the prospective employee and employer. The most obvious issues such as the length of the contract, the circumstances for how it can be terminated early, the relocation arrangements and adjustment period for change, are all very real and practical considerations that are too

often ignored or assumed away. There is also a potential for further complication or miscommunication, where the person who may be responsible for making any pre-contractual representations is a third party. In this case, although there is no evidence that has usefully assisted the Tribunal in this regard, it would seem that Mr Kuruvita is not an employee of the Sheraton. It is assumed that he operated or allowed his brand name to be used, under some form of franchise or licence arrangement[23]. While it may very well be the case that Mr Kuruvita was not involved at all in the formalisation of the employment contract, if he provided any representations ostensibly with the authority of Respondent to the Employer, then one way or the other, there will be some level of ownership that the hotel will need to assume regarding any pre-contractual statements that may have enticed the Grievor to enter into an employment agreement in the first place[24].

[36]The fact that the Grievor was unaware that his position would be subject to a probationary period of three months, is quite a relevant consideration when first looking at this case. The Grievor's evidence is un-contradicted in this regard and the Employer can only claim that the Worker was provided with its probationary policy as contained within its *Associate Handbook*, when Mr Sanchez had arrived in the country. It is also worth mentioning that in Mexico, where hotel workers are ordinarily only required to serve a 30 day probationary period where one applies[25], possibly supports any lack of attention that the Grievor may have otherwise given to the issue. This is understandable enough given the fact that the Employer was prepared to relocate him approximately 9,000 km away to a new workplace. Who would possibly want to take the risk of dismissal after 30 days in such circumstances?

[37]In relation to Mr Sanchez's performance at work, the Tribunal does not accept that the issues were raised as clearly as portrayed through the materials. For example, the Affidavit of Vishnu Deo, at Paragraph 10, relies on a substantial amount of hearsay evidence. Consider for example, where he writes at sub-paragraph (d) "there were 3 further counselling sessions", yet he elaborates no further. Mr Deo's lack of corporate memory or recollection, hardly places him in good stead as authority for what sort of performance discussions transpired. And what if those discussions were undertaken by Mr Kuruvita; was he representing the Employer or his own business interests when giving such feedback? After all, the Grievor's employment contract was with the Sheraton Resorts Fiji and not Mr Kuruvita. In relation to sub-paragraphs (e) and (f), the witness similarly failed to provide any elaboration as to what these allegations related to whatsoever.

[38]It is nonetheless the case, that some of the documentary evidence did paint a picture of dissatisfaction, such as demonstrated on:-

- 1 August 2014 – Email communication from Mr Jalijali regarding reversal of restaurant charges
- 2 August 2014 – Email communication from Mr Kuruvita re quality of food (and reference to 3 earlier discussions)
- 10 August – Email communication from Mr Kuruvita – re guest complaint that the food was not as good as last time
- 29 August 2014 – Email communication from Mr Jalijali

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23 The Tribunal understands that this arrangement may now have come to an end.

24 Telling someone that they had a three year contract for example, may in some circles create an expectation that the contract was a fixed term one, for three years.

25 http://www.maquilasolidarity.org/sites/maquilasolidarity.org/files/attachment/Mexico_Committee_Comparison_Chart_2015.pdf

[39] For example, the email communication from the Director of Food & Beverage –Complex, Mr Jalijali, to the Grievor on 29 August 2014, sets out concerns, regarding the HACCP Procedure dealing with the food poisoning incident, complaints regarding food quality, the NZ Food Critic's visit and the financial operating procedures. While the comments in relation to Food Quality may be capable of being challenged or interrogated further, they nonetheless were the legitimate issues that were raised by Mr Jalijali. Certainly, Mr Kuruvita appears to have expressed concerns twice within 8 days, regarding client perception of quality.

Letter of Termination Dated 15 August 2014

[40]By 14 August 2014, the Respondent felt that the Grievor was not the right fit for the role. Having said that, it is quite concerning that the only witness called by the Employer to give evidence pertaining to the termination was Mr Deo, who claimed that he could not recall if he attended the meeting that day. Mr Sanchez on the other hand was quite categorical, when he stated that Mr Deo had been in attendance and had indicated that the decision to terminate his employment was irreversible and that he should consider resigning to avoid that outcome. The Tribunal prefers the Grievor's evidence in this respect and concludes that this would have been the reason why a dismissal letter was issued to him the following day and in such opaque terms.

The Letter in Response dated 28 August 2014

[41]The letter in response that was prepared by the Grievor for forwarding to the Employer, was on the other hand, quite to the point. It claimed that he was unaware of any probationary period and had not undergone any reviews as required under that process. Within the letter, the Grievor expressed concern that the question of probation was only raised when the Respondent sought to terminate his employment. The Grievor claimed, that he would not have brought his wife and daughter to Fiji in July of that year, had he known his employment was precarious and that it was for that reason, if he was to accept the termination, that he would want to be compensated for loss of fares, opportunity and other work related entitlements that would be foregone.

Meeting of 2 September 2014

[42]This meeting on 2 September 2014, is only of moderate importance within the scheme of things. The Employer contends that the Grievor sought to finish his employment before the nominated termination date of 14 September 2014. On the other hand, it would seem probable, that Mr Sanchez may have been prepared to leave there and then, if it was the case that the Respondent submitted to his demands set out within the letter dated 28 August. The Tribunal accepts the evidence of Mr Sanchez, that Mr MacDonald was not happy with the position that the Grievor had taken in relation to this matter. It is more likely than not, that the Hotel Manager thereafter thought it best to bring the employment to an end, sooner rather than later.

[43]In the scheme of things, this issue is not the main game here. The Employer claims to have acted upon the Grievor's request to leave his employment prior to the termination date and it is possible that this position was expressed, but it is more likely than not that he did so with the caveat that he wanted to be reimbursed for his lost earnings and other outlays. What transpired beyond that is likely to have been that the Grievor was provided with the letter acknowledging

his early release[26] and he in turn was unwilling to accept what he regarded was a repudiation of the employment contract[27]. One way or the other, the Grievor was ultimately asked to leave the workplace. Again the Grievor's version of events at this point and time is preferred[28].

Was the decision to terminate Unjustified for the purposes of the Act?

[44]The first obvious issue to consider is that of the impact of any probationary period. Of course it is relevant and sets the context for evaluating questions of justification or the justifiability of the dismissal decision. The problem for the Employer however, is that it did not follow its own procedures.

The Standing of Policies and Procedures

[45]The submissions and legal references made by the parties in this point, need to consider the Declaration that forms part of the Associate Handbook. The intention of the document is that an employee reads it, agrees to abide by its terms and that it forms a collateral agreement to the employment contract proper. There is no other way to view the document. It is not incorporated by reference within the Appointment Letter of 17 April 2014, as the only policy document that is referred to, is hidden within Clause 17 entitled Separation, where it relevantly states:

> *Your employment will be subject to Starwood's Code of Conduct and the Hotel's rules and regulations, which will be found in the Hotel Employees Handbook.*

[46]What that document is, again is hard to fathom from the submissions and evidence.

[47]In relation to the *Associate Handbook,* the document is not signed and it is true, that in a strict sense for it to be binding, it would have to have been at least brought to the attention of the employee[29]. In some respects it is a double edged sword where, if the employee is not aware of it, why then should he then claim it as an enforceable contractual right against the employer. The fact is though, that it is the Respondent that claims a probationary period is in force and has referred to its own policy as setting out the way in which it was to apply. The Employer did not undertake the monthly reviews and to that end, cannot claim that it has followed its own policy in any event.

[48]That is not the end of the issue though, as the *Separation Clause 17* within the Employment Contract makes clear that "*Separation of employment may be effected by either party providing one calendar months' notice in writing."* Whilst such an arrangement on its face may be fine for the local hotel worker, in the case of a worker who has uprooted himself (and his family) from Mexico to come and work for the Employer in Fiji, in a case where the employment contract appeared to be silent in relation to what transpires in the event that the worker is terminated at the end of a probationary period, begs the question whether in the circumstances of this case, the action of the employer can be seen as justifiable.

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26 See Annexure VD9 to the Affidavit of Mr Vishnu Deo dated 19 February 2018.

27 That is, by bringing it to an end, prior to the 14 September 2018.

28 Mr Deo's oral evidence appeared consistently vague and somewhat evasive.

29 The point being here, that even if the document was not signed, his willingness to remain employed knowing that the Associate Handbook was to be a collateral contract, would be sufficient to determine that he had consented by conduct (the continuation at work) to its application.

[49]The Employer's dismissal decision is inadequate as it does not provide a written statement setting out the reasons for the termination, as required for the purposes of Section 114 of the Act. To simply say "your performance during the probationary period which is unsatisfactory," hardly gives the impression of meeting the likely policy imperatives that underpinned the statutory requirement.

[50]Mr Sanchez commenced employment with the Respondent on 5 May 2014. After the expiration of three months on 5 August 2014, there was no reason why in ordinary circumstances, the Grievor had not come to the end of his probationary period[30]. Yes it is true that he had not been required to submit to monthly assessment reviews and neither had he been confirmed in his position at that time, however as the employment contract made no mention of the probationary arrangement, there is no real reason why he would not have thought he was not now in a permanent position with his employer. Not that it makes any great difference. The right of an employer to terminate for poor performance is not restricted by the presence or absence of a probationary arrangement. But having said that, the standard of an employer's approach to such matters cannot be lowered by virtue of the fact that it regards a probationary period as being licence for in effect, to do whatever you like. It is not a licence to be able to dismiss a worker without justification. In any event, the Respondent has no records of the monthly reviews that were supposed to be undertaken as part of the probationary period and without any better understanding as to Mr Kuruvita's role, it is hard to know whether his performance feedback is the feedback of the Respondent or that of a third party. In any event, it seems quite odd if what Mr Sanchez says is true, that Mr Kuruvita did post on social media on 17 July 2014:

> *Say Bula to Daniel! Very proud of this great chef, he's been bringing the flavours of Mexico to Flying Fish Fiji- I couldn't have found a better man for the job if I'd tried.*

[51]It strikes the Tribunal as even more peculiar, that within a period of less than one month after making such comments, that Mr Kuruvita seems to have been instrumental or at least influential in seeing the Grievor terminated in his role.[31] The Tribunal holds the view that in the circumstances of this case, there is not sufficient information to support the finding that the Grievor has been given a 'fair go'.[32] The email communication that Mr Kuruvita sent to the Grievor on 2 August 2014, is the first evidence of any formal feedback provided to him by the person who 'recruited' him for the role. And consider the language of that email. It follows on from the earlier one that had been sent by Mr Jalijali the day before, concerning the reversal of charges in the restaurant, food quality and presence. Mr Kuruvita, does not appear to have undertaken any investigation of what transpired with the Grievor whatsoever, but saw fit to write:

> *I am also concerned that you have decided to give away FJD 500 to a guest.*

[52] It is unclear from the documents provided, who were the recipients of that email communication, however there is a sense of a lack of impartiality here. As Mr Deo made clear in his evidence, he was unaware of the investigation that followed in relation to this issue. On the

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30 Despite the fact that at the time he claims to be oblivious to the existence of such an arrangement.

31 That is, the Employer now is relying on various communications attributed to him, to validate the decision that it took.

32 *Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

other hand, the Grievor made very clear, the reversal had been sanctioned by the Duty Manager after liaising with finance officers from within the hotel.

Conclusions

[53]The Grievor should have been more alert to the inherent dangers that exist when contracting for international employment. Prima facie at contract,[33] the Employer would be well within its rights to claim that it only need to give the employee one month's notice to effect separation. The fact that the employment letter makes no provision for relocation in the case of termination (particularly in the case of probation), is a mere illustration of the one sided nature of employment contracting in such a case. The fact that the Grievor thought that his family had the 'all clear' to come to Fiji and join him, was somewhat naïve. The contract was not a fixed term three year contract. It was still capable of being able to be brought to an end, subject to statutory considerations of justification, by the giving of one month's notice. Workers whether coming into the country or working abroad, need to turn their mind to such issues before entering into such arrangements.

[54]In any event, the termination was premature based on the available information. A case in point would be the concerns expressed that Mr Sanchez was not on board when the NZ Food Critic had come to visit the restaurant. That seems to have been nothing more than a communication breakdown arising out of a rescheduling for the visit. It hardly seems justification for dismissing an employee. Mr Jalijali's concerns regarding his salad "drowning in dressing",[34] is a similar case in point. It would seem mighty strange if the Employer had transported a worker over 9000 kilometres from Cancun City Mexico to Port Denarau, only to now claim he was incapable of making an edible salad.

[55]The termination was premature and without justification. There was no evidence of the justification of the decision provided by way of reasons in the dismissal decision and no direct evidence given from those who supposedly made such performance assessments[35]. The Grievor should have been 'warned' or informed of the fact that his employment would be subject to a probationary period, prior to having been provided with the formal offer of employment. Secondly, if the benchmark for client satisfaction is to be realistically set at "99% happy guests[36]" then the Respondent would be well advised to also make that clear in any of its contractual documentation. Whether that benchmark is one that is realistically obtained is a matter for others to determine at another time. Certainly the proverb, "*one person's fish is another person's poison*" is one that comes to mind[37].

[56]In *Peni Koro Lagi v Calm Fire Professionals*[38], 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

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33 That is, in the absence of any statutory protection such as the *Employment Relations Act* 2007.

34 See Email communication dated 2 August 2014 at Annexure VD5 to the Affidavit of Vishnu Deo.

35 For an analysis of what constitutes justification in such circumstances, see the decision in Kumar v *Nanuku Auberge Resort Fiji* [2017] FJET 2; ERT Grievance 122.2016 (10 February 2017)

36 See Mr Kuruvita's email communication to Mr Sanchez dated 10 August 2014.

37 The proverb was traditionally "one man's fish is another man's poison".

38 [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)

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.

[57]The Grievor indicated within his Affidavit that he was out of work for approximately nine months following his termination and is now working in a private capacity selling foodstuffs at a local roadside stall. As a starting point, the Tribunal is of the view that the Worker should be compensated for a period of five months. If on 17 July 2014, Mr Kuruvita had been publicly lauding the praises of the Grievor, who at that time had just completed the first 10.5 weeks of work, one must really question what went wrong within the next 11 days to make the probationary period, one that would render it "unsatisfactory." The expectation of ongoing work in those circumstances was a legitimate one and no doubt led the Grievor into bringing his wife and daughter to the country to join him. While the contract of employment makes clear that it is dealing with only 'single hire' travel arrangements, these are costs and disruptions to lives that cannot be overlooked and could have been avoided.

[58]The Worker appears to have been in receipt of the following entitlements:

- Salary - $3333.33 USD per month = $7034.00FJ
- 8% Superannuation
- Medical Insurance Scheme
- Accommodation ($5,000 USD per annum)
- Relocation $2,500 expenses

[59]The Grievor claims not to have been reimbursed his initial relocation costs associated with his move to the country and that issue was not disputed by Mr Deo.

[60]As mentioned earlier, the issues of what happens in the event of termination, particularly in terms of meeting the costs of repatriation, are not contained within the employment contract and are issues that the Employer on future occasions should make very clear. The Tribunal concludes that the amount of 5 months wages plus the reimbursement for the unpaid relocation allowance, is a fair outcome to be paid on this occasion, giving rise to a final determination of:-

Compensation for Wages @ 5 months	= $35,170.00
Relocation Allowance	= $ 2,500.00
Total	**$**37,670.00 FJ

Should An Allowance be made for Unfair Dismissal?

[61]In *Food for Less (Fiji) Ltd v Chand,*[39] Her Honour Wati states:

[39] [2016] FJHC 323, ERCA 10.2014(26 April 2016) at 49

Unfair termination is when the Employer acts in bad faith in carrying out the termination or when the manner of treating the employees whilst carrying out the termination is without respect or dignity.

[62]In some ways, the sense of unfairness does permeate through the evidence, particularly if the decision to 'accept the resignation' of the Grievor on 3 September was taken more in response to his wishes to be appropriately compensated, rather than just accepting the position of the Employer that he had been given notice of a justifiable dismissal decision. Whilst the Tribunal has expressed its preference to accept the Grievor's account of events as to what transpired on 3 September, it is likely too, that there was a degree of intransigence or stubbornness on the part of Mr Sanchez, in circumstances where he was not wanting to accept what he saw as the repudiation of the employment contract. Situations like these are difficult, because the operations of the Employer at the same time need to run smoothly and without an impact on customers and other staff. The level of emotion between the parties had obviously increased and it is possible, though there is no evidence about this point, that there would not have been a peaceful period for the remaining term to 14 September, had the Grievor been allowed to remain in the workplace.

[63]With the benefit of hindsight, the preferred situation would have been for the Grievor to have submitted to the further letter at that point and thereafter considered his options in a more clear headed fashion. Understandably though he was upset. On the finest of balances, the Tribunal is disinclined to award the Grievor any further compensation for the unfairness of the dismissal.

Decision

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

(i) The Employer pay the Grievor the sum of $37,670.00 within 28 days.
(ii) Solicitors for the Grievor may make application for costs within 28 days.

Andrew J See
Resident Magistrate