

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

Grievance No 162 of 2011

**BETWEEN:** TOM JOSEPH LEE

**Worker**

**AND:** SUBRAILS FURNITURE, JOINERY & UPHOLSTERY LTD TRADING AS  
SUBRAILS FURNITURE CENTRE

**Employer**

**Counsel:** Mr D Nair, for the Employer  
No appearance by Counsel on behalf of the Worker

**Dates of Hearing:** Tuesday 27 March 2012

**Date of Judgment:** Wednesday 28 March 2012

---

**JUDGMENT**

---

**TERMINATION OF EMPLOYMENT CONTRACT – Section 33 Employment Relations Promulgation 2007 –  
Summary Dismissal of Employee: Non production of Medical Certificate: Absenteelism from Work**

**Background**

1. The Worker is a 24 year old man who entered into a contract of employment with the Employer in August 2010.
2. The Worker was engaged as a Sales Assistant, subject to the terms and conditions set out within the *Wages Regulation (Wholesale and Retail Trades) Order, 2011*.

3. The Worker was engaged for an indefinite period and had participated in an initial three month probationary period with the Employer.<sup>1</sup>
4. On 24 May 2011, the Worker was summarily terminated in his employment for reasons contained within a letter issued to him of that same date. In short, the primary reason for termination is claimed to be absence from work, without leave or approval.
5. The Worker initiated an employment grievance against the Employer on 31 May 2011, on the basis that he claimed he was unfairly dismissed.
6. This matter was referred to mediation on 1<sup>st</sup> and 8<sup>th</sup> August 2011 and without any resolution, referred to arbitration.

**Lack of Legal Representation at Hearing**

7. It is the case that the Worker was without legal representation at the hearing. The reasons for this are quite unsatisfactory. It is understood that his initial representative had taken ill, though it would seem that he had forecast this event one day prior. The substitute Counsel was himself not available at the commencement time and as it transpired, was not available later in the day despite earlier indirect representations that this would be the case. The result of all this, particularly given the costs already incurred by the Employer, led me to the view that the matter should proceed and that special accommodation should be given to the Worker, so that he was not disadvantaged in any way in the giving of his evidence or the agitation of his case. I believe that no disadvantage ensued to either side as a consequence of that decision and the manner in which the proceedings were conducted.

---

<sup>1</sup> See Paragraph 1.0 of the Submission of the Employer, as filed 31 October 2011.

**The Case of the Employer**

8. Mr Vimlesh Chetty, Manager of the Subrails Furniture Centre, Laucala was called as the sole witness for the Employer.
  
9. Mr Chetty indicated to the tribunal, that save for the worker's absenteeism that he was regarded as a good worker and one that the Company would have been prepared to have re-engaged. According to Mr Chetty, the termination of the Worker was brought about by continued absenteeism. He claims the worker was absent from work without leave, generally between 2 to 3 days each month. He stated that in April 2011, that he was absent for a period of approximately 3 weeks (8 April to 27 April) before he was ultimately contacted and returned to work.<sup>2</sup> On the occasion that gave rise to his termination, Mr Chetty indicated that the Worker had been absent from work for approximately 5 days and then failed to produce a medical certificate despite having been requested earlier to do so.
  
10. When questioned by the Tribunal, it was put to Mr Chetty that the absences were not accurately depicted. In relation to the absence in April, it was suggested that this came about because the Worker had resigned. Mr Chetty did not refute that proposition. Mr Chetty was also not in attendance at the workplace when the Worker returned to work in May, nor had he any direct knowledge of discussions that had taken place either prior to his absence, during his absence or upon the Worker's brief return to work on 23 May 2011.
  
11. Mr Chetty was taken to Section 68 of the *Employment Relations Promulgation 2007* and asked if he himself had asked that the worker produce a medical certificate following the Worker's absence from 19 to 23 May 2011. His answer was no. The witness was asked whether he knew if the Acting Store Manager, Ms Chand who had been supervising the Worker at that time, had made such a request. Mr Chetty was unable to provide any knowledge of such a request.

---

<sup>2</sup> Such an allegation seems extraordinary given the evidence of the Worker that he lived next door to his workplace.

- 12. It is nonetheless noted and Mr Nair forcefully made the submission, that the Worker had on previous occasions been advised that a medical certificate should be provided based on such absence. While there is no documentary evidence to that effect, there is no reason why I should not accept that position of the Employer.
- 13. According to Mr Chetty he was absent from the store, the morning of the termination and was therefore unable to assist the Tribunal further in relation to such matters.
- 14. It should be noted that the Employer did not provide any documentary evidence to demonstrate the alleged previous absences of the Worker. This would have been a simple task based on wages records and timesheets.
- 15. The case of the Employer, as given through the evidence of Mr Chetty, was that the Employer could not run a business with the uncertainty of an employee who was not reliable in his attendance.

**The Case of the Worker**

- 16. According to Mr Lee, the worker, he was absent from work on only three occasions. The first occasion in September 2010, when he fractured an ankle playing sport and was absent from work for two days. According to Mr Lee, he had provided a medical certificate on that occasion. On the second occasion in February 2011, he says he was absent from work for one day following a workplace accident, in which he says he was slightly concussed. On that occasion he freely admits not having provided a medical certificate.<sup>3</sup>
- 17. On the final days in question (19 May to 23 May 2011) the evidence of the Worker is that he telephoned the Acting Manager Ms Chand on 19 May and advised that he would not attend work because he was unwell and would not come back to work

---

<sup>3</sup> It should be noted here, that there was no suggestion whatsoever that he was required to provide a medical certificate on this occasion.

(128)

until such time as he was feeling better. According to Mr Lee, on 23 May 2011 he attended the Employer's workplace and indicated to Ms Chand that he would return to work the following day. According to Mr Lee, Ms Chand advised "ok".

18. The Worker's evidence was that upon returning to the workplace on 24 May 2011, he received a telephone call from the Operations Manager, Mr Pillay indicating that he was faxing through to him a letter. That letter dated 24 May 2011 advised the worker of his summary termination, as follows:

*It came to the Senior Managements attention that you stay away from work most of the time and also you did not inform your Centre Manager regarding your whereabouts.*

*You did not turn up for work on Thursday (19.05.2011), Friday (20.05.2011), Saturday (21.05.2011) and Monday (23.05.2011). I personally called you on your mobile but it was diverted.*

*You have been warned several times verbally regarding your absenteeism but there have been no signs of improvement at all. It seems to us that you do not take your work seriously.*

*In view of the above the company has no choice then to inform you that your service is no longer required.*

#### **Worker's Account of Absence for Period 8 April to 27 April 2011**

19. The Worker's evidence pertaining to his absence from 8 April to 27 April 2011 is as follows. He says that he had resigned from his employment on 8 April 2011 as a consequence of complaints that he had in relation to the underpayment of his wages. It was the Worker's evidence that he resigned on 8 April 2011 and took a complaint to the Labour Office. According to the Worker, it was only after being contacted by Mr Gounder, the Company Director who encouraged him to return to work, that he did so. According to Mr Lee, he was of the impression from Mr Gounder, that he would be paid for all underpayment of wages.

- (129)
20. The existence of a labour complaint, seems to be supported by the fact that contemporaneous enquiries from the Tribunal staff to the Labour Office made at my request during the hearing, confirmed that an active wages complaint was with that Office. At the hearing, the respondent Employer did not deny that such a complaint had been made. I am satisfied therefore that the Worker has made a wages complaint against this Employer.

#### Conclusions Drawn from the Evidence

21. The evidence of Mr Chetty in relation to the Worker absence for the period 8 April to 27 April 2011, is not accepted and the version of events provided by the Worker, preferred.<sup>4</sup>
22. It is hard in the circumstances to see what otherwise motivated the Employer to summarily terminate the Worker from his employment. If the Worker's account of events can be accepted and there is no evidence before me to the contrary, he advised his employer of his absence due to illness on 19 May 2011. He also advised his employer that he would be resuming employment on 24 May 2011. There was no evidence from the Employer that the worker did not have any statutory sick leave entitlements available to him. What Mr Chetty and Counsel for the Worker appear to be arguing, is that against an earlier expressed directive that such absences required the provision of medical certificates, that the Worker failed to comply.
23. The Employer could have easily restated that request to the Worker upon his return to work on 24 May 2011. The Worker could have at that stage indicated firstly whether he had consulted a medical practitioner and secondly whether or not he

---

<sup>4</sup> Counsel for the Employer also appears to have accepted that a resignation may have been at work, when he sought to therefore reduce any claim being made, as relating only to a new contract that must have taken place from 28 April 2011. For the reasons given to Counsel at the time, I do not accept that a new contract was in force. The preferred inference arising out of the conduct of the parties, is that the Employer allowed the Worker to withdraw his resignation and therefore as a result recognised the continuity of the existing employment arrangement.

had been issued with a medical certificate for his absence, or could he obtain one, reliant on that earlier consultation. That would have been the fair way to deal with this matter.

24. This to my mind suggests that the Employer has acted disproportionately to a workplace situation. It is a matter of conjecture as to whether or not, the tolerance threshold of the Employer was also lowered by the fact that the Worker had an active complaint against the Employer for unpaid wages. In any event, the Employer has not made out its case of seeking to rely on Section 33 of the *Employment Relations Promulgation 2007* as the vehicle for justifying the Worker's summary termination.

25. Whether or not the Employer could have otherwise given the worker notice of its intended decision to terminate his employment, is on this occasion academic. In my view without more, this set of facts would not have justified a decision to terminate the Worker's employment in any event. He would have been entitled to an opportunity to respond to the proposed decision to terminate and he should have been given an opportunity to provide additional medical information to support his period of absence. There was no record keeping of any counselling of the Employee and on that basis, no evidence of any efforts made by the Employee to warn the Worker of the consequences that would flow for continued absences. In my view, there is simply not adequate evidence before me that justifies any form of termination.

**Compensation Sought by the Worker**

26. The Worker is not seeking reinstatement. He is now working within the security industry and though while working at a lower wage rate, advises that he is content for the time being remaining in his present position.

27. The Worker was without employment for approximately five months. Given though that he was only employed with the Employer over a total period of nine months

and of his own doing absent from work for three weeks of that period, makes the order of compensation somewhat more complicated.

28. I do not accept Mr Nair's argument that the Worker's continuity of service was broken by the events of 8 April 2011.<sup>5</sup> It would appear that the Company Director sought the Worker's return to work. There is no reference within the termination letter to such an absence, which does beg the question why this was the case. In any event, I am content to accept that Mr Pillay's actions at the time as Company Director, constituted the Company's willingness to reject the Employee's resignation. The fact that the Worker was not paid for his absence at work, seems somewhat of a moot point.

29. The Worker's then monthly wage rate has been calculated at \$450.00. In my view the Worker had a reasonable expectation that his employment should have continued, although if it is the case that the Worker felt he was not being paid correctly in accordance with his statutory entitlements, then it is likely that the employment contract would have come to an end sooner rather than later.

30. The Employer has not demonstrated that it has acted appropriately in the circumstances. The letter of termination states:

*"..you stay away from work most of the time"*

31. There is no evidence of that whatsoever. The Worker was entitled to have the allegations put to him and given an opportunity to respond. The financial consequences that flow to a terminated worker, as a result of summary termination are obvious. There is also a degree of stigma rightly or wrongly that also attaches to such an event.

---

It should also be noted that Counsel was initially unaware of these events. He raises, somewhat validly, the fact that the Grievor had made no mention of this issue in the Grievor's Preliminary Submission. This may have been due to the fact that the 3 week April absence, did not form part of the Employer's termination letter.

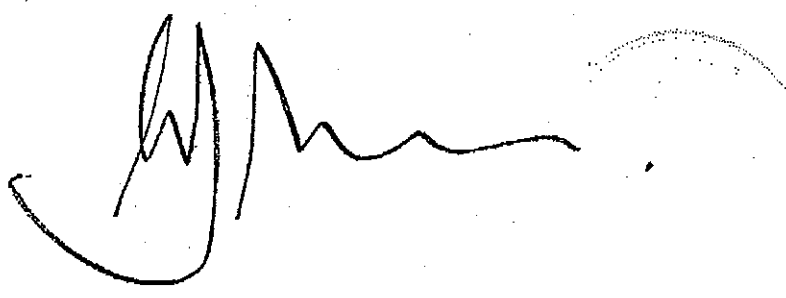


- 32. Workers need to be protected against conduct by Employers that is not even-handed and fair in all of the circumstances. I award the Worker the equivalent of three months wages entitlement, as compensation for lost earnings. That sum equates to \$1350.00
  
- 33. The Worker has not sought any specific reimbursement for legal expenses incurred. He did indicate that he would have to pay 25% of any compensation received to his Counsel, should he have been successful in these proceedings. As Counsel did not attend the hearing, nor is there any evidence of any extensive work undertaken in relation to Preliminary Submissions, I do not believe that the Worker should have to meet such costs. It is noted that representatives did nonetheless attend mediation and a preliminary directions hearing. I will allow \$100.00 only for the expense of the representative and order that the Employer pay this cost.
  
- 34. I would also encourage the Employer to assist the Worker resolve any outstanding wages complaint he may have, as a matter of priority.

**DECISION OF THE TRIBUNAL**

35. The Tribunal orders:

- (a) That the Employer pay the Worker the amount of \$1350.00 as general compensation, within fourteen days hereof.
  
- (b) That the Employer pay the Worker, the additional amount of \$100.00, for representative costs associated with the undertaking of this action. Such payment also to be made within fourteen days.



**Mr Andrew J See  
Resident Magistrate**