



Employment Relations Tribunal

Decision

Title of Matter: Meli Lasekula Bitu
v
Ba Provincial Holdings Company Limited

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

Subject: Adjudication of Employment Grievance (Unjustifiable Dismissal)

Matter Number: ERT Grievance 159 of 2018

Appearances: Mr K Tunidau and Mr T Duanasali, Kevueli Tunidau Lawyers, for the Grievor
Mr I Tikoca, for the Employer

Dates of Hearing: Wednesday 19 June 2019
Thursday 20 June 2019

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 3 September 2019

KEYWORDS: Unjustifiable and Unfair dismissal; Disobeying lawful instruction; Intermingling of funds.

CASES CONSIDERED

Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2; ERT Grievance No 122 of 2016 (10 February 2017)

Peni Koro Lagi v Calm Fire Professionals, [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)
Yanuca Island Limited trading as Shangri Law Fiji Resort and Spa v Vani Vatuaruku [2017] FJHC92; ERCA 9 of 2014 (8 February 2017)

Background

[1] This is a referral made to the Tribunal in accordance with Section 194(5) of the *Employment Relations Act*. The referred matter relates to a grievance lodged by Mr Meli Lasekula Bitu on 14 September 2018, claiming that he had been unfairly dismissed in his role as Manager Finance and Accounting, Ba Provincial Holdings Company Limited (“Ba Holdings”).¹

Case of the Employer

[2] In opening the Respondent’s case, Mr Tikoca explained the Employer’s justification for the dismissal decision in this way. The Grievor was terminated in his employment for failing to follow a lawful instruction that was issued by the Employer’s Chief Executive Officer concerning the

¹ The term ‘unfairly dismissed’ is used by the majority of Grievors and representatives within this jurisdiction, to encapture what is often otherwise judicially determined to mean unjustifiably dismissed.

payment of wages for employees and contractors working at an 'AusAid' sponsored project², being supervised by Ba Holdings at Koro Island, as part of Cyclone Winston rehabilitation program. The allegations against the Grievor are two-fold. Firstly, that he did not attend to the payment of the contractors and employees as requested by his Chief Executive Officer and secondly, that in breach of the standard operating procedure and without approval he organised for the payment of wages for Ba Holdings employees working at the Rogorogovuda House, Lautoka, and in other locations on the main land, one day prior to when their wages were otherwise due and payable.

[3] The Grievor was summarily dismissed in his employment by letter dated 2 July 2018³. Within the dismissal letter, the Employer provided additional reasons to justify the dismissal decision, that included:-

- the Grievor's attitude;
- the fact that he had been convicted and subject to a suspended sentence for one count of receiving a corrupt benefit in the Suva Magistrates Court; and
- for failing to agree to a variation of his employment contract as request by the Chief Executive Officer.

Mr Isimeli Bose

[4] The first witness to give evidence on behalf of the Employer was Mr Isimeli Bose, who is the Chief Executive of Ba Provincial Holdings Company Limited. The Witness had earlier prepared an Affidavit dated 25 February 2019, that was tendered as part of his Evidence in Chief. The evidence of the Chief Executive was that :-

- (i) He provided the Grievor with an Internal Memorandum requesting that he pay Ba Provincial wages employees and sub-contractors outstanding monies due to them;
- (ii) He was contacted by the Manager Works and Constructions Mr Rakesh Prasad, who advised that no payment had been made to these workers on that day⁴;
- (iii) Employees based at Rogorogovuda House⁵, were paid on the Monday 1 July, rather than the Tuesday 2 July and claimed that if these persons were paid outside of the standard operating procedure (and pay day), that this would need his approval, as he would need to know the reason why;
- (iv) Workers at Koro Island, who were not paid on 1 July, became abusive and one cheque that had been issued by the Employer to another contractor had also been dishonoured as a result of this early payment.

² The correct funding name was Access to Quality Education Program (AQEP) funded through the Australian Department of Foreign Affairs and Trade and overseen by Palladium International Pty Ltd.

³ See Annexure ML-1 to the Affidavit of Evidence in Chief of Meli Lasekula filed on 1 May 2019.

⁴ In his evidence Mr Bose initially intimated that he had received a call around 10.00am on 2 July 2018 to advise that no such payment had been received, although later the Witness indicated that he could not recall the time of that call.

⁵ These are regarded as the 'head office' employees.

- (v) Denied that the Grievor had told him that utilising of company funds to pay workers engaged under the Access to Quality Education Program (AQEP) works was unlawful;
- (vi) Accepted that the Grievor had advised him that cross transactions from one fund to another, were in breach of accounting principles.

[5] During cross examination, the Witness:-

- (i) Refuted the suggestion that the Employer had a distinct 'AusAid' account, but only a projects account, to which Cyclone Winston funding was directed;
- (ii) Explained that a statement of works would be completed each month, assessed and then payment made by Palladium International Pty Ltd ("Palladium"), who was the Principal under the terms of the design, repair and reconstruction of school buildings contract;
- (iii) Stated that the main operating account was used by the Company to pay everyone;
- (iv) Explained that the funds deposited into the 'Operating Account', came from the rental income of company assets; and
- (v) Agreed that workers from Rogorogovuda House ("the Head Office staff") ordinarily received their pay from the Operating Account.

[6] The Witness was referred to Annexure IB-2 to his Affidavit dated 25 February 2018 (Exhibit E4) and was challenged as to the date in which he appears to have given the Grievor the instruction to pay the Koro Island workers⁶. The Witness claimed that he had handed the memorandum to the Grievor for him to action and within his Affidavit also states that he instructed the Grievor to make payment on 2 July 2018, the same date in which the termination letter was issued.

[7] Mr Tunidau put to the Witness, that the funds within the two accounts operated by Ba Holdings - the operating account and the projects account that was used to receive the monies for the Koro Island works, should not have been inter-mingled. In reply, Mr Bose told the Tribunal that the Grievor had not told him that. Mr Bose further explained, that the 'project account' was not a trust fund and that the Chief Executive Officer and Managers needed to be able to look at issues of cash flow and commitments when utilising these funds.

[8] The Witness was asked of the role of Mr Albert Sanday, an employee of the company that had been fulfilling the role as Internal Auditor and who it was said had been providing the company loan monies in order to keep it liquid. Counsel referred the Witness to a meeting that was held with the then Chair of the Board, himself and the Grievor, at which time it was put, that Mr Bitu had highlighted to him the conflict of interest in having the internal auditor being a person to

⁶ The hand written note on the internal memorandum, appears to have been made on Sunday 1 July 2018.

whom the company was borrowing and repaying loan amounts. In response, the Witness claimed that the loan funding from Mr Sanday had been approved by the Board⁷.

Payment to Workers at Koro Island

[9] The Witness was asked to clarify the pay cycles for the workers employed at Koro Island and indicated that the pay period was calculated from a Monday to a Monday. According to Mr Bose, the process for paying the workers, was that staff would have him sign a cheque and then take it to the bank, where it would be cashed and funds deposited into various accounts for employees. The Witness stated that he:

“Would sign a blank cheque .. without money inserted into it”

[10] Mr Tunidau reinforced to the Witness, that it was this sort of practice, that the Grievor had been wanting to point out as the malpractices of the company. The witness did not respond to that proposition.

Declaration of Prior Conviction

[11] Mr Bose was asked about the circumstances of Ba Holdings engaging the Grievor in the first instance and also as to the constitution of the interview panel that made the decision to employ Mr Bitu. The Witness advised that the interview panel comprised of himself, the Chairperson and a consultant. According to the Witness, Mr Bitu had openly declared his criminal conviction at the interview.

[12] In re-examination, Mr Bose indicated that the project bank account that was held by Ba Holdings was not only for the Koro Island ‘Palladium’ income, but for all projects. The Witness stated that it was a revenue account and that he would move funds from that account to the operating account. The Chief Executive Officer was referred by Mr Tikoca, to the occasion in question that he had signed a cheque in order to facilitate the payment for the Koro Island workers and asked to clarify when he had signed the cheque. Mr Bose told the Tribunal that he could not recall whether the cheque had a date or an amount. The Witness confirmed though, that the pay day for workers in Lautoka was always the Tuesday.

[13] When asked by the Tribunal about the notation on the internal memorandum (Exhibit E4) which was said to be the instruction to pay, the Chief Executive Officer said that he gave Mr Bitu the request to attend to the payments on 28 June⁸. The Tribunal was intrigued as to why, given the Manager Works and Construction Mr Prasad had requested that a total amount of \$101,753.45 be paid by COB 28 June 2018, did the Chief Executive not authorise that full payment be made, but rather only for two specific amounts are “Koro Wages (2 weeks) and “Koro Sub Contractors Payments” totalling \$41,515.15. Mr Bose responded by saying that he could not pay the total payment, because there were insufficient funds in the operating account. When asked how much money was in the operating account on 28 June 2018, Mr Bose told the Tribunal, \$63,000.00. The Tribunal was concerned that if the situation was, as Mr Bose says it was and he had authorised for the immediate payment of the Koro Wages (\$9,095.05) and the Koro Subcontractor Payments (\$32,420.10), totalling \$41,515.15 that there would not be enough money to pay for the wages to the Lautoka staff. The Tribunal asked if the requisition voucher to

⁷ Note here that the Chair of the Board in his evidence, refuted any such suggestion that the Board had approved such borrowings.

⁸ This evidence seems inconsistent with the markings on that memo, where twice the date recorded appears to be the first day of the month.

support these payments could be produced and was advised that the payment voucher could not be located. Mr Bose told the Tribunal, that had Mr Bitu paid the monies as requested, that he would not have terminated him. Mr Bose said that he had received various complaints from the workers and the Minister for Youth and Sports, that the outstanding payments had not been paid. The Tribunal sought to ascertain how much were the wages of the Lautoka staff, who it was claimed by the Employer had been given priority in payment by Mr Bitu and was provided with an estimate of \$16,000.00⁹.

[14] According to the Witness, Mr Bitu had given him an ultimatum before the Chair of the Board on 8 June 2019, suggesting that if he wanted him to continue in the new role, that Mr Sanday should leave.

Miliakere Tabukere Daku

[15] Ms Daku was the Human Resource Officer, at Ba Holdings. According to Ms Daku, the time sheets in question that gave rise to the early processing of pay for the Lautoka Office staff, were prepared by a Junior Assistant, Ms Asenaca Turua. The Witness stated that the Junior Assistant was advised by the Finance Clerk, Ms Sakuru, to process the time sheets and submit them as early as possible¹⁰. Ms Daku advised that ordinarily, Managers verify the time sheets at close of business on Monday afternoon. The Witness stated that the employees were paid in cash, from the proceeds of a cash cheque that was signed by the Chief Executive Officer. The Witness stated that the cheque would be signed, when they produce the voucher for payment¹¹. Ms Daku told the Tribunal that the Chief Executive Officer would normally sign the cheque on the Tuesday and that this signing would take place with supporting vouchers and a requisition form. The Witness said that she “didn’t know what happened in this particular case.” According to Ms Daku, the Chief Executive Officer will sign the cheque, after knowing that it had been approved by the Manager Finance, Mr Bitu.

[16] In response to questions from the Tribunal, the Witness indicated that Ba Holdings had changed from a weekly to fortnightly pay cycle on 19 June 2018 and that the payment made on 2 July 2018, was only the second occasion that the pays had been processed in that way. In the case of the payment to Koro Island workers, Ms Daku stated that once the cash cheque was presented to the HFC Bank, that office staff would make manual deposits into nominated BSP and Westpac accounts. The witness gave evidence that normally Human Resources would prepare the time sheets around 930am on the Monday, prior to the pay day¹². Ms Daku indicated that there were approximately 50 casual workers who were engaged at Koro Island at the time and said that the Koro island workers had contacted her asking why they had not been paid. The Witness said that at the time in question, the workers at Koro Island, who were normally paid weekly, had not been paid for two weeks.

⁹ If that was the case, based on Mr Bose’s evidence, there would have been enough funds to pay the \$16,000.00 for Head Office employees, as well as the \$41,515.15 for Koro Wages employees and sub-contractors.

¹⁰ Clearly this is hearsay evidence. Nonetheless, when questioned it was noted that the time sheets needed to be signed by the various Department Heads.

¹¹ Note here, that Mr Bose made no mention of signing any payment vouchers, but he must have at least in the case of the Head Office staff, that included himself.

¹² This is a significant issue here, because the case theory of the Employer was very much that this activity normally did not occur until after the close of business on the Monday. It also seems to be the case that the Witness had moderated her initial evidence, upon the Tribunal seeking further clarification of the process. If HR are preparing time sheets around 9.30 am the day before pay day, that really is the starting time for wages preparation.

[17] At the close of this witness evidence, the Tribunal issued Directions that the Bank Statements of the project and operating account needed to be provided from the Employer, together with the requisition, vouchers and cheque details for the period 19 June to 2 July 2019; including copies of the documents pertaining to the request made by the Chief Executive Officer to pay the Koro Island workers and contractors as set out within the Internal Memo dated 28 June 2018. (Exhibit E4). The Employer was also requested to provide the original Internal Memo that was the subject of the dismissal decision¹³.

[18] At the request of Counsel for the Grievor, the witness Mr Sitiveni Weleilakeba was interposed to give evidence.

Mr Sitiveni Weleilakeba

[19] Mr Weleilakeba was the former Managing Director of Fiji Holdings and after a period of time spent abroad, returned to Fiji where he assumed a position as Chair of the Board of the Ba Provincial Holdings Company Ltd. The Witness told the Tribunal, that he was appointed as Chair in October 2017 and resigned from the position on 9 July 2018. Mr Weleilakeba said that at the time he commenced in his role, the company was receiving approximately 90 percent of its income from property rental and that it was 'bleeding' in cash. The Witness told the Tribunal that Ba Holdings was engaged to oversee works in a schools reconstruction project at Koro Island that was being funded out of monies from 'AusAid' and that the project was to take two years only. Mr Weleilakeba gave evidence that the projects works were delayed and he went to Koro Island to review what was going on. According to the Witness, there had been a misallocation of funds and that the funds for the project works were being consumed by the administrators of the company to service elsewhere. Mr Weleilakeba stated that the monies were directed to other expenditure for the company that were not linked to that project. The Witness told the Tribunal, that the project contractors were not being paid as a consequence. Mr Weleilakeba gave evidence that the company had 7 properties under its management, of which three it owned in its own right, with another four operating under 'build, operate and transfer' arrangements.

The Interview Panel for the Appointment of Mr Bitu

[20] Mr Weleilakeba gave evidence that he insisted upon being part of the interview panel, for the recruitment of the position of Manager Finance and said that the Grievor Mr Bitu, had made all declarations required of him and that all documents were made clear to the panel at interview. In relation to Mr Bitu's termination, Mr Weleilakeba conceded that he was made aware of the decision by the Chief Executive Officer.

[21] The Witness said that in relation to Mr Bitu's criminal conviction, that he was made aware of this issue and it was discussed at interview and disclosed by the Grievor. According to Mr Weleilakeba, the Grievor had the attributes that the panel were looking for to hold the position; both the knowledge and a strong personality. Counsel Tunidau asked the Witness about the condition of the company and its operating funds? According to Mr Weleilakeba "people were

¹³ Note only that some of the records were produced. The Employer was unable to produce the original or copies of the payment vouchers in question, or the original copy of the Internal Memorandum Ex E4.

coming in and resigning” and that this “gave me a signal something was wrong”. The Witness said that he had another “dig into accounting” and found a lot of anomalies. Mr Weleilakeba gave the example of a loan from a staff member Mr Sanday, not being approved by the Board, with the point being that any liability needed authorisation of the Board. The Witness explained that Mr Sanday was an employee providing loans to the business, yet also undertaking a role as a full time employee, being the Acting Manager Finance. According to Mr Weleilakeba, he only got to know of the loan in June 2018 and uncovered three charges totalling \$180,000.00. The Witness told the Tribunal that monies that were otherwise allocated to the Koro Island rehabilitation were being paid to Mr Sanday, rather than to the sub-contractors working on the Koro Island project. The Witness said that the ‘Koro money’ from ‘AusAid’, was going through another vehicle and then to Ba Holdings. He stated, “When you look at it, certainly BA Holdings was insolvent”. Mr Weleilakeba said that there was a lot of wastage and that the rental income was consumed by wages. According to the Witness, “the money that was coming to Koro, the Chief Executive Officer was using”.

[22] Mr Weleilakeba told the Tribunal that the Grievor was given instructions to streamline operations and that his mandate was to try and control and monitor expenses. The Witness said that Mr Bitu’s questioning of the Chief Executive, as to the loans that had been received from Mr Sanday, had come about at his request and said that the policies and procedures in place were never followed by the Chief Executive Officer, Mr Bose.

[23] During cross examination, Counsel for the Employer sought to clarify the experience of the Witness and his views pertaining to the company. Mr Weleilakeba stating that there were employees “not doing anything, but getting paid”. The Witness said that the progress on Koro Island’s reconstruction, was hampered by the fact that the company had a lack of monies to buy building materials. Mr Weleilakeba said that Ba Holdings had no experience in the building and construction industry. It was put by Mr Tikoca to the Witness, that in relation to Koro Island, that some of the sub-contractors such as Modern Investments, were not performing and that one entity, 4K Construction, did not building according to plan and this was why the company had cash flow issues. The former Chairman of the Board did not accept that view. He made the point, that 4K Construction was one of only four contractors engaged to undertake project works. The Witness said that the dispute with 4K Construction was only one small reason why the project costs for Koro Island blew out from an initial cost of \$2million to \$10million¹⁴. According to the Witness, the issue was complicated because as BA Holdings engaged the contractors directly, it did not get paid for any work delays from Palladium.

[24] Counsel for the Employer, questioned the Witness as to the authority of the Chief Executive Officer to issue instructions to the Manager Finance and his staff and Mr Weleilakeba acknowledged that Mr Bose had such authority. When asked whether the Chief Executive Officer was authorised to use monies from the project account to support the operating account, the former Chair said that this was a question of cash flow management and providing all the necessary documentation was in place, that it would be acceptable.

[25] In re-examination, Mr Weleilakeba restated that the company cash flow was poor and that rental income was not enough on occasions to pay wages. It was for that reason that the former Chair stated, that he wished to review staff numbers. When questioned by the Tribunal, Mr Weleilakeba described the company structure and its contract with Palladium. In relation to the

¹⁴ See *Ba Holdings Co Ltd v Kumar* [2018] FJHC 149; HBE08.2017 (28 February 2018).

monies received from Palladium, he stated, that “some of those funds were being used for operational expenses not related to Koro Island”. The Witness told the Tribunal that the Grievor was not initially the first person who had been offered the position as Manager Finance arising out of the recruitment process that he was involved with, however he stated that the preferred candidate was “sacked on his first day”. The Witness said that he pushed for the position to be filled and was concerned that the 2016 Company Accounts were qualified. According to the former Chair, there needed to be a thorough analysis of what went on with the management of funds for the Koro Island project, as the works were supposed to be over in 18 months.

Mereseini Culaculawave

[26] Ms Culaculawave is the Accounts Clerk at Ba Holdings. The Witness told the Tribunal that in her role, she looked after accounts payable for creditors. As part of her evidence, the Accounts Clerk explained the way in which payment vouchers for processing were first approved by the Manager Finance, before requiring the final approval from the Chief Executive Officer.

[27] In relation to the events that gave rise to the premature payment of Head Office staff, the Witness stated that the Ba Holdings wages were prepared by the Payroll Clerk and that they had been advised to do so, along with preparing payment for the security and cleaning contractors. The Witness was shown an extract from the Cash Disbursements Journal (Exhibit E3 (a)) and acknowledged that the wages for Koro Staff and Ba Holdings and other projects, were organised for payment. According to the Witness, she received the request to pay for those staff through the Manager Finance. Ms Culaculawave indicated, that normally the Finance Team prepared wages for these staff every Tuesday¹⁵. The witness said that on Monday, the timesheets were given by Human Resources and on the Tuesday, the payroll was prepared and “the payout is done”. In her evidence, the Witness told the Tribunal that the payment voucher authorising for the payment of these wages was prepared by Ms Kini Selo, the Payroll Clerk. According to Ms Culaculawave, the voucher was taken to the Manager Finance and then the Chief Executive Officer, Mr Bose, for the signing of the cheque. According to the Witness, she processed the MYOB payment voucher on that same day.

[28] The Witness was asked by Mr Tikoca, “How many payment vouchers did you input on 2 July 2018?” to which she replied, “Just payment voucher for one on 2 July.” The Witness thereafter conceded that based on the entries on the Cash Disbursements Journal (MYOB)¹⁶ that there would have been a separate payment voucher for each of the five entries for that day¹⁷. In cross examination and as a result of the Tribunal’s request for the relevant documents to be disclosed, the Witness told Counsel in his questioning, that the payment vouchers for this day were missing.

[29] According to the Witness, the wages for Koro AQEP were prepared first (\$9,068.00) and the Chief Executive Officer signed a cheque. Ms Culaculawave stated that after that, the payments for the Ba Holdings staff and others were prepared and all “subject to available funds”. The Witness told the Tribunal that the Manager Corporate Services, Mr Jese Saukuru was the other signatory to the company cheques that were presented to the bank. According to the Witness, the payment voucher for wages was a 2 page document; the first a payroll summary and the

¹⁵ The Tribunal understood this evidence to mean, that at least in the case of the head office staff that was the practice, until the fortnightly cycle was introduced on 19 June 2018.

¹⁶ See Exhibit E3 (a).

¹⁷ If that was the case and the Chief Executive Officer was required to sign each of the payment vouchers, then he would have been aware at that time, that wages were being paid for Koro wages employees, as well as Head Office staff.

second a payment summary. It was the evidence of the Witness that as a consequence of the instructions given by the Manager Finance to process these wages, that a payment to a logging contractor for \$26,600.00, which had already been prepared and the cheque post-dated, was held up¹⁸. According to the Witness, she had entered the payment of \$26,600.00 into the Cash Disbursement Journal on 15 June 2018, but did not give the cheque to the contractor Voloca Logging, due to the funds at that time being used to pay wages on 19 June 2018¹⁹. The Witness told the Tribunal that part of her role was to check the internet banking daily, by looking at the status and transactions on the company bank accounts.

Rakesh Prasad

[30] Mr Rakesh Prasad is the Manager Projects. The Witness told the Tribunal that the company had managed two projects, one for the Fiji National University and the other for the Koro AQEP. According to the Witness, the workers at Koro Island were paid weekly based on their qualifications, however the pay cycle was converted to a fortnightly one. In his evidence, Mr Prasad stated that the process for making payment to the Koro workers was that the working hours were summarised, checked by Human Resources, verified by himself and then approved by the Chief Executive Officer for payment. According to the Witness, the wages were paid late and some small contractors at that time were also not paid. The Witness was shown the Internal Memorandum dated 28 June 2018 and advised that despite his request within the document to Mr Bose, that the contractors be paid on that same day in the amount of \$32,420.10, that they were not paid as requested. Mr Prasad said he discovered that the contractors were not paid as requested, when on the following Monday 2 July 2018, he travelled to Koro Island and learnt of that fact. The Witness told the Tribunal that when he realised that no payments had been received by 3.00pm on that day, he rang the Lautoka Office and was advised by a staff member, Ms Lita Nasica, that no payments had been made. According to the Witness, the workers stopped all work at Koro Island and the Minister for Youth and Sports, the Honourable Mr Tuitubou sought clarification of the issues.

[31] Mr Prasad told the Tribunal, that when monies were received from Palladium on 6 July 2018, that Ba Holdings were able to clear off the remainder of the outstanding amounts contained within his memorandum,²⁰ that in all totalled \$101,753.45. The Witness stated that he was not sure why the payment had not been made, but had heard, that the payment for contractors had been used to pay Ba Provincial staff. The Witness told the Tribunal, that he returned to Viti Levu on the following day 3 July 2018, in order to sort out the issues. During cross examination, Mr Prasad was asked about the Internal Memorandum he had written on 28 June 2018 requesting that the payments be made that same day and acknowledged that the payment for wages employees at Koro Island was made on 2 July 2018 consistent with that request. The Witness said that at the time there were two outstanding accounts owing to Goundar Shipping for the months of April and May, in the amount of \$51,436.95 and whilst he had prepared the first voucher request for payment, understood that there were no funds to pay the invoice.

¹⁸ The Witness here is referring to a payment voucher prepared on 15 June 2018 and according to Mr Bose, the cheque post-dated, causing the amount to be dishonoured upon presentation. It is unclear where on the bank statement, that dishonouring activity occurred, as there is insufficient information available to ascertain from the limited bank statements provided. What seems to be the case though is that Ba Holdings had issued a post-dated cheque to the contractor.

¹⁹ See entry in to the Project Bank Account of Cash Personal Chq \$26,555.10, 19 June 2018. (Exhibit E3 (b)).

²⁰ See Exhibit E4.

[32] Mr Prasad provided another example of the insolvent trading of the Employer, when in the case of one contractor involved in the rebuilding of the teachers quarters, every two weeks he would issue an invoice of \$5782.40, however because the project account didn't have any funds, could not be paid. The Tribunal asked the Witness what sort of contingency funding had been received from Palladium to buffer against any start-up costs and was advised that a mobilisation amount of 2.5 percent of the initial contract price was provided (\$211,000.00), but understood that there had been intercompany borrowing from those funds²¹. The Worker was taken to the payments that were actually made for the Koro wages staff that were set out within the MYOB Cash Disbursements Journal for that period (1/7/2018 to 3/7/2018)²² and stated that whilst he had filled in a requisition for the amount of \$9095.05, had not done so for the amount of \$3,070.83, that had been paid to those workers on 2 July 2018.

The Case of the Grievor - Mr Meli Lasekula Bitu

[33] The Affidavit in Evidence in Chief of Meli Lasekula dated 1 May 2019, was admitted as evidence in proceedings. The Grievor is a qualified accountant, with primary qualifications from the University of Queensland and has also obtained a Master's Degree in Applied Finance. Mr Bitu told the Tribunal that he had previous work experience in an international accounting firm, prior to working for the Asset Management Unit, Ministry of Finance; the Fiji National Provident Fund and later for a consultancy firm.

[34] The Tribunal heard that Mr Bitu commenced his employment with the Employer on 2 June 2018 and was summarily dismissed in his employment on 2 July 2018. Mr Bitu openly and without hesitation recounted in his Evidence in Chief, the events that gave rise to his criminal conviction in the Suva Magistrates Court. It is perhaps easier, to set out the relevant facts of that case as follows:

The Respondent was employed as the Director, Asset Management Unit at the Ministry of Economy. He was tasked to manage the affairs relating to the Kalabu Tax Free Zone. On the 2nd of May 2013, he had experienced a pain and visited the CWM Hospital in Suva. While he was waiting at the Hospital for his treatments, he received a call from Mr. Robert Cromb, a Businessman and a tenant at the Kalabu Tax Free Zone, inquiring whether the Respondent was attending the meeting that was scheduled in the evening of that day. The Respondent had told Mr. Cromb that he could not attend to the meeting as he was waiting at the hospital in order to obtain treatment for his pain. Mr. Cromb had then told the Respondent to go and get his treatments at the Suva Private Hospital. He had offered the Respondent that he would pay the cost of the treatment. The Respondent accepted the said offer and admitted in at the Suva Private Hospital, where he had an appendicitis surgery. Mr. Cromb initially paid sum of \$12,592.95 as the estimated cost for the treatment. Upon the conclusion of the surgery and treatment, the Suva Private Hospital returned the Respondent a sum of \$3, 030.21 as the actual cost incurred was \$9,247.00. When he returned to work after the treatment, the Respondent had made a Declaration pursuant to Public Service Gift Policy, detailing about the money which he received from Mr. Cromb and the subsequent treatment and expenses he had incurred. He has stated that the cost for the treatment was \$12,593.00.

²¹ If that is the case, in effect what is being described, is overseas aid funding being used for purposes other than as allocated for under the contract.

²² See Exhibit 3(a).

Upon making inquiries of this declaration, the Ministry of Finance finally found that the actual expenses of the treatment were \$9,247.00 and not \$12,593.00 as declared by the Respondent in his declaration²³.

[35] Mr Bitu received a 15 month fully suspended sentence in relation to this matter. The Witness made clear that the Fiji Independent Commission Against Corruption appealed against that decision, but were unsuccessful in their appeal. The Witness told the Tribunal that he fully disclosed this issue to his interview panel consisting of the Chairman of the Board Mr Weleilakeba, the Chief Executive Officer, Mr Bose and an external consultant, Ms Bole. The Witness was asked about the events giving rise to his dismissal. He stated that he was approaching his task “doing everything for the shareholders’ interests”. According to Mr Bitu, he had inherited a cash flow system and cash flow problems when he commenced. The Witness stated that there were a lot of Managers and that we put a proposed structure to the then Chair of the Board. Mr Bitu told the Tribunal that the Chief Executive Officer was not keen with the proposal. The Witness stated that most of the Managers were either relatives of the CEO, or from Ba town.

[36] Mr Bitu said that when he came into the organisation, that it was obvious that it had no money. The Witness told the Tribunal that the bank’s operating account was always “in the red” and so he was put in a very challenging position. Mr Bitu stated that he put measures in his email to the Chief Executive Officer, recommending reducing the telephone allowances to staff, post pay phone plans, and monthly allowances. The Witness said that at one point that there was \$2million in trade receivables. Further, Mr Bitu told the Tribunal that there was approximately \$2 million provided in related party advances, such as monies advanced to relatives and related entities. It was claimed that the company had provided about \$200,000.00 in staff loans and that the Chief Executive Officer himself owed more than \$100,000.00 to the company at that time. According to the Grievor, since these monies were part of trade debtors, he had advised payroll that repayments had to commence. Mr Bitu told the Tribunal that Mr Albert Sanday had approved these loans²⁴.

[37] Mr Bitu was directed by Counsel to an entry within the Employer’s operating account bank statement dated 30 June 2018, that showed a repayment to Mr Sanday in the amount of \$66,000.00²⁵. The Grievor’s attention was drawn to Annexure ML-9 to his Affidavit filed on 1 May 2019, in which in an email communication to his then CEO dated 2 July 2018 at 12.58pm, Mr Bitu wrote:

*It just came to my knowledge this morning that \$66k was paid into Albert Sandy (sic) Account (by transfer) from the Operating Bank Account on 30th of June, 2018.
I understand that this has been approved by you in your position as the CEO of the company with another authorized signatory whom we are not aware of.*

²³ The Respondent had been charged in the Magistrate’s Court in Suva with one count of Receiving a Corrupt Benefit, contrary to Section 137 (1) (a) (ii) of the Crimes Act and one count of False or Misleading Information, contrary to Section 333 (1) (a) and (b) (ii) and (c) (i) of the Crimes Act. See also unsuccessful appeal by FICAC in this matter in *Fiji Independent Commission Against Corruption v Bitu* [2018] FJHC 90; HAA026.2017 (20 February 2018)

²⁴ Mr Tikoca raised an objection at this juncture, that it was not fair to receive this evidence, when the allegations had not been specifically put to the Chief Executive Officer, Mr Bose.

²⁵ See Exhibit E1.

*Accordingly we only have \$2476 available balance for our utilities (FEA/WAF etc..)
Because of the above transfer to Albert we are not in a position to pay approx. \$32,420.11
for the Contractors in Koro.
As per Clause 2 of my Job Description I am in charge of the day to day management of the
daily cash-flow of BPHCL.
And with such activities (transfer to Albert account without Finance Dept knowledge) being
condoned from top management, how do you expect us to control our cash flow position at
your Finance Depart?
This arrangement with Albert Sandy (sic) is **NOT** in the best interest of the shareholders and
is against our fiduciary duties as custodians. Thus, it needs to be discontinued effective
immediately.
Submitted for your consideration and for future reference.
Regards
Meli Lasekula Bitu
MFA-BPHCL*

[38] Mr Bitu stated in his evidence that he did not know at the time, that the \$66,000.00 paid to Mr Sanday, had been drawn from the bank funds. The Witness stated that it was not possible to pay the contractors when requested, as the money had been transferred out of the bank account without his knowledge, by the CEO Mr Bose. The Witness told the Tribunal that Mr Sanday had been the Internal Auditor and Management Accountant prior to himself commencing and that Mr Sanday didn't have the qualification to be given that title, as the only qualification he was aware of, was that he had been a rugby referee. The Grievor was of the view that the mixing of monies between those provided for the Koro Island project and the operating expenses of Ba Holdings, without proper records of the transactions, was an intermingling of funds that was in breach of accounting standards. He stated that the funds received from Palladium for the Koro schools project, should have been used for that purpose. According to the Witness, the first thing that he had requested when he commenced his role, was that there needed to be a reconciliation undertaken, when funds were transferred from one account to another. The Witness stated that monies were taken from the Koro funds but were never repaid whilst he was employed at the company. When asked by Counsel, why Mr Sanday was providing loan monies to the company, the Witness responded, "that is the big question." Mr Bitu said that the monies loaned had not been approved by the Board and that Mr Sanday was charging 5 percent interest.

[39] The Grievor was referred to Paragraph 3.0 of the dismissal letter where it had stated, that "your attitude displayed since your joining on 4th June have confirmed that you are not suitable for the position that you were appointed to". In response to this issue, the Grievor was clear that he had said to the CEO in relation to Mr Sanday, "he goes, I stay – I stay he goes". Mr Bitu finally explained to the Tribunal, that he has been seriously impacted by the allegations and defamatory comments made by his former employer. Mr Bitu stated, that he had not been able to obtain full time employment since that time and had been stigmatized by the experience and could not put a value on that.

[40] In cross examination, Counsel put to the witness that he had disobeyed the instruction to pay the contracts at Koro Island from the funds in the operating account and the Grievor agreed that he had "disobeyed the unlawful instruction." In relation to the Internal Memorandum (Exhibit E3) Mr Tikoca asked the Grievor, "Did you receive the memo?" to which he replied, No, I would have signed off on it. The following exchange ensued:

Mr Tikoca: Why did you say you were disobedient?

Mr Bitu: I was not disobedient. Just giving priority to operating staff. I was just putting operating wages first, instead of Koro.

Mr Tikoca: Do you have authority to process wages one day earlier than when it was suppose to happen?

Mr Bitu: No

[41] The Witness agreed with Counsel that the transfer of funds between the operating and project accounts of the company were lawful, providing that the reconciliation had taken place. It was put to Mr Bitu, that he had been guilty of a gross misconduct, by failing to obey a lawful directive of the Chief Executive Officer. The Witness disagreed and said that this was not the case, “not when there is no money to pay.” The cross examination continued:

Mr Tikoca: (The CEO) signed a memo for you to pay \$32,000 – but you used it to pay wages?

Mr Bitu: Yes, due to unavailability of funds.

Mr Tikoca: You misled Finance Team to pay wages, instead of Koro contractors?

Mr Bitu: No.

[42] It was further put to the Grievor that the wages for the Lautoka staff would have been paid that week, if he had followed the instructions from the Chief Executive Officer, a position that the Witness could not confirm. In relation to the specific requisition that was prepared to facilitate the payment for the subcontractors in the amount of \$32,420.11, the Witness agreed that the requisition had been brought to his attention, but no action had been taken on it. The Witness was not sure whether in fact he had signed the payment voucher for forwarding to the Chief Executive Officer, although agreed that he was aware that the document had been prepared. The Witness stated that he was not sure if the cheque had been signed, but later appeared to recant from his earlier position and agreed that he had signed the payment voucher for this payment.

The Reasons for the Dismissal Decision

[43] To evaluate whether or not the Employer was justified in bringing the employment contract to an end, it is important to review the reasons for dismissal as set out within the dismissal letter.

2.0 Offences

[44] The first matter of substance raised by the Employer, deals with the claim that Mr Bitu had deliberately disobeyed the directive in regard to the payment for worker’s and contractors wages in Koro, which it was claimed was to be actioned as a priority. The Employer has told the Tribunal that the Koro Island wages staff and contractors had been waiting for payment for

two weeks and that the matter was conveyed to the Grievor on Thursday 28 June, as well as the morning of 2 July 2018. The claim is not made out, based on the evidence before the Tribunal. In the first place, all wages employees for Koro Island were paid their wages on Monday 2 July 2018. The evidence is that two amounts of \$9,068.68 and \$3,070.83 were paid that day. In relation to the subcontractors payments, it is accepted that this amount was not paid, however, the Tribunal notes the email communication that had been sent from the Grievor to the Chief Executive Officer, where monies he appears to have been otherwise relying on to pay those persons was no longer available, as the Chief Executive Officer had transferred \$66,000.00 out of the operating account, without his knowledge.

[45]The language of the dismissal letter is a little curious where it reads:

...you yourself committed the cardinal error of authorizing the payment of wages and salaries on Monday, even before the close of business and the money paid into the worker's accounts without approval.

[46]Here, the allegation does not align with the facts. As the illustrative payment voucher provided within Exhibit E3 shows, it is the Chief Executive Officer who authorises the payment from the payment voucher, not the Manager Finance. The process as to how payment of wages was made to these workers, was described in the evidence of Ms Culaculawave above. It is accepted that the Head Office workers (including the Chief Executive Officer) received their wages some time on Monday 2 July 2018²⁶, rather than the following day. It is accepted that the entitlement to those wages did not occur until after the close of business of that day, however there is no evidence as to when the monies were paid on that day. The Chief Executive Officer further writes, "this is the first time it has happened in the history of this Company". Whether or not this is the case is not that important, what is clear though is that had the Head Office staff not been paid whilst there was monies in the operating account, then they would not have been paid. There is no evidence of any other deposits that were made into the account the following day to have covered any shortfall that otherwise would have occurred. If the subcontractors had been paid from monies in the operating account, there was simply not enough money to pay others. It is suggested here, that in addition to this, the \$26,600.00 cheque that had been earlier post-dated and presented to Voloca Logging Contractors, was also dishonoured. But again, had the \$66,000.00 not been drawn out of the account in the manner in which it had, the Manager Finance would have been in a better position to understand all these things.

[47]It is not the role of this Tribunal to interfere or make unnecessary inquiry as to the operations of an Employer. The mandate is to ensure that the parties have conformed with their respective obligations at law. Whether the Employer in this case, had been misusing monies that indirectly came to it though Australia's Department of Foreign Affairs and Trade, is really a matter for Palladium International Pty Ltd and its clients. Certainly, based on the evidence given in these proceedings, it should come as no surprise to anyone why Mr Weleilakeba and Mr Mark Halabe resigned as Chair and Board Members from the company when they were of the view that the company was technically insolvent²⁷.

²⁶ At least that is when the banking into accounts took place.

²⁷ See Annexures ML11 and ML12 to the Affidavit of Evidence in Chief of Meli Lasekula filed on 1 May 2019.

[48]The Tribunal cannot place any weight on the notations made on Exhibit E4, nor on the evidence provided by Mr Bose in relation to the request to make payment. In the dismissal letter, Mr Bose claims that he had instructed Mr Bitu to make the payment for the Koro Wages and Subcontractors in the combined sum of \$41,515.15 both on Thursday 28 June and then again on the morning of Monday 2 July 2018. In the first place, the memorandum appears to have been approved and the request for the processing of the partial payment, based on an indeterminate date provided, more likely to be 1 July 2018. The original document was not provided and that in itself causes warning bells for the Tribunal, particularly having regard to the centrality of the document to the Grievor's dismissal. The more important question is, where are the relevant requisitions and payment vouchers for these transactions? Again here, the Employer said that these could not be found. The Tribunal finds that very difficult to accept.

[49]What seems to be the case is that at the time that the Manager Works and Construction had requested the immediate payment of \$101,753.45 to pay some outstanding invoices and contractors and wages employees who were both overdue, in the Project Bank Account on that date, based on Mr Bitu's reconciliation, the company held only \$4,061.36²⁸. In the operating account, when Mr Bitu reconciled the cash flow and included the transfer having been made to Mr Sanday of \$66,000.00 there was estimated to be \$2475.90 available²⁹. There was simply no money to pay the Koro Island contractors, the amount of \$32,420.11.

[50]The Chief Executive Officer claims that the payment to the company staff working at Rogorogovuda House, Lautoka, Ba and Qereqere, together with payment for security and cleaning expenses and FNPF should have been withheld, until such time as the Koro contractors had been paid. That is the essence of this issue, that the Grievor had failed to follow the CEO's instruction to pay the subcontractors. As the Employer claims that the relevant requisitions and payments vouchers are "missing", makes it very difficult to drill down to the truth of what really has taken place. What it seems from the payment that were made on 2 July 2018, that the Employer claims was unauthorised, despite the fact that the Chief Executive Officer had approved it; was that the wages bill for Ba Holdings employees other than those located at Koro Island, was \$27,429.31 (including FNPF)³⁰. Even if that amount had not been paid, there were still other payments due to be paid including security and cleaning costs of \$4,189.00 and additional Koro Island wages of \$3,070.83. It is unlikely even if the amount of \$27,429.31 had not been paid one day early, whether the Koro Island contractors could have been paid, as there was simply not enough money to pay them. In his evidence, Mr Bose claims that he would have found the money to have paid the company's workers the following day, but how was this going to happen? The limit to the overdraft facility of \$180,000.00 had been reached by this point. Was the Chief Executive Office going to borrow more money off Mr Sanday to pay wages?

[51]The Grievor was placed in an unenviable position. He was firmly of the belief that the Chief Executive Officer was acting improperly in relation to the misuse of specific Koro Island project funds, utilised for other purposes. There was no effective system of control of the cash

²⁸ See Exhibit E3 (b). Also note the bank statement provided by the Employer to the Tribunal in the documents marked as Exhibit T1, where the amount at that time was \$4024.53.

²⁹ See Annexure ML-9 to the Affidavit of Evidence in Chief of Meli Lasekula dated 1 May 2019.

³⁰ Within the Grievor's cash flow reconciliation attached to his email communication that was Annexure ML-9 to his Affidavit, this group of employees is referred to as 'Wages HQ'.

management and the dealings with Mr Sanday, that Mr Weleilakeba claimed were unauthorised, meant that there was simply no proper checks and balances in place. Mr Bitu thought he was doing the right thing. He was a person acutely aware of the need to act appropriately at all times, given that he himself knew what it was like to fail to exercise the appropriate degree of probity, required in the conduct of his duties as a former public servant. Mr Bitu clearly recognised that the company's financial position was in crisis and he made a choice as to the priority of payments. The point cannot be lost on anyone, that in any event, it was the Chief Executive Officer himself that ultimately authorised the payment for the Lautoka Head Office (HQ) Staff. There is certainly no allegation that any staff had been over-paid, only that the staff had received their wages one day earlier than otherwise ordinarily made available.

3.0 Attitude

[52]The second ground for dismissal that is contained within the dismissal letter reads inter alia:

You do not seem to appreciate the ongoing activities of the Company but have begun to do things contrary to what is being done without ever studying them. You have been here less than a month. Your giving an "ultimatum" to me as Chief Executive Officer in front of the Chairman on June 8th smacked of insubordination & disrespect and was really the height of arrogance.

[53]At the heart of this complaint, appears to be the position that was put by Mr Bitu to his Chief Executive Officer in the first week of commencing duties, when he essentially told him, that unless Mr Sanday's contract and involvement in the financial affairs of the company ceased, that the Grievor would resign. Let us reflect for one moment what was the state of affairs at the time. The evidence of Mr Weleilakeba and Mr Bitu was, that here you had a situation where the Chief Executive Officer was entering into loan agreements with Mr Sanday that were not authorised by the Board. A situation where Mr Bose himself had transferred funds into Mr Sanday's bank account, without the knowledge of the Manger Finance and Administration, whose area of responsibilities included "managing expenditure and daily cash flows³¹." It was a backdrop where the CEO gave evidence, of his practice of signing blank cheques. A situation where up and until around that time, that Mr Sanday was also the Internal Auditor of the company.

[54]No accountant with any integrity would have tolerated the situation. Mr Bitu's response to the conduct of Mr Bose and Mr Sanday, was quite understandable in the circumstances. The tone of Mr Bose's letter seems to have taken issue with the fact that the ultimatum was presented to him in the presence of the Chair of the Board, however the resignation letter provided by Mr Weleilakeba appears on all fours with that of Mr Bitu, when he stated:

(that the company requires) a change in operations leadership. Leadership that is authentic, clean and ethical.....the current leadership style of 'slash and burn', rule by fear, manipulative, divide and rule ..does not augur well.....the company is technically insolvent .. (and that it) requires the immediate appointment of a professional and highly skilled executive management team.

³¹ See Schedule 2 to the Employment Contract entered into between the parties on 4 June 2018.

[55] Mr Weleilakeba was in short, telling his fellow Board Members he had absolutely no confidence in the Chief Executive Officer whatsoever and believed that if the company Directors did not take action, that they would be in breach of their fiduciary duties. The attitude of Mr Bitu, was again understandable in the circumstances. That Mr Bose was presented an “ultimatum” by Mr Bitu, was not sufficient cause to justify his dismissal.

4.0 Criminal Conviction

[56] The dismissal letter reads:

This termination notice is under pinned by your criminal conviction and suspended sentence. Your record shows you were charged and found guilty in the Suva Magistrates Court with one count of Receiving a corrupt benefit, contrary to Section 137(1)(a)(ii) of the Crimes Act and one Count of False or Misleading Information, contrary to Section 333 (1)(a) and (b) and (c)(i) of the Crime (sic) Act

[57] It is hard to comprehend on what basis now the Chief Executive Officer has raised this issue. All three witnesses, Mr Bose, Mr Weleilakeba and Mr Bitu acknowledged that the Grievor had fully disclosed this issue at interview. Mr Bose gave evidence that if Mr Bitu had followed his instruction and paid the Koro Island contractors, he would still be employed. If that is the case, then the inclusion of this issue within the dismissal letter demonstrates a lack of bona fides on the part of the Employer. The Magistrates Court and High Court of Fiji found it appropriate that Mr Bitu’s sentence be fully suspended for three years. That time has passed and no public good is served by ‘dragging up’ this issue, in a bid to somehow strengthen the case for termination.

[58] The Employer did not have genuine concerns about Mr Bitu’s previous conviction. The matter was disclosed and despite that fact, a three member interview panel still decided to appoint him to the position of Manager, Finance and Administration. To rely on the conviction now, for this reason, is an act of bad faith and runs against the basic second chance philosophy that underpins the Fijian criminal justice system.

5.0 Fit and No Police Clearance

[59] The final issue that is raised within the dismissal letter deals with whether the Grievor is a fit and proper person and whether he had a police clearance. The letter relevantly reads:

The police as (sic) yet to confirm your clearance, but we have proofs and record of your conviction. You were given an opportunity to consider a variation to your contract to include the mandatory probationary provision so as to give Management some leeway in allowing your continued employment despite the conviction. You chose to ignore it.

What you have displayed shows you are not FIT and your criminal conviction record definitely confirms and consolidate the termination hereby awarded.

[60]The first aspect of this reasoning makes no sense. The disclosure had taken place and this was acknowledged. In relation to the variation of the employment contract, the relevant correspondence provided by Mr Bose to the Grievor is located at Exhibit E2, which is a letter dated 26 June 2018 and an apparent amendment to that letter the following day³². The claim is that the Grievor chose to ignore the correspondence. This again makes no sense. What was there to ignore? Let us also look at the time window in which all of this took place.

[61]If the letter dated 27 June 2019, is to be relied upon as requiring the Grievor to do something, the question begs what was it that it is claimed he was required to do? The language of the communication does not require the Grievor to do anything. What the Chief Executive Officer says is to happen is that the:

matter be regularized with the insertion of the relevant section that was precluded from the signed contract viz:

- (1) During that period the employee's employment is probationary and can be terminated without reason by either party on 24 hour notice.*
- (2) At or before the end of the probationary period, the employer will advise (sic) the employee if an employment position is to be offered to the employee in which case, the terms of this agreement will be terms applicable to the employment of the employee by the employer*

[62]The first and most obvious consequence of the variation that was proposed by the CEO in his letter, is that it is arguably unlawful in any event. If it was the case that the parties had been engaged under a fortnightly contract, then Section 29(1) (c) of the *Employment Relations Act 2007*, would render a 24 hour notice period as unlawful. During these proceedings, the Grievor had indicated that he was in the midst of obtaining legal advice in relation to the proposed variation in any event. At best he would have had the correspondence for two full business days. There is no justification for relying on this issue as the basis for bringing about the termination of the Grievor.

Is the Dismissal Decision Justified?

[63]The parties were given the opportunity to lodge closing submissions in this matter. Despite, the Directions being amended to allow a further time for the lodging of materials by the parties, for some reason, neither party chose to do so³³. This Tribunal cannot and will not be delayed by such indifference. If after two occasions of offering parties the opportunity to provide closing submissions that they fail to do so, the window for doing so is shut. There is no gain to anyone, in offering the opportunity to file materials on a third occasion. The Tribunal feels confident nevertheless, that all necessary information is before it, in order that an informed decision can be made.

³² See Annexure IB-3 to the Affidavit of Support of Isimeli Bose, dated 25 February 2019.

³³ Directions for filing of materials were issued on 19 June 2019 and 25 July 2019.

[64] The most important issue to determine at the outset, is whether the dismissal decision was justified.³⁴ That is, whether there was a valid and reasoned decision that formed the basis for the dismissal. The critical issue here, is whether there has been a wilful disobedience. The only documentary evidence of the instruction that was issued to the Grievor, is that which is located in Exhibit E4, that appears to read:

Pls process the wages and the contractors payments to be disbursed today.

[65] But when that notation was written is somewhat hard to determine. It appears to have been written on the first day of the month, though this is not clear. Mr Rakesh Prasad, claims that he discovered the contractors payments had not been made when he went to Koro Island on the Monday afternoon of 2 July. What is somewhat surprising here, is that if Mr Prasad had requested that the contractors be paid by close of business on 28 June 2018, why was it that he had not made any inquiry either on the 29 June or even the 2 July, before he had embarked for Koro Island. After all, the title of his Internal Memo was, "Urgent Payments for Koro Project". The Tribunal is inclined to the view that the notation of the Chief Executive Officer was not done until Sunday 1 July 2018. The Tribunal is also of the view that Mr Bose knew too well, the parlous state of the company accounts and he simply could not process the amount of \$101,753.45 that Mr Prasad had sought to have paid. Mr Prasad gave no evidence that in response to his memorandum, that he had been advised by the CEO Mr Bose, that it was simply not possible to pay that full amount. This too seems highly improbable. Some discussions must have ensued.

[66] The Grievor's response to the situation, is likely to have been tempered by the fact that he was well aware that the company could not pay its bills when due. That is, that it was insolvent. During cross examination, Mr Bitu freely admitted to giving priority to the operating staff and giving priority to the payment of their wages over the Koro Island subcontractors. The rationale appearing to be, because he was of the firm view that the project payments for Koro Island contractors, should have been sourced from the project account, that was awaiting further monies from Palladium. Although in the email that was sent to the CEO on 2 July, Mr Bitu makes clear that he cannot make the payment as requested, as there was insufficient monies in the account, following the transfer of \$66,000.00 to Mr Sanday. Certainly the Internal Memo does not instruct the Grievor to give priority payment to the Koro Island contractors, only that he should disburse the payments "today".

[67] The Tribunal accepts that the Grievor may have escalated the administrative activities associated with the payment of HQ staff in preference to facilitating the payment to Koro Island contractors, by having the time sheets reconciled on the Monday, rather than Tuesday. Although, as this was only the second occasion that the fortnightly pay system had been in place, it is hard to say what the custom and practice for processing the fortnightly time sheets would have been³⁵. Certainly the evidence is, that Mr Bose himself had approved his own wages for payment on that same Monday. If he didn't want the wages to be paid, it would have been a very simple thing for him to just not approve the payment and not sign the

³⁴ See an analysis of the relevant jurisprudence in *Kumar v Nanuku Auberge Resort Fiji* [2017] FJET 2

³⁵ One would think that a fortnightly pay cycle would increase the preparation time, when contrasted to a single pay week.

cheque. The evidence of Ms Culaculawave, was that prior to this event, that ordinarily the time sheets were given by HR to the Finance Team on the Monday. This evidence seems somewhat contradictory to what she had earlier given. If the sign off of the Managers did not occur til close of business on the Monday, then how would it have been possible to have handed over the time sheets for wages preparation on that same day? It is more likely, that Managers ordinarily signed off on the time sheets, well before close of business on Monday.

[68] The conduct of the Grievor appears wilful, insofar as he deliberately escalated the time for the payment of Ba Holdings staff, so as to avoid them having their pay delayed, due to the lack of funds. Yet, if one is to gain any guidance as to what would ordinarily be the way in which preferential payments should be determined, in other circumstances, the salaries and wages of employees would be given priority of payment to that of the contractors³⁶. The Tribunal accepts that the Employer wished the Grievor to undertake a probationary period of employment and that despite its defects, would have ultimately been something to have been agreed for variation to the employment contract. This is a case where summary dismissal was not justified, although the relationship between Mr Bose and Mr Bitu was coming close to being unworkable. Mr Bitu, rightly in the Tribunal's view was attempting to do the right thing and ensure that the company was acting in accordance with accounting standards and practices. The absence of good governance, concerns over misuse of monies and unauthorised loans being secured by Mr Bose, gave rise to the Chair of the Board and another member resigning. They it seems, were of the view that the company was technically insolvent and this was largely due to the practices of the CEO. There were internal loans paid to staff, including the CEO with no apparent repayment arrangements in place. There was an Internal Auditor loaning the company money to meet its operating costs, when these loans had not been given Board approval and the practice of a CEO signing blank cheques. There were claims that 'AusAid' monies channelled through Palladium to Ba Holdings for the purposes of rebuilding the schools at Koro Island, were being misused. The CEO was free to bring the contract to an end, by the giving of two week's statutory notice, had the probationary arrangement been in place. Otherwise, the dismissal was subject to the usual scrutiny warranting the termination to have been justified. This Tribunal cannot see justification in the conduct of the Employer, based on the unique facts of the case. The Grievor was trying to do what was right. At best in these circumstances, he should have been issued a warning. The dismissal was not justified.

[69] To recap the views expressed in *Kumar v Nanuku Auberge Resort Fiji*³⁷, it has been said:

As a starting point, at least in the context of 'unjustifiable dismissal', the question needs to be asked, having regard to the Statement of Reasons provided, whether a termination based on those reasons was justified. The question post Central Manufacturing v Kant, where a new regulatory regime is

³⁶ See for example, Section 473 of the *Companies Act 2015*.

³⁷ [2017] FJET 2

installed, must be, Can the dismissal be justified? The initial question to ask is not how the dismissal takes place, or what is relied on as part of that process, but whether the reasons for giving rise to the decision to terminate are justifiable. The concept of whether or not a termination or dismissal at work is justified or not, has been enshrined in international labour law for many years. The Termination of Employment Convention, 1982 (No. 158) adopted at the 68th International Labour Convention session in Geneva, sets out within Part II, Division A, a framework for assessing whether or not a dismissal is justified. Article 4 for example, provides that "The employment of a worker shall not be terminated unless there is a valid reason for such termination concerned with the capacity of conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Articles 5 and 6 thereafter provides additional illustrations of circumstances that would not constitute a valid reason for termination. These include union membership, filing a complaint or participating in proceedings against an employer, discriminatory grounds based on attribute, absence due to maternity leave or temporary absence from work because of illness or injury.

Northrop J in Selvachandran v Peteron Plastics,³⁸ provided the following clarification when a comparable question was being asked as to whether a termination decision was a valid one. In that case, his Honour stated:

Subsection 170DE (1) refers to "a valid reason, or valid reasons", but the Act does not give a meaning to those phrases or the adjective "valid". A reference to dictionaries shows that the word "valid" has a number of different meanings depending on the context in which it is used. In the Shorter Oxford Dictionary, the relevant meaning given is "Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value." In the Macquarie Dictionary the relevant meaning is "sound, just, or well founded; a valid reason."

In its context in subsection 170DE (1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of subsection 170DE (1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly, see what was said by Wilcox CJ in Gibson v Bosmac Pty Ltd, 5 May 1995, unreported, when Considering the construction and application of section 170DC.

...the concept of what constitutes a justifiable decision within the meaning of Section 230(2) of the Promulgation, could well canvas such concepts as to whether the dismissal decision was sound, defensible or well founded; not capricious, fanciful, spiteful or prejudiced.

³⁸ See [1995] IRCA 333;62 IR 371 at 373

Was the Execution of the Dismissal Unfair?

[70] In *Josifini Lagi v Nadi Town Council*³⁹ this Tribunal stated:

*The question of whether the dismissal was fair in my mind is quite clear.The issue is whether in carrying out the dismissal, the Employer acted in a manner that was harsh, aggressive, humiliating, degrading, embarrassing, or in a manner that otherwise causes humiliation, bad repute and injury to the feelings of the worker.*⁴⁰

[71] The dismissal letter is ingenuine. It is so, because it gives the impression that the previous criminal conviction of the Grievor, had not been disclosed. But the more reprehensible language within it, comes about where it states:

What you have displayed shows you are not FIT and your criminal conviction record definitely confirms and consolidate the termination hereby awarded.

[72] That language is totally inappropriate in these circumstances, where the Chairman of the Board gave evidence to make very clear, that there had been full disclosures by Mr Bitu at the time of his interview. To somehow attempt to leverage off this record now, when the Grievor was terminated for doing what he believed was the right thing, is vindictive, unnecessary and designed to cause hurt and distress to Mr Bitu. The language is unfair and reflects very poorly on Mr Bose and his capacity as a Chief Executive Officer.

Conclusions and Other Issues

[73] Section 230 (1) of the *Employment Relations Act 2007* provides

If the Tribunal or the Court determines that a worker has an employment grievance, it may, in settling the grievance, order one or more of the following remedies—

(a) reinstatement of the worker in the worker's former position or a position no less advantageous to the worker;

(b) the reimbursement to the worker of a sum equal to the whole or any part of the wages or other money lost by the worker as a result of the grievance;

(c) the payment to the worker of compensation by the worker's employer, including compensation for-

(i) humiliation, loss of dignity, and injury to the feelings of the worker;

(ii) loss of any benefit, whether or not of a monetary kind, which the worker might reasonably expect to obtain if the employment grievance had not occurred; or

(iii) loss of any personal property.

[74] 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

³⁹ ERT Grievance 173 of 2016; [2017] FJET 7; ERT Grievance 173.2016 (27 March 2017)

⁴⁰ See *Yanuca Island Limited trading as Shangri Law Fiji Resort and Spa v Vani Vatuinaruku* [2017] FJHC92 at [61].

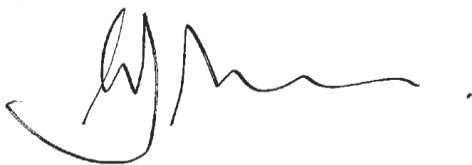
appropriate amount of compensation to be awarded to a Grievor, in the case where it has been established that she or he has been unjustifiably dismissed in employment. These would include: the length of service with an employer; the likely remuneration received if the employment had continued; attempts 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.

[75] In his evidence, the Grievor says that he has been defamed as a result of the conduct of the Employer and not been able to find full time employment. The Grievor had a reasonable expectation that he would hold the position as Manager Finance and Administration for some time. He was well qualified to undertake the role and acutely aware of the importance of ensuring that it was undertaken lawfully and ethically. At the relevant time, the Grievor was in receipt of a salary of \$45,000 plus housing and telephone allowance. This equates to an annual salary of \$52,200 plus FNPF. The Tribunal assesses that the Grievor should be awarded six month's salary (\$26,100) for loss of compensation, with an additional amount of \$5,000.00 for the hurt and humiliation that he had suffered through the way in which his termination was brought about and in particular, the derogatory and humiliating language that was contained within the dismissal letter.

Decision

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

- (a) The Grievor was unjustifiably and unfairly dismissed in his employment
- (b) The Employer should pay to the Grievor the amount of \$31,100.00 as compensation for loss of wages and for hurt and humiliation, within 28 days.
- (c) An Order to give effect to this decision will be issued to the parties.
- (d) The Grievor may make an application for costs within 28 days.



Mr Andrew J See
Resident Magistrate