

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

ERT Dispute No 61 of 2011

BETWEEN: AMENATAVE MALANI

Grievor

AND: NASINU TOWN COUNCIL

Employer

Counsel: Mr W. Tokalau for the Grievor
Ms M Savou for the Employer

Date of Hearing: Friday 12 April 2013

Date of Decision: Wednesday 1 May 2013

DECISION

EMPLOYMENT RELATIONS PROMULGATION 2007 - Section 194(5); Administration of Justice Decree 2009; Administration of Justice (Amendment) (No.3) Decree 2010 – Section 23B(1).

Background

1. This decision deals with a matter that possibly should have been argued at first instance, in the form of a threshold jurisdictional issue. The grievance deals with the claim of unfair and unjust termination of employment, arising out of a contract entered into between the parties on 6 April 2009.
2. The employment contract was terminated by the Employer on 21 January 2011, at the directive of the Ministry of Local Government, Urban Development, Housing and Environment.

3. At issue in the first place, is whether or not the decision of the Nasinu Town Council or in fact that as exercised in the directive issued by the Ministry, is one that is not subject to challenge by virtue of Section 23B of the *Administration of Justice Decree 2009*.

Section 23 B Administration of Justice Decree 2009

4. Section 23 B of the *Administration of Justice Decree 2009*, reads as follows:

"Certain decisions of the State not to be challenged

23B - (1) No court, tribunal, commission or any other adjudicating body shall have the jurisdiction to accept, hear, determine or in any other way entertain, any challenges at law, in equity or otherwise (including any application for judicial review) by any person or body, or to entertain or grant any remedy to any person or body, in relation to the validity, legality or propriety of any action, decision or order of the Government of the Republic of Fiji, any Minister, the Public Service Commission or any statutory authority or Government entity to:

(i) restructure or reform any Government public office or public service, including corporatizing or privatizing any Government department, ministry, statutory authority or Government entity; or

(ii) alter or amend the terms and conditions of employment of any person in any public office or public service, including any changes effected through directions issued by the Public Service Commission by any memorandum or circular or through any other directive issued by the Government of the Republic of Fiji, any Minister, the Public Service Commission or any statutory authority or Government entity; or

(iii) any changes to terms of services including the remuneration of any person in public office or public service, statutory authority or Government entity;

(2) Any action proceeding, claim, dispute or grievance of any form whatsoever in any court, tribunal, commission or any other person or body exercising a judicial function which purports to or purported to challenge any action, decision or order of the Government of the Republic of Fiji, any Minister, the Public Service Commission or any statutory authority or Government entity as it relates to actions, decisions, or orders as referred to in subsection (1) shall wholly terminate upon the commencement of this Decree and all orders

whether preliminary or substantive made therein shall, wholly terminate upon the commencement of this Decree, and a certificate to that effect shall be issued by the Chief Registrar, Tribunal, Commission or any other person or body exercising a judicial function.

(3) A certificate issued under the subsection (2), is for the purposes of any proceedings in a court, tribunal, commission or any other person or body exercising a judicial function, conclusive of the matters stated in the certificate.

(4) A decision of the Chief Registrar, Tribunal, Commission or any other person or body exercising a judicial function to issue a certificate under subsection (2) is not subject to challenge in any court, tribunal, commission, or any other adjudicating body.

5. The discrete categories of case that can be drawn from this provision and that need to be analysed, are as follows:

Actions, decisions or orders of either:-

- *the Government of the Republic of Fiji;*
- *any Minister;*
- *the Public Service Commission;*
- *or any statutory authority or Government entity*

6. The first class of actions, decisions or orders would be those issued by persons exercising authority under the *Executive Authority of Fiji Decree 2009*. This would appear to be either the President, the Prime Minister or the Cabinet.
7. The second would be those made by Ministers exercising powers as issued under Sections 8(1) and (2) of the *Executive Authority Decree*.
8. The next would relate to decisions made by the Public Service Commission in accordance with Sections 11 and 12 of the *Public Service Act 1999*.
9. The final categories of case would seem to deal with either authorities that have been:-

- a. established by specific statute and in which set out their governing arrangements; or
 - b. entities created and controlled by government, (an example may be that of a corporatised business unit of government), though not established in their own right by discrete enactments.
10. Neither party to these proceedings, is claiming that the termination decision¹ falls within the first or third categories of case. Instead, what is being argued by the Employer, appears to be that the decision is one that is made by a Minister.
11. The Grievor in turn argues that the decision is not one made by Nasinu Town Council in a capacity as either a statutory authority or government entity.

Is the Decision One Made by a Minister ?

12. I cannot see how this decision could be one that is made by the Minister. At best the only evidence that is available from the Employer, is that the directive to terminate, was issued to the Special Administrator Nasinu Town Council, by letter dated 21 January 2011.² That letter was signed by J Rakuita for Permanent Secretary of Local Government, Urban Development, Housing & Environment. It makes no mention of a decision of the Minister.
13. Nowhere within that documentation is any reference made to the relevant Minister whatsoever, or to the fact that he had been somehow involved in the decision making process.
14. A Directive from the Permanent Secretary or his or her delegate, is not a Ministerial decision.

¹ Action or order

² See Exhibit E3 (Attachment J to the Further Preliminary Submissions of the Employer filed 14 March 2013)

15. To that end and in the absence of any better evidence, I am not inclined to support a contention that the termination decision is one that is made by the Minister for Local Government, Urban Development, Housing & Environment.

Is the Employer a Statutory Authority or Government Entity?

16. Counsel on behalf of the Grievor, argues within his submissions that in the cases of *Construction, Energy and Timber Workers Union of Fiji and PAFCO Employees Union v Fiji Electricity Authority and Pacific Fishing Company Limited*³ and *Sera Nicholls v Suva City Council*⁴, the Employment Relations Court has held that local authorities are captured by the *Employment Relations Promulgation 2007*. So much is made clear by the language of the original 2007 Promulgation, that drew the distinction between local authorities, statutory authorities and government entities; indicating that these were distinctive categories of employer.⁵
17. The net result appears to be that the Nasinu Town Council is not a statutory authority for the purposes of the Promulgation, nor is it caught within that expression as it is used within Section 23B of the *Administration of Justice Decree 2009*.⁶
18. For the above reasons, I am of the view that the grievance and more importantly the decision that it relates to, is not caught within Section 23B of the Decree.
19. Based on the evidence and submissions before me, the decision to terminate the Grievor arises neither from an action, decision or order, whether from a Minister,

³ [2011] FJHC 821.

⁴ [2012] FJHC 1139

⁵ See Section 3 of the Promulgation and the definition given to local authority at Section 4.

⁶ This seems to be the case, given that the *Employment Relations(Amendment) Decree 2011* and the *Administration of Justice (Amendment) (No3)Decree 2010* would appear to be legislative instruments seeking to otherwise achieve the same opting out arrangements and by virtue of Wati J's decision, should be able to be assumed to have the same result. (ie Instruments of pari materia).

statutory authority or government entity. It appears to be based on the directive of a delegate of the Permanent Secretary of a Government Department on the recommendations of findings of the Prime Minister's Investigating Team. The decision was in turn, put into effect by a local authority. I therefore find it is not a decision that is immune from the provisions of the *Employment Relations Promulgation 2007*.

Was the Decision Unfair or Unjust ?

20. In *Nale v Carpenters Fiji Ltd*⁷, this Tribunal set out established principles of law and practice that govern the obligation of an employer when terminating an employee. Within that decision the Tribunal referred to views of the Supreme Court in the case of *Central Manufacturing Company v Kant*⁸, where it was determined that

..there is an implied term in the modern contract of employment that requires an employer to deal fairly with an employee, even in the context of dismissal.

21. It was noted in *Kant*, that while the Court was of the view that the *common law* implication plainly does not extend to a requirement that reasons be given, or that a hearing be afforded at least where the employee has the right to dismiss without cause and to make a payment in lieu of notice. It does extend, to treating the employee fairly, and with appropriate respect and dignity, in carrying out the dismissal.

22. It is very important to note that *Kant* was decided before the advent of the *Employment Relations Promulgation* in 2007, in which a deliberate statutory framework was created:

Providing a structure of rights and responsibilities for parties engaged in employment relations to regulate the relationship.... as well as effective prevention and effective settlement of employment related disputes. (and)'

⁷ [2012]FJET3

⁸ [2003]FJSC 5

*Establishing the mediation services, the Employment Relations Tribunal and the Employment Relations Court to carry out their powers, functions and duties.*⁹

23. That framework provides statutory safeguards that ensure that termination decisions can now be vetted by the Tribunal and Court. Put simply the Promulgation now fills the void that was brought about under the common law, where there was no remedy for unfair dismissal only for breach of contract.¹⁰

24. As indicated in the case of *Nale*,¹¹

While the Employment Relations Promulgation 2007 does not set out a statutory framework for how unfair dismissals within employment should be adjudged, the Promulgation does nonetheless provide strong signposts that termination in employment (whether with or without notice, or with or without cause) should be undertaken fairly.

Consider for example the language at Section 230(2) of the Promulgation. The Tribunal and Court both have powers to remedy or resolve grievances that arise out of "unjustifiable or unfair dismissals". Yet these terms are not defined within Section 4 of the Promulgation. So what is an unjustifiable or unfair dismissal?

Section 4 of the Promulgation defines the term "dismissal" to mean: any termination of employment by an employer including those under Section 33"

In the case of a written contract, for example, such dismissals would include, any termination of employment that is unilaterally initiated by the Employer, including termination arising under:-

- *Section 41 (in the case of a worker's inability to fulfill the contract[22], or due to sickness or accident; and*
- *Section 33 (that deal with the circumstances in which summary dismissal is justified);[23] and*

⁹ See Preamble to the Promulgation No 36 of 2007.

¹⁰ See *Addis v Gramophone Co* [1909]AC 488

¹¹ At [57] to [68]

- Section 29 (in all other cases where termination is provided with notice).[\[24\]](#)

In the absence of any statutory or apparent common law definitions of "unjustifiable and unfair dismissals", I would attribute the following ordinary meanings to such words. For a dismissal to be justified, it would need to be capable of demonstration that it was just, right or valid; capable of being defended with good reasoning. A decision would be unfair, if it was harsh, unjust or unreasonable.

So it would seem the intention of the Promulgation is to ensure that all terminations of employment are both justified and fair. Unlike the common law, the Promulgation does not just concern itself with the manner in which the dismissal was executed, but whether or not it was justified or fair as a substantive decision. A remedy for reinstatement would not be made available, if the role of a tribunal was only confined to the manner in which an employer treated a worker at dismissal and not whether or not, the decision to termination was actually justified in the first instance.

The critical focus of termination law is that the unilateral action taken by the Employer to bring to an end the employment contract is placed under scrutiny.[\[25\]](#)

In the case of a Worker seeking statutory relief, what is being pursued, particularly where reinstatement is sought, is the intervention of the court or tribunal, to declare the termination, unjustifiable or unfair.

This requires two considerations. Firstly, an assessment as to whether or not the termination was unjustified or unfair, but secondly, whether such a remedy is a feasible one.[\[26\]](#)

The interrogation of employment grievances alleging unjustifiable or unfair dismissal, therefore have as their focus the cause or reason for termination. It would be hard to envisage an employment contract, other than in the case of a Section 40 Contract, where a cause was not attributable to its termination.

An Employer may for example determine that a position is genuinely redundant, in which case, the action to terminate may be justifiable and depending upon how the redundancies determined, fair. The termination may be based on the inability of the Worker to meet the key performance objectives of the position, or it may be as a consequence of the employee's behaviour and conduct at work. It may be due to communication or personality disputes. These are all causes. An employer does not bring an employment contract to an end for no reason, for no cause.

A Worker engaged under a contract for an indefinite period of time, is entitled to understand the reason for termination. To not do so, in my mind, at

least in a prima facie sense, renders the termination, unfair or unjustifiable. An Employer may say that it has no obligation to provide such reason, but in my mind such a state of affairs would more likely than not, be unfair.

25. These are the principles that should govern the analysis of the present case before the Tribunal.

The Case of the Employer

26. The case of the Employer was opened with the calling of evidence from Ms Filimaina Waqa Varea, the Human Resource Manager, Nasinu Town Council. The purpose of Ms Varea's evidence was in effect to explain to the Tribunal the events that had transpired leading up to the termination decision.

27. Essentially the history of events can be described through that evidence as follows:-

- The Grievor was appointed to the role of Assistant Manager Human Resources, following the acceptance of a letter of offer dated 3 April 2009;¹²
- The contract was for a fixed term of three years, though it had a termination provision that allowed the Grievor to give one month's notice of termination.
- Some time on or around 15 November 2010, the Council received a directive from the Ministry of Local Government, Urban Development, Housing and Environment, that the Grievor was to go on 14 days annual leave, in order that an investigation could be conducted by the Prime Minister's Investigation Team into allegations of corrupt practice levelled against the Grievor.
- The Grievor was notified of this requirement in writing, by letter from the Special Administrator, Nasinu Town Council dated 18 November 2010.¹³

¹² See Exhibit E1

¹³ See Exhibit E2.

- As the investigation had not concluded within that time frame, the Grievor was advised by his Employer to take a further three day's leave.
- The consequence of that investigation was contained in summary form within a letter written from the Ministry to the Special Administrator dated 19 January 2011¹⁴, in which it provided among other things, that:

Mr Amenatave Malani's employment is to be terminated forthwith for breaches (sic), corrupt practices and gross misconduct.

- As a consequence of the above, the Employer thereafter wrote to the Grievor and terminated his employment.
- Included within that correspondence dated 21 January 2011¹⁵ were the reasons given by the Employer as follows:

Essentially, your termination is due to the fact for breaches of work conduct, corrupt practices and gross misconduct.

- At termination, the outstanding annual leave entitlements calculated by the Employer were seven days.¹⁶

28. According to the witness she herself had a good relationship with the Grievor. When asked whether there were any other issues of a disciplinary nature involving the Grievor, she advised that there had been one occasion of an alleged assault against a labour staff person that was resolved internally and one complaint, prior to her time that involved allegations by a female employee of sexual harassment.¹⁷

¹⁴ See Exhibit E3.

¹⁵ See Exhibit E4.

¹⁶ See Exhibit E5.

¹⁷ This matter was subsequently dealt with by an Internal Disciplinary Process and is the subject of correspondence as tendered by Ms Savou as Attachment P to the *Further Preliminary Submissions of the Employer* dated 14 March 2013.

29. At cross-examination, the witness indicated that additional allegations of corrupt practices were levelled against the Grievor and reported by staff to the Prime Minister's Office, prior to her commencement with Council. She stated that these allegations were made in writing and were not made available to Council.
30. When asked by Mr Tokalau words to the effect, "If it wasn't for the investigation would the Council have done anything to investigate the Grievor?", the response was "No".
31. Ms Varea was also not aware whether the Grievor had been informed of the specific allegations.

Nature of Corrupt Practices

32. At this juncture the Tribunal sought clarification from the witness as to what were believed to be the specific allegations, the subject of the Prime Ministers Investigating Team's inquiry. The witness believed that these were as follows¹⁸:-
- Discrimination among staff;
 - Unfair treatment (those who were personal favourites receiving favourable treatment);
 - Tampering with personnel files of employees;
 - Placing a negative report on employee without knowledge of employee;
 - Abused his office of position of Assistant HR Manager (eg If i do this for you what are you going to give me);
 - Bullying Staff; and
 - If he had conflict with staff would always work out way to get back at staff.

¹⁸ The witness claimed not to have specifically seen the allegations, but was relying on general discussions that she had had with various Council personnel and presumably investigators when providing this response.

33. The Tribunal further enquired of the witness, whether prior to the 18 November 2010, were there any other allegations on file. In this regard, the witness advised that there were including the following complaints:

- Staff had signed a grievance and sent it to the Prime Minister's Office on 9 October 2009 (This dealt with allegations of poor leadership, attitude, nepotism and misuse of Council vehicle);
- 31 December 2009- Irregularities – Nasinu Town Council; including allegations of temporary appointment of relatives; failing to act against an officer who had been guilty of theft against employer;

The Case of the Grievor

34. Mr Tokalau opened the case of the Grievor, by calling the former employee to give evidence.

35. According to the Grievor at engagement he was not specifically made aware of any disciplinary procedures Council had, though acknowledged he consent to be bound by Council policies and rules.

36. His evidence in summary was as follows:

- He was not given details of the grounds of his suspension from work on 18 November 2010, only that he was shown a letter from the Ministry directing the Council to suspend him for an initial period and to go on annual leave.
- The Grievor was not provided with reasons for his termination.
- He met with the Prime Minister's Investigation Team on one occasion only; that it was not a disciplinary meeting; there was no mention of allegations, nor of discussions regarding corruption.
- He claimed that he had provided an initial response to the allegations to the Special Administrator of Council and that the investigators were of the view that this was sufficient.

- It was the Grievor's understanding that they would speak further to Council staff. He said the allegations were not just about him.
- After a period of time, he received a telephone call from the Special Administrator to advise that he was now directed to terminate his employment, alongside a few other employees.
- It is claimed that in relation to the other two employees that they subsequently asked that their case be reviewed and that they were reinstated in employment.

37. When cross examined by Ms Savou, the witness conceded that he was provided with an opportunity to respond to allegations in writing. He said that he wrote his response in front of the Investigation Team and claimed that most of the allegations were from a former Information Technology Officer that they had terminated. He stated that the allegations were made against the Special Administrator and himself. The witness maintained that he was advised at this meeting:

"Based on your response we will speak to other Council Members..(but) I was not given an opportunity to respond."

38. The Grievor claimed that he was made to take annual leave when the investigation was being conducted and that this was unfair; that he took annual leave under duress. In relation to the allegations that were levelled against him, the witness claimed that he had spoken to the Special Administrator about these and was initially provided 3-4 days in which to provide a response.

39. He clarified that the allegations focussed on four main themes:-

- Leadership;
- Human resources;
- Discrimination and
- Contract Tendering.

40. In clarification of the allegation pertaining to sexual harassment of a co-worker, the witness explained that it related to an occasion in which he summoned a female employee to his desk. According to Ms Savou, the complaint was made under Section 213 of the *Crimes Decree* 2009. That is, the indecent insulting or annoying of a person.

Conclusions of the Tribunal

41. There is no evidence before the Tribunal of the Grievor being provided with a final opportunity to respond to any of the statements given by Council workers to the Investigation Team.
42. Ordinarily that would have been a fair thing to do. Even if it was the case that the gathering of additional evidence did no more than provide corroborative evidence. So much should have been put back to the Grievor. That is, he should have been given the opportunity to respond to the allegation that the views of the former IT worker were supported and corroborated by staff. It is hard therefore to ascertain what else shaped the view of the Investigation Team or the Permanent Secretary, in reaching its decision.
43. However, in the broader picture the Investigating Team may have been relying on a longer analysis of issues when reaching its conclusion. The Grievor clearly did not have a clean record of employment. He had complaints levelled against him on several occasions and had already been suspended for a period of two weeks by a disciplinary board. The issue of an alleged workplace assault, which was not contested by Counsel for the Grievor, is also of some concern.
44. While the Tribunal has not had the advantage of understanding what actually took place during the course of the investigations, it is clear that there had been a consistent flood of complaints levelled against the Grievor for a considerable period of time.

45. There is no evidence that the allegations were investigated thoroughly, nor is there evidence that the investigation was wanting in some respect. I simply cannot make any findings in that regard, only that it would seem the Grievor was not provided with an opportunity to respond to the wider findings of the investigator, following the interviewing of Council staff.
46. To that end, the termination would appear procedurally unfair. I nonetheless sense that on balance there did appear to be ongoing reasons why the Grievor should not have remained in his employment with the Employer. I reach that conclusion regardless of whether the investigation and termination was initiated by either the Employer, the Ministry or the Investigation Team. There would appear to be many unchallenged incidents of poor conduct and indiscretions. There was one occasion of alleged assault against an employee and at least one of inappropriate conduct against a female staff member.
47. I am not convinced that had the Grievor been given a further opportunity to respond to the broader evidence accessed by the Investigation Team, that the net result would have been any different.
48. It was clear that the Grievor was deemed unsuitable for continued employment in the eyes of the Ministry and the Investigation Team. The fact that the Employer was content to follow the directive of the Ministry to execute the termination decision, is also prima facie evidence of its complicity in the process and its satisfaction with the request.
49. If not, it would have been opened to the Employer to have verified the lawfulness of the request in the context of the *Administration of Justice Decree 2009*. There is no evidence whatsoever that it did so.

Requirements for Summary Termination

50. Section 33 of the *Employment Relations Promulgation* 2007 provides:

(1) No employer may dismiss a worker without notice except in the following circumstances-

(a) where a worker is guilty of gross misconduct;

(b) for wilful disobedience to lawful orders given by the employer;

(c) for lack of skill or qualification which the worker expressly or by implication warrants to possess;

(d) for habitual or substantial neglect of the worker's duties; or

(e) for continual or habitual absence from work without the permission of the employer and without other reasonable excuse.

(2) The employer must, provide the worker with reasons, in writing, for the summary dismissal at the time he or she is dismissed.

51. I have some reservations that the Employer has not fully complied with the requirements of Section 33(2) of the Promulgation. The reasons provided by the Employer in my view are scant and hardly provide a full understanding in any objective sense, as to what really has transpired between the parties. Having said that, I nonetheless accept that the Grievor was aware of the nature of the allegations that he initially responded to and could safely relate these to the general reasons provided by the employer on this occasion.¹⁹ If I understand the Grievor's evidence correctly, he was initially shown the allegation letter from the Special Administrator and prepared a response. He provided an additional response while in attendance with the investigating team.²⁰

52. The reasons provided by the Employer within the termination letter state, "breaches of work conduct, corrupt practices and gross misconduct". Yet there is certainly no further understanding of what this all means. The Employer itself could not expand

¹⁹ That is not to say that on occasions where a worker was not fully appreciative of the allegations being put to her or him, that a similar set of reasons would be similarly characterised.

²⁰ His evidence at one point was that he was made to write a response on one A4 page before Investigators while at that meeting.

these, as based on the evidence of Ms Varea, it was not really privy to the specific allegations or the findings. On that basis while I am not necessarily convinced that the Employer has made its case out in relation to gross misconduct, I am satisfied that neither has the Grievor been able to dispute the allegations adequately. The Grievor admits to having responded to the allegations, but he too for whatever reason, elected not to canvas the scope of that response at trial.

53. It is also the case that the Grievor has been the subject of previous allegations of a similar nature, a case of alleged assault against a labour employee and a claim of sexual harassment of a female co-worker.
54. On balance, I am prepared to accept that the case of the Employer justifying the termination of the Grievor has been made out. That is not necessarily to say that I would find that the Employer was entitled to terminate the Grievor summarily for reasons which I will shortly address. But having said that, proven deficiencies in the investigation and termination decision making process, need not always be fatal to an employer's decision to terminate an employee.²¹ The worker may still be guilty of the misconduct, even if it is the case that the investigation process is flawed.²²

Compulsory Taking of Annual Leave

55. The residual complaint of the Grievor relates to the fact that he was compelled by his employer to take 17 days annual leave, while in effect suspended from duties. It is noted in the contract of employment entered into between the parties on or around 3 April 2009, that the Grievor was entitled to 15 days paid annual leave per annum.

²¹ See for example analysis in *Humphries and Cootamundra Ex-Services and Citizens Memorial Club* [2000]NSWIRC 208 at [130]-[136]

²² I reach this conclusion on a very fine balance of the facts and evidence before me.

56. While the *Employment Relations Promulgation 2007* sets out the statutory minimum entitlement provided for under Fijian law, it does not provide any insight into the way in which the parties under contract, can agree for the taking of such leave.
57. Ordinarily I would have thought that the taking of leave either comes about as a result of the mutual agreement of the parties, or in accordance with some form of advanced scheduling of the work cycle. In either case, it would be fair to expect that a worker should be given advanced notice as to when that leave would be taken.
58. In the case of workers with family responsibilities, they too I am sure, would like some capacity to negotiate with their employer for the taking of such leave. Such an expectation would seem most reasonable and in line with international labour practices.²³
59. I sympathise with the Grievor in being forced to take annual leave, at that stage when the investigation commenced. What if it was the situation that the Grievor was found innocent of all of the allegations? That they were baseless and possibly even the work of a spiteful ex-employee.²⁴ Why should he be made to take annual leave, if at the end of the day he was cleared of all allegations?
60. Ordinarily workers in similar situations would be stood down on full pay. The incentive for the Employer or anyone else charged with the task of an investigation process, would then be to complete the activity as expeditiously as possible. A worker could be on leave for a very long time, if it was the case that the investigator was slow in its task. That is simply unfair.

²³ Note for example ILO Convention 156 - Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981

²⁴ Which is what the Grievor actually asserts that they are.

61. In the circumstances that have been described to this Tribunal, I do not think that there has been any justification for compelling the Grievor to take annual leave at the commencement of an investigation. He is entitled to a fair hearing and investigation and that would also mean, entitled to remain in paid employment, even if there was not a requirement to attend work for a specific period of time.
62. I find this aspect of the Employer's conduct, unfair and riding against traditional industrial principles. The worker should be compensated for those 17 days that he had otherwise been required to take his leave.

Conclusions

63. The first major concern I have with this termination is the way in which it has been brought about.
64. The Minister is clearly entitled to issue an instruction to the local authority and request that a worker's employment be terminated. The Minister is able to do so, with the complete unfettered discretion that is found within Section 23B of the *Administration of Justice Decree 2009*. No such power otherwise exists in the case of a Permanent Secretary (or delegate) and or local authority. Decisions that they bring about, are amenable to the interrogation of this Tribunal.
65. On this occasion, the Employer acted on the ostensible advice of the Permanent Head, who in turn was acting on the recommendations of the Prime Ministers Investigation Team.
66. There is no apparent power that is vested within the Prime Ministers Investigation Team, that would render any action, decision or order that it makes, requesting the termination of a worker, to be one in which cannot be challenged by virtue of Section 23B of the Decree. As such, the decision is capable of being interrogated for both its fairness and justification.

67. The process embarked upon and explained to the Tribunal, based on the evidence available to me, does not look absolutely fair in all respects. On this occasion however, I am nonetheless satisfied that based on the previous course of dealings between the Employer and Grievor in relation to similar fact matters, that the Grievor did understand the nature of the allegations that were levelled against him and he was giving the opportunity to respond to such allegations. So much was his evidence.
68. The fact that the Grievor held a role within the human resource department of the Employer, may also impose upon him a requirement to demonstrate a higher level of corporate and professional conduct befitting of such a position. In some respects, human resource personnel are assumed to exemplify the qualities of employee conduct that an organisation holds as being the ideal. For an Assistant Human Resource Manager to have been involved in not only an alleged assault against a labour employee, but also a disciplinary process that caused his suspension from work for two weeks, is suggestive of conduct not befitting such a position.
69. I would be more content in the conclusion that the worker could be terminated summarily by virtue of Section 33(c) of the Promulgation. That is, that he lacked the skills which by implication he warranted to possess. Skills such as diplomacy, self restraint and capacity to exemplify the corporate standards befitting a Human Resource Manager. Yet even then, I am not that convinced that such a case has been adequately made out.
70. There is insufficient evidence of serious misconduct before me. There is a stronger case that reflects a lack of judgment and a lack of appropriate skills in the circumstance. In terms of the language of the employment contract, this may be more likely to be characterised as amounting to a “failu(ure) to meet the minimum performance requirements”. I am more inclined to find on that basis.

Remedy Sought

71. Within the *Closing Submissions on Behalf of the Grievor*,²⁵ the claim for compensation is set out. The Grievor seeks six months compensation for humiliation arising out of the manner in which the termination came about and claims in addition to that, the amount of 21 months unpaid wages, being the outstanding period remaining under the contract at termination.
72. As mentioned at the outset, the contract is strange, as it purports to be a fixed term contract of three year's duration, though expressly providing for the worker and not the Employer, to terminate the contract with the giving of one month's notice.²⁶ I am satisfied that the contract had come to an end. The Employer terminated the contract, whether in complete justification of the facts that it relied upon, or otherwise.
73. I feel that the Employer has not been able to justify the way in which it brought the decision about, due to a lack of evidence presented in proceedings. I nonetheless accept that the Employer sought to bring the contract to an end and it remains free for this Tribunal to rely on the conduct or skills of the Grievor valid at the time of discharge, as forming or possibly aiding in the justification for such a decision.²⁷
74. If it was the case that the termination was justified, then one still needs to look at how the contract can be brought to an end in such circumstances. At first glance, whoever drafted the contract appeared to wish that the Grievor virtually had three years of guaranteed income, save for the case of his own desire to resign or where he demonstrated serious misconduct. Outside of the six month probationary period, there was no express provision that allowed the Employer to otherwise bring the contract to an end. This is very unusual for a public sector position at this level. The Employer appears to have created its own problems in this regard.

²⁵ As filed on 22 April 2013.

²⁶ Except for the case of serious misconduct.

²⁷ See *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359

75. The Termination provision within the Employment Contract dated 6 April 2009, does nonetheless provide:

In the event that you fail to meet the minimum performance requirements or where you are made redundant, the Council will accept a notice period of less than one month

76. I think it can be safely argued by the Employer²⁸, that the Grievor did not meet the minimum performance requirements of the position. On that basis, I believe that the contract was capable of being terminated with the giving of one month's notice. Despite the clumsy language of the provision, I am satisfied that the intention of this provision was to enable the Employer to terminate the contract in such cases.

77. Based on the evidence before me,²⁹ the giving of one month's notice in the circumstances, even if the Grievor was not required to work out the notice period, would have been the fairer outcome. I find accordingly.

78. Finally I believe that the annual leave entitlements of the Worker should not have been utilised in the manner in which they were. Again, the Employer could have explained with more precision the rationale underpinning why on this occasion, the annual leave entitlements of the Grievor were to be used. My objection to this is based on a fair assumption that the worker is deemed not guilty of any of the allegations prior to the completion of any investigation and therefore supportive of the view that workers need to be protected against vexatious and mischievous complaints. They are entitled at the outset to be treated fairly.

²⁸ That is despite Ms Varea's evidence, that in the absence of the Prime Ministers Investigating Team's intervention, it is unlikely that the Council would have conducted its own inquiry into the Grievor's conduct.

²⁹ This could have possibly been easily displaced had the Employer presented as evidence in proceedings, the Investigation Report of the Prime Ministers Investigating Team.

79. The Grievor is entitled to be reimbursed for the 17 days annual leave.

80. Insofar as any application for costs is concerned, as neither party has adequately made out their case before this Tribunal, I am disinclined to award either party costs in this matter.

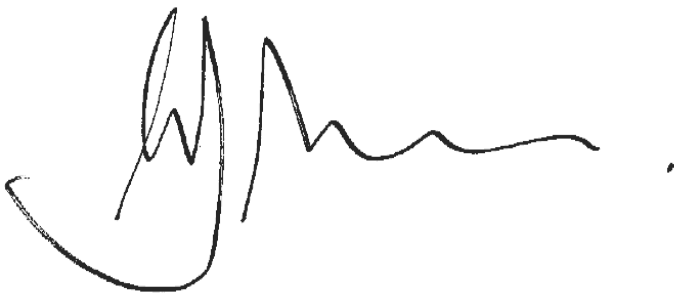
Decision

81. It is the decision of this Tribunal that the Employer pay to the Grievor within 28 days:

- (i) The sum of four week's salary equivalence, to be calculated based on the weekly rate of pay made to the Grievor at the time of termination.

- (ii) The equivalence of 17 days of annual leave pay, calculated based on the weekly rate pay made to the Grievor at the time of termination.

I order accordingly.

A handwritten signature in black ink, appearing to read 'A. See', with a large, sweeping initial 'A' and a long horizontal stroke extending to the right.

Mr Andrew J See
Resident Magistrate