



Interim Ruling

Section 211 Employment Relations Promulgation

Title of Matter:	Taitusi Naiduki v Biosecurity Authority of Fiji	(Worker) (Employer)
Section:	Section 211 Employment Relations Promulgation	
Subject:	Interim Ruling of Tribunal	
Matter Number(s):	ERT Grievance 93 of 2015	
Appearances:	Ms T Waqaniika for the Worker Mr A Sokimi for the Employer	
Dates of Hearing:	11 October 2016	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	11 October 2016	

Background

1. This is in effect an interpretative ruling of the Tribunal. It has been made at the request and in response to the objections raised by the Employer in relation to the manner by which certain aspects of this matter have been progressed. An oral response was provided to the issues, when they were made, however in fairness to all concerned, some further clarification should be provided. Specifically those objections have been identified as follows:
 - (i) "The Respondent objects to the summons under Section 229 (iii) of the ERP for the Executive Chairman and Station Supervisor, Nadi, Mr. Bolaitamana to be called as a witness as the said Section provides no such authority.

- (ii) The Respondent objects to the Summons under...being issued by the Honourable Tribunal under any section ...objects to the Summons issued under..by the Honourable tribunal for the Executive Chairman and Station Supervisor, Nadi, Mr. Bolaitamana to be called as witnesses as it is inconsistent with the adversarial system of judicial proceedings ..of legal proceedings...
 - (iii) The Respondent objects to the Honourable Tribunal's pre determination of the matter based on repeated suggestions for the Respondent to consider settlement – this late in the proceedings.
 - (iv) The Respondent objects to the repeated interjections of the Honourable Tribunal particularly in Mr Suren Pratap's evidence which extends beyond mere clarification which is inconsistent with the adversarial system and more inclined towards the inquisitorial system.¹
2. The ruling has been issued as an aid to the parties only and on that basis, the factual backdrop that gives rise to this grievance will not be canvassed at this juncture. Suffice to say, that the Grievor was terminated by the Employer in his employment, for reasons that include allowing for the entry into Fiji, of Chinese dairy products, in a manner that was in breach of the *Biosecurity Promulgation* 2008.

The Timing of the Objections Now Made

- 3. At the outset it should be noted that these objections have been made, when the Employer has all but finished its case. In fact the final witness that has been called by the Employer, who is the Acting Human Resource Team Leader, Ms Ram, is only giving evidence that is largely hearsay evidence, providing information to the Tribunal that is on the Grievor's Personnel File.
- 4. It perhaps also should be noted that the issue has come about when this witness sought to produce an unsigned document purporting to be the *Investigation Report*² that was completed by the Employer in relation to the matters giving rise to the Grievor's termination at work.
- 5. By way of further background and throughout these proceedings, the Tribunal has expressed its concern to the Counsel for the Employer, Mr Sokimi, that the information before the Tribunal, does not appear to be the 'best evidence' that can be adduced. This is concerning when the matters at issue have given rise to the termination in employment of a worker

¹ As transcribed from the record of proceedings.

² See unsigned Letter to the Executive Chariman dated 27 April 2015, marked for identification purposes as "Document A".

who has devoted approximately 20 years of service to the Employer and its antecedent body.³

6. It is also a matter of record that despite several requests by the Tribunal, that the Employer has failed to provide any documentary evidence whatsoever relating to the incident that gave rise to the entry into the country of a non-approved dairy product, including:-
 - (i) The declaration made by the person apprehended at the Nadi Airport with those products.
 - (ii) The Inspection Certificate that was issued by the Authority detaining the goods in question;
 - (iii) Any description of the goods;
 - (iv) Any payment information dealing with a 'fast track application' that was ultimately claimed to be made so as to effect the release of those goods; or
 - (v) The manufacturer's certificate that was said to be provided to facilitate that release.
7. In fact as the transcript of proceedings will clearly show, on several occasions it had been intimated either by Counsel for the Employer or witnesses that were called by the Authority, that it was the Grievor who was the last person known to have had any access or possession of such documents.⁴
8. Against that backdrop and when it became apparent to the Tribunal that Ms Ram herself was to give evidence in relation to the Investigation Report and the process purportedly conducted that gave rise to its making and that she herself had not been employed by the Authority at that time in that role, nor did she have any knowledge whatsoever as to what events had relevantly transpired; that the Tribunal requested she 'stand down'⁵ while various issues pertaining to evidence were canvassed.

Does the Tribunal Have Power to Order a Person to Appear to Give Evidence?

9. The first and second objections can be dealt with together. The identification by the Tribunal that it is necessary to call further Employer evidence in this matter, is set against a backdrop where the Employer has failed to adduce any material evidence whatsoever pertaining to:-

³ That is a natural concern and one that should not be construed as suggesting any sympathy or view as to the merits of any issue.

⁴ It for that reason among others, that the Tribunal persisted with its line of questioning with the Acting National Operations Manager, Mr Pratap regarding the suspension of the Grievor and his exiting from the workplace.

⁵ This has been a common feature of this proceeding, where witnesses are required to be excused in order that legal discussions between Counsel and the Tribunal regarding matters of procedure, can take place.

- (i) The drawing up of the misconduct allegations against the worker;
- (ii) The investigation and consideration of the information arising out of those allegations;
- (iii) The human resource processes that were observed at that time;
- (iv) How, when and why the complaints were formulated against the worker;
- (v) Who considered the worker's response to the allegations and a consideration of those issues?; and
- (vi) Who formed the view that the worker should be terminated and the rationale for doing so?

10. Throughout proceedings, the Executive Chairman Mr Khan's name is a common thread within the evidence. The Tribunal has formed the view that Mr Khan's evidence is critical to the fair hearing of this matter and so to allow an informed decision to be reached, based on an understanding of all matters. A statutory authority as a 'model litigant' has a duty to the Tribunal to ensure that it does reach a decision, armed fully with the relevant facts and factors. In the case of Mr Seremaia Bolaitamana, as the Station Supervisor of the Nadi Airport and a person with administrative responsibilities for the maintenance of the Authority's records pertaining to customs clearance and related issues, his evidence is also seen as desirable.

11. The powers to conduct and oversee this grievance before the parties arises out of the *Magistrates Court (Amendment) Decree 2011*⁶. The Employment Relations Tribunal is a designated Statutory Tribunal as designated by the Chief Justice in Gazette Notice dated 12 August 2011. It should be noted that in accordance with Section 61(B)(4) of the *Magistrates Court Act* [Cap 14],

Any order, award, decision, finding, judgment or ruling made by a magistrate in the exercise of the powers and performance of duties and functions of any statutory tribunal under this Part, shall be enforced or implemented in accordance with the written law ...provided however that if the written law and any rules and regulations made therein which established that statutory tribunal do not contain any provision for enforcement or implementation, then any such order, award, decision, finding, judgment or ruling made by a magistrate under this Part shall be enforced in accordance with the provisions of this Act.

12. Section 229(3) of the *Employment Relations Promulgation 2007* provides:

The Tribunal or Court may order any person to appear or to be represented before it.

⁶ See Decree 24 of 2011

13. The power is clear and unambiguous and follows the authority that is given to parties to proceedings at Section 229(1) of the Promulgation, where it provides that they “may produce before the Tribunal or the Court witnesses, documents, books, and other evidence as the party thinks fit”. The power to order a person to attend and give evidence, is one that is available to the Tribunal as well as the Court.
14. But even if there was any doubt that such a power is contained within the meaning of this provision of the Promulgation, which there is not, a Magistrate while exercising powers within the Statutory Tribunal, could still rely on the implementation powers provided for within Section 61B(4) of the *Magistrates Court Act* [Cap 14]. Used in that way, the question is one of implementation. That is, how can a summons to appear or request to attend be implemented.
15. The source for that broader power exists at Section 52 (1) of the *Magistrates Court Act* [Cap 14] that provides as follows:

In any civil suit or matter, and at any stage thereof, a magistrate may, either of his own motion or on the application of any party, summon any person within Fiji to attend to give evidence, or to produce any document in his possession or power, subject to just exception.

16. The Tribunal has flagged to the Counsel for the Employer it intends to issue various Notices to employees in accordance with its powers. There is no impediment for this discretionary power to be exercised, where it is done with a purpose consistent with the objects of the Promulgation.

What is the Nature of How Evidence is to be Adduced before the Tribunal: Adversarial, Inquisitorial or somewhere in between?

17. There are a couple of salient points that the Objector appears to have not understood. In the first place, Section 231(1) of the Promulgation provides that “in proceedings before the Tribunal, the Tribunal may accept and admit evidence as it thinks fit.” Further the Tribunal is not bound by the strict rules of evidence.⁷
18. While the Objector claims that the calling of witnesses by the Tribunal is inconsistent with the “adversarial system of judicial proceedings”, that is perhaps its first fundamental error. These are not judicial proceedings. While it is true that the proceedings in the present case are closer draw on a judicial model of representation and argument, the fact that the Tribunal may accept and admit evidence as it thinks fit, renders the operation of the Tribunal more of a hybrid type, that was described by Basten JA in *Italiano v Carbone*.⁸ The purpose

⁷ See Section 229(2) of the Promulgation.

⁸ [2005] NSWCA 177 at [114].

of the statutory framework of the Promulgation, is further support of that historical approach that can assist in the “efficient settlement of employment related disputes”.⁹

19. It is well recognised that a tribunal exercises discretion as to whether to inquire or refrain from making an inquiry.¹⁰ The most important factor out of all of this, is that the Tribunal finds itself in a position where it can adjudicate on the critical jurisdictional facts before it and do so in an environment that is fair to all parties and efficient. In this case, in the statutory determination as to whether a dismissal is just and fair,¹¹ warrants additional information be adduced in evidence. Some of that has been flagged above. Based on the evidence before me, the attendance of the Executive Chairman, Mr Khan is a critical component to that inquiry. As intimated in my oral determination of these matters, Notices to Attend will now be issued on that basis.

Repeated Calls by Tribunal to ask that the parties consider resolving the matter

20. The third objection made by the Respondent is also misconceived, where it claims that the Tribunal has predetermined the matter “based on repeated suggestions for the Respondent to consider settlement – this late in the proceedings”. The invitation to the parties, that has been made approximately three times now, was made **to the parties** (the Tribunal’s emphasis), not to an individual party. To suggest that the Tribunal has “predetermined the matter” is simply wrong.
21. Section 210(2) of the *Employment Relations Promulgation 2007* makes clear that the Tribunal may in relation to any matter,
- assist parties to amicably settle the matter and the settlement must be signed by the parties and endorsed by the Tribunal as a binding decision.*
22. The ability to do so, is a general power provided to the Tribunal, by virtue of Section 211 (r) of the Promulgation. There is nothing that restricts the Tribunal while it is adjudicating a matter, to reinforce the view that an agreed settlement between the parties may still be a more suitable outcome for all concerned.
23. This is no way seeks to diminish the respective positions of the parties, but merely flags the practical realities that a Tribunal and parties face, when a matter is brought for trial. Invariably neither party’s case may run to plan and the benefits that arise out of a privately settled mediation are well known.

⁹ See Paragraph C of the Purpose of the Statutory Framework.

¹⁰ See *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 at 434.

¹¹ As is required by the *Employment Relations Promulgation 2007*.

Questions Asked of Mr Pratap

24. The final objection in relation to Mr Surend Pratap, the Acting National Operations Manager, again suggests that the questioning of the Tribunal of the witness, has gone “beyond mere clarification which is inconsistent with the adversarial system and more inclined towards the inquisitorial system.”¹²
25. Again, that objection needs to be placed in some context. The Employer has demonstrated no real achievements in providing the Tribunal any supporting documentation that may assist in the interpretation of the evidence.¹³ As mentioned earlier, while it was inferred by Mr Sokimi, that the Grievor himself was the last person to have had access to any of the relevant documentation, that issue seemed difficult for the Tribunal to understand. While the objector somewhat discourteously refers to the “repeated interjections” by the Tribunal in relation to the giving of Mr Pratap’s evidence, the issue was more one of trying to reconcile why there was no relevant documentation that could be provided to the Tribunal. Some of these issues again were quite critical to the evidence given by Dr Watson, for example as it pertained to the manufacturer’s certificate that apparently had been sent to her by the Grievor.
26. What did transpire through the inquiries of the Tribunal, was that Mr Pratap admitted to having exited the Grievor out of the workplace on the day in which he was suspended from duties and further admitted that Mr Naiduki had taken no documents with him. The further salient issue arising out of the questioning by the Tribunal, was that the witness had misled the Tribunal in relation to the way in which the Inspection Certificate books had been utilised by staff at that time. That is, the witness claimed to have a state of knowledge, that when questioned fully, was found not to exist.
27. While the Employer may feel that the questioning was unnecessary and outside of the role of the Tribunal, the fact remains that the evidence given by Mr Pratap did appear inconsistent with that given by the earlier witness Ms Raratabu.¹⁴ The Tribunal sought only to reconcile these concerns.

Conclusions

28. In relation to the first two objections, the Tribunal holds that these are misconceived for the reasons given. In relation to the evidence given by Mr Pratap and the general premise that such inquiry by the Tribunal is inconsistent with the “adversarial system of judicial proceedings”, that objection is also dismissed. While *ceteris paribus*, a hearing may be able to be conducted without any intervention by the Tribunal Member whatsoever, that situation would likely be a rare event. It would be most unusual in a Tribunal situation for

¹² As transcribed from the record of proceedings.

¹³ The Tribunal had even asked for a ‘blank form’ and that was not readily provided either.

¹⁴ See final sentence of the Memorandum provided by Ms Raratabu at Exhibit 6.

questions to arise that do not need to be explored further. The primary governing considerations, should be that such questioning in turn, allows for Counsel to further pursue any of the issues raised; it is done in an unbiased manner and it is also done for the purposes of ensuring that in the interests of justice that the Tribunal can reach a decision that is a well- informed one, based on a full understanding of the essential issues before it. The concerns raised by the Objector are nonetheless noted.

29. Finally and far more importantly, the Tribunal turns to the question that asks the parties explore the ongoing possibility to resolve the matter without arbitration. It should be more than apparent to both parties why that course of action has been suggested. The fact that the parties have decided not to pursue that approach, even if it does require an element of compromise, is a matter for the parties. Having said that though, the Tribunal remains of the view that this would be the most productive way of resolving this grievance, on this occasion. No stronger recommendation can be given.

30. As there is no formal application before the Tribunal, the proceedings will continue in Suva on 16 December 2016. Counsel should note that the current witness Ram is still under oath and has an obligation not to discuss this matter with any person until such time as her evidence is completed.

I rule accordingly.



Mr Andrew J See
Resident Magistrate