



Decision

Title of Matter:	Ruci Buna	(Grievor)
	v	
	Goodman Fielder International (Fiji) Ltd	(Employer)
Section:	Section 211(1)(a) Employment Relations Promulgation	
Subject:	Adjudication of Employment Grievance	
Matter Number:	ERT Grievance 176 of 2016	
Appearances:	Mr J Serulagilagi, MC Lawyers, for the Grievor Mr R Singh, Munro Leys Lawyers for the Employer	
Date of Hearing:	30 May 2017	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	10 August 2017	

KEYWORDS: Employment Relations Act 2007; Unjustifiably and unfairly dismissed; Intoxication at Work Function; Duties of Employer and Employee at Outside of Working Hours Work Functions.

Background

1. This is a grievance that has been referred to the Tribunal from the Mediation Service in accordance with Section 194(5) of the *Employment Relations Act 2007*. The grievance arises out of the summary dismissal of the Grievor, in circumstances that are alleged to be both unfair and unjust.¹ By way of background, the Grievor had been employed by the Employer for 31 years and prior to her summary dismissal, had been engaged as a Team Leader at the company's *Tuckers and Frozen Goods* processing plant.
2. The events that gave rise to the Grievor's termination, come about as a result of a work function that she attended as part of a Gala Conference Dinner held by the Employer at the Grand Pacific Hotel on 2 July 2016. The conference dinner was the culmination of a business planning activity conducted by the Employer, where approximately 400 guests were in attendance. Towards the end of the function that evening, the Grievor was intoxicated from alcohol. The Grievor's

¹ See Form 1 lodged by the Grievor on 15 August 2016.

subsequent conduct, that formed the primary basis for the dismissal decision, is said to have given rise to various breaches of the Employer's Code of Conduct and compromised the trust relationship between the Grievor and her Employer.² At the outset of these proceedings, the parties were encouraged to resolve this grievance through a 'without prejudice' mediation process under the auspice of the Tribunal. It is a matter of record, that the Employer was unwilling to do so.

The Case of the Employer and Justification for the Dismissal

3. In considering the case of the Employer, the Tribunal has had regard to the following materials:-

- The Employer's Preliminary Submissions, dated 14 February 2017;
- The Affidavit of Earl Hughes, Site Manager; sworn on 14 February 2017;
- The Affidavit of William Greig, Operations Manager; sworn on 14 February 2017;
- The Affidavit of Peni Puamau, Site Manager, Crest Processing Plant; sworn on 14 February 2017;
- The Affidavit of Ms Doreen Francis, Food Service Sales Manager; sworn on 14 February 2017.
- The Employer's Submissions in Reply, filed on 20 March 2017; and
- The Employer's Closing Submissions in Response, filed on 28 June 2017.

4. In addition, the Employer subpoenaed Woman Detective Constable (WDC) Adi Salaseini Vatusevu to give evidence at the hearing.

5. The following key facts and issues arises out of the above evidence.

Woman Detective Constable (WDC) Adi Vatusevu

6. Detective Constable Vatusevu was the first witness who was called by the Employer. At the time of hearing, the Detective Constable was employed within the Child Abuse and Sexual Offences Unit, Valelevu Police Station. The witness told the Tribunal that she had been employed within the police service for 28 years and that she had responded to a complaint of rape made by the Grievor. Detective Constable Vatusevu stated in evidence, that it was alleged by the Grievor that she had been raped by her three workplace managers, following the work function on 2 July 2016, when they had driven her home after she had become intoxicated.

7. According to Detective Constable Vatusevu, following an investigation of the complaint, it was found that there was no evidence to substantiate the allegation, as the Grievor had no witness. The Detective Constable was provided with a copy of correspondence that she had prepared and forwarded to the Employer's Operation Manager, Mr William Greig. That undated Minute states inter alia:

The status of Police Action is recorded as follows:

- *The report has been formally registered as Police Enquiry Paper and is under investigation and now it's been filed.*
- *Upon enquiries and investigations been done so far and found out that there are no evidence according to Ruci Bun's (sic) complaint.*

² See Dismissal Letter provided to the Grievor dated 20 July 2016.

- Ruci Buna have (sic) apologized and she had admitted that she didn't know what had happened to her on that particular day.
- Ruci Buna also have (sic) mentioned that her husband was the one told her about her condition on that particular day (02/07/16).
- The Valelevu Police have submitted to Ruci Buna her Feedback letter and then she mentioned that she have apologized to the Company.

The Fiji Police thanked the Goodman Fielder (Fiji) Ltd for assisting us in investigating Ruci Buna's case. We would like to thanked (sic) the Operations Manager-Mr William Greig, the Branch Manager for Colo-I-Suva Crest-Mr Peni Puamau and also Mr George for giving their time and also assisting us in our investigation.³

8. It was put to the witness during cross examination by Counsel, that the Grievor had not made a rape allegation, but only a complaint about the fact that she was left unattended at a local shop by the three Goodman Fielder managers and could not understand how she had reached home, wearing different clothes and without underwear.⁴ This proposition was rejected by the Detective Constable.

Evidence of Ms Doreen Francis

9. Ms Francis has been employed with the Employer since 2008. At the time of hearing, she had been engaged as one of the Export and Food Service Sales Managers with the company. Within the Affidavit that had been prepared as the Evidence of Chief of the witness, it is stated that around 10.30pm of the evening of the function, that the Grievor became "rowdy to the point of annoying delegates and guests".⁵

10. Ms Francis stated:

To my surprise, Ruci suddenly lay on the floor on her back and started to dance by wildly kicking her legs in the air. This was embarrassing, since Ruci's skirt had come down to her waist.....

At about 10.45pm, Ruci staggered onto the front stage and started kicking equipment around. She knocked over the podium as well as a TV screen. ...I went over to Ruci, she poured herself a glass of wine. I put the wine aside and offered her a glass of water .. eventually she drank a few sips of water and said that she would like to go home... Suddenly, Ruci refused to go home and said "no, I want to talk to William". I could not locate William. I said to her "okay, I will call William but have some more water". I was surprised and upset when she grabbed me by the front of my top (breast area) and repeatedly said "you want me to kill you, I will kill you!". I felt threatened and was scared.

³ See Exhibit E1.

⁴ As it transpired, the Grievor later told the Tribunal that she did not arrive home in the clothes that she wore to the function and this was the initial source of concern to her husband.

⁵ See Paragraph 5 to that Affidavit.

11. During cross examination, it was put to the witness by Mr Serulagilagi that there had been a lack of supervision in the serving of alcohol that evening. The witness disputed that proposition.

Evidence of Mr William Greig

12. Mr William Greig is the Operations Manager of the Employer's 'Tuckers Operations' since May 2014. Within the Affidavit material provided, the witness gives evidence that includes the background to the hosting of the Gala Dinner, information pertaining to the way in which alcohol was served at the function and various communications with the Grand Pacific Hotel, associated with those arrangements.

13. From the Annexures contained within Mr Greig's sworn Affidavit dated 14 February 2017, it would seem that the following alcohol was supplied by the Employer for the 395 delegates:

- A pre dinner cocktail for each delegate
- 6 kegs of beer
- 158 bottles of wine⁶

14. Mr Greig's account of events relating to that evening, are set out within Paragraphs 15 to 42 of his Affidavit. Within the Affidavit, the Operations Manager describes what he says took place on the dance floor, on the front stage of the venue, while he was sitting down seeking to placate the Grievor and on the drive to Cunningham, where it was claimed that the three Managers, Messrs Puamau, Turagasila and himself sought to take the Grievor home to her residence. Mr Greig states within his Affidavit:

When we reached Cunningham Road, Ruci was unreasonable and uncooperative; she refused to tell us where her house was. We stopped at the neighbourhood shop, Save on Foods, to ask for directions. As soon as we pulled over, Ruci jumped out and started to scream and cry. Her swearing continued. By-standers, pedestrians and passing traffic all looked at us. It was an embarrassing and stressful situation. Ruci held onto the fence of the shop and again let out a war-cry like shout and started crying. At one point she was sitting in a pool of mud and later she wandered onto the road trying to distract on-coming vehicles. Ruci was out of control and would not tell us where she lived. I called Hamish, Ruci's immediate supervisor, and asked for directions. Hamish was not completely sure but said she lived in Stage 1 near a mango tree, at this point, Ruci started swearing at Hamish saying "fuck Hamish". At this point, we decided to get into the vehicle and continue up the road but Ruci refused to get into the vehicle. We decided to leave Ruci. George and I stayed back to supervise while Peni left his vehicle to try to find Ruci's house. It was about midnight and raining heavily. .. At one point a taxi drove by, and we asked the driver if he knew Ruci. The passengers knew Ruci and gave directions. They also volunteered to drop Ruci but she refused to get inside the taxi. Peni came back after about 20 minutes but he could not locate Ruci's house. Ruci was screaming along the shop fence. She again refused to get inside the vehicle and pushed us, her swearing continued. Concerned with Ruci's safety, I called the Nabua Police Station to inform about the situation. We were told that a team from Valelevu Police Station was on its way to assist Ruci. We came back to the GPH at about 1.00am.⁷

⁶ See Annexure WG1 to the Affidavit of William Greig dated 14 February 2017.

⁷ See Paragraphs 33 to 42 within the Affidavit of William Greig.

15. Under cross examination by Mr Serulagilagi, the witness agreed with the proposition that there was “no limit on how much (the Grievor) could drink” at the function. Mr Greig also agreed that the Company had “provided unhindered access to alcohol”. Mr Greig told the Tribunal that there was no designated person supervising the alcohol consumption of the employees at the work function and accepted the proposition put to him by Counsel, that “getting intoxicated (was) expected”.⁸ The Operations Manager also conceded that she stated that the Grievor found herself in, was a direct result of the alcohol provided to her by the Employer. In response to the questioning by Counsel, Mr Greig accepted that he had left the Grievor at a shop, but did not believe that in doing so, that he had put her life at risk. In re-examination, the witness appeared to clarify some of his earlier evidence. Mr Greig stated that he was of the belief that the service staff and bar manager at the hotel, had been responsible for the controlling of drinks. The witness indicated that he believed that the Grievor’s abuse toward himself and others, was more than verbal abuse, but extended to scratching and in one case, drawing blood from his wrist. Mr Greig also clarified that “we did call (the) police station (however was) not sure (whether) Valelevu or Nabua Police Station”.⁹ According to the witness,

*at the end of (the) investigation (I) found out someone who recognised and knew her picked her up and took to her residence.*¹⁰

Evidence of Mr Peni Puamau

16. Mr Peni Puamau is a Site Manager for the company’s Crest Processing Plant at Colo-I-Suva and has held that position since 2013. The Affidavit that was tendered as the Evidence of Chief of Mr Puamau, had a consistency with the recollection and sequence of events that had been provided within Mr Greig’s Affidavit. Mr Puamau said at Paragraph 31 of his Affidavit that:

I was told that Ruci’s husband had alleged she came home with a different set of clothes and with no underwear on.

17. Under cross examination, Mr Puamau did not accept that there had been no safety measures in place for the responsible service of alcohol at the event, nor did he agree that employees had unlimited access to alcohol. The witness nonetheless agreed with the proposition that the Grievor’s actions were a direct result of the alcohol that had been provided to her at the function. Mr Puamau accepted that when being questioned by the police in relation to the allegation of rape that had been made, that he was also questioned as to what had happened to her after being dropped off at the shop, until the time that she had come home.

Evidence of Mr Earl Hughes

18. At the time of hearing, Mr Earl Hughes was the Site Manager at the Employer’s ‘Tuckers’ operations. Mr Hughes has been an employee of the company since 2003. Mr Hughes appears to have been responsible for the investigation process and set out within his Affidavit the specific

⁸ Although it is conceded that Mr Greig, said that the expectation was that people would still be responsible.

⁹ The Tribunal notes this uncertainty. It is noted within the email communication initially prepared by Mr Greig to Ms Jennifer Ali dated 7 July, that he claims to have contacted the Nabua Police Station. (See Annexure WG 2 to the Affidavit of William Greig)

¹⁰ It is a shame that this person was not called to give evidence in proceedings.

allegations that were made against the Grievor and which were put to her as part of the disciplinary inquiry. Annexure EH3 to the Affidavit of Earl Hughes contains the letter requesting that the Grievor attend an investigative meeting in order to respond to certain allegations. As the Annexure sets out within the letter dated 7 July 2016:-

...the purpose of the investigation meeting is to seek your explanation in relation to the following allegations:

- *As a Leader in the business you acted in an unprofessional and disorderly manner at a Company organised Gala Dinner on Saturday 2 July 2016;*
- *Threatening Peni Puamau that you wanted to kill him;*
- *Physically abusing William Greig by scratching his arm, the back of his neck and threatening to kill him;*
- *Physically grabbing Doreen Francis's blouse (chest area) repeatedly and said to her "You want me to kill you?";*
- *Physically grabbing Arti Mala by grabbing her arm and scratching her hand which caused minor bruises on her arm;*
- *Placing your safety at risk and the safety of other Goodman Fielder employees who were present at the Gala Dinner.*

19. The Evidence in Chief of Mr Hughes is that Ms Buna was unco-operative at the Disciplinary Meeting. Further, at Annexure EH8, within the *Preliminary View* letter that was prepared by Mr Hughes, it indicates that some discussions transpired between the Employer and the Grievor as to whether or not she would be allowed to resign in her employment and if so, what would be the conditions that would be imposed upon taking such action. At Paragraph 23 of the Affidavit, Mr Hughes makes clear that he did not receive any response to the preliminary view taken by the Employer and on that basis, summarily terminated Ms Buna by letter dated 20 July 2016. According to Mr Hughes, the Employer had organised a mini-bus to transport staff home after the event. The witness said that he had informed his Team Leaders of the behaviour required of staff, particularly having regard to the Code of Conduct. Mr Hughes told the Tribunal that the bus had been organised to transport staff after the formalities had concluded, some time between 10.00pm and 10.30pm. In cross examination, it was put to Mr Hughes that there was a lot of alcohol served that night. In response, the witness told the Tribunal, that there was "enough alcohol for everyone." Mr Hughes also conceded that there were no supervisors delegated to monitor the alcohol consumption of staff, but stated that there were measures in place, with the bar being controlled by the Grand Pacific Hotel. Mr Hughes told the Tribunal that there was "no need" for supervisors to monitor alcohol consumption. When asked by Counsel, whether any attempt had been made to contact the Grievor's next of kin, when it appeared that she was under the influence of alcohol, Mr Hughes responded, "not that I am aware of". It was further put to the witness that it was not fair to terminate the Grievor for something that she could not remember. Mr Hughes did not accept that position. Under cross examination, Mr Hughes told the Tribunal that despite the Grievor's 31 years of service with the Employer, that he had lost trust and confidence in the employee. Mr Hughes accepted that the Grievor's conduct was as a result of the alcohol provided by the Company, but that the Grievor had consumed it at her request.

20. Mr Hughes was questioned by the Tribunal in relation to the other disciplinary sanctions that had been imposed on the Grievor, giving rise to earlier warning letters being issued.¹¹ The witness explained one occasion when Ms Buna was issued a warning letter for absenting from work to attend a function whilst on night shift, without prior approval and where her absence extended

¹¹

See Annexure EH1 to the Affidavit of Earl Hughes dated 14 February 2017.

for two and a half hours.¹² Mr Hughes told the Tribunal of a second occasion, when the Grievor was absent without authorised leave for one day and then returned to work on her next rostered day, late and again without explanation. Finally, the Tribunal was advised that in May 2016, the Grievor was again absent from work for three days without notification and explanation of the absence.

Statement Contained within Annexure EH2 to the Affidavit of Earl Hughes

21. As part of the evidence tendered within the Affidavit of Mr Hughes, is a statement said to be obtained by Mr George Turagasila, the Hatchery Manager. It is noted within the statement provided, that Mr Turagasila was the other Manager who accompanied Mr Greig and Mr Puamau with the Grievor in the car that evening to Cunningham. Mr Turagasila's statement suggests that not only did Mr Puamau find the Grievor's home, but that he spoke to a neighbour. The statement also indicates that Mr Greig made contact with the Nabua police post.

The Case of the Grievor Ruci Buna

22. Ms Buna was the only person to give evidence on her behalf at the hearing. In considering the case of the Grievor, the Tribunal has taken account of the following materials as filed:

- Preliminary Submissions of the Grievor, dated 14 March 2017;
- Affidavit of Ruci Buna, dated 14 March 2017;
- Closing Submissions of the Grievor, dated 13 June 2017; and
- Closing Submissions of the Grievor in Reply, dated 7 July 2017.

23. Within the Preliminary Submissions of the Grievor, the claim of unjustifiable and unfair dismissal decision is made on the basis that can be summarised as follows:-

- The Employer provided the Grievor and attendees at the Conference Dinner access to a large amount of alcohol without having in place any procedures for safely taking care of, taking home or contacting persons to assist where they may have been affected by the consumption of such alcohol;
- That to provide the alcohol, fail to ensure the safety of the attendees and to then terminate the Grievor for her actions was unfair in the circumstances;
- That the Conference Dinner was a social event and took place outside of work hours and therefore the Company's Code of Conduct did not apply;
- That the Grievor could not recall the events that transpired on 2 July 2016 and should have been provided with video evidence made available from the hotel, rather than solely having to respond to statements provided by various persons containing allegations of certain conduct; and
- That the Grievor should have been able to resign from her employment free from repercussion.¹³

¹² See Letter issued to Grievor dated 13 May 2015.

¹³ See Paragraphs 3.3.1 to 3.3.5 of the Preliminary Submissions.

24. The Affidavit of Ms Ruci Buna dated 14 March 2017 that forms her Evidence in Chief in the proceedings before the Tribunal, sets out the Grievor's account of events on 2 July 2016. The Grievor admits to having had three glasses of wine prior to the formal awards being presented at the function. The Grievor stated that at no time did she allege rape against the three Managers of the Employer, but only that she wanted to understand the events and circumstances relating to the time from when she had been dropped off at the nearby shop, to the time in which she had reached her home, including how and why she was wearing different clothes and no underwear. The Affidavit evidence further sets out the events that transpired in the subsequent investigation and disciplinary action taken by the Employer, including her offer to resign from employment. At the time of the hearing, the Grievor said that she received \$60 per week in maintenance and that she had no employment reference to allow her to obtain another job.
25. Under cross examination, the Grievor maintained that she was of the view that her drink had been spiked at the Conference Dinner and that she had not been able to access any of the video footage that may have assisted in this regard. Ms Buna also insisted that there had been no allegation made of rape, but only of unexplained events following been dropped off by the Goodman Fielder Managers at approximately 12.15 am on 3 July 2016. Ms Buna accepted that she did not challenge the Investigation Report within her Affidavit. Ms Buna accepted that she had previously been to work functions and that there were no company designated 'responsible alcohol' supervisors on those occasions. The witness told the Tribunal that she was involved in one other proceedings before the court, involving a domestic dispute that involved an "argument in the house where my husband hit me". In re-examination, the Grievor reinforced her willingness to resign from employment, but said that she did not want to sign any document in the terms proposed by the Employer.

Need for Grievor to Identify Distinction between Justification and Unfairness

26. At the outset it is perhaps useful making a brief comment about the distinction between what is an unjustified dismissal, as opposed to one that is unfair. The referred grievance does draw this distinction, although the language within submissions appears to rely more generically on the expression 'unfair' as if it was an all-encompassing concept. The fact it, that it is not treated that way under Fijian Employment law. A brief analysis of the history of the concept of what constitutes an 'unjustifiable' dismissal decision is set out within the decision of *Parvinesh Kumar v Nanuku Auberge Resort Fiji*¹⁴. In the case of what constitutes an unfair dismissal, her Honour Wati J provides the clear distinction within the case of *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuinaruku*.¹⁵

The Function of the Tribunal

27. The Submissions of the Employer state:

The function of the Tribunal is to review the employer's decision and is not in nature of rehearing and the Tribunal must not substitute its own decision or "override" the employer's (per Gates J in Thomas b FEA and Winter J in State v Arbitration Tribunal, FBFSEU & Aseri Kolikata Ex Parte LIC)

28. There are a couple of observations that must be made. Firstly, the decision to which his Lordship Gates J, as he then was refers, makes the distinction between the role of the Employment

¹⁴ [2017] FJET 2

¹⁵ [2017]FJHC92; ERCA 9 of 2014.

Tribunal and that of the appellate bodies. This is quite an important distinction. The Tribunal is involved in a hearing of the evidence. The fact finding nature of the Tribunal lends itself to be able to make an informed view as to whether in the context of all issues, the decision of an Employer to dismiss a worker was justified or not. The activity is not restricted to a review of the employer's decision per se. That may be the ultimate act to take place, when reaching a decision as to whether a dismissal was unjustified or unfair, but it is quite appropriate to take evidence from a variety of sources so as to form that view. Secondly and far more importantly the Tribunal is not restricted in substituting or overriding the Employer's decision, in circumstances where the decision cannot be justified.

29. In *Kumar v Nanuku Auberge Resort Fiji*¹⁶, this Tribunal has set out the basis on which a dismissal decision can be justified as follows:

The question post Central Manufacturing v Kant, where a new regulatory regime is 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^[24] 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,^[25] 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

¹⁶ [2017] FJET 2 at [24] to [27].

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.

A comparable set of criteria for setting out the "test for justification" is located within Section 103A of the Employment Relations Act 2000 (NZ), that provides:-

103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

As can be seen in the New Zealand case, issues of procedural fairness are intertwined within the notion of whether or not the decision to terminate, is justifiable. Be that as it may, 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.

30. The question for this Tribunal is whether or not, based on the conduct of the Grievor, that the Employer is justified in dismissing the Grievor from her employment.

The Work Function and the Conduct of the Employee

31. The Tribunal accepts the submissions of the Employer, that the Grievor was at a work function and that she was there in the capacity of an employee and that the Code of Conduct for attending such functions should apply. The case law in this regard is quite clear and some of this is set out within the *Employers Closing Submissions in Response*. The Tribunal does not accept some of the submissions made by the Employer within its Closing Submission, such as the Grievor, “saw it as an opportunity to abuse the bar and is now upset with the consequence of her action”;¹⁷ or that “Ms Buna was constantly offered water but she chose to drink more alcohol knowing that she could not control her intoxication”.¹⁸ There is simply no evidence to support either of these submissions.
32. Mr Greig made clear that there were no designated and responsible company staff assigned with the task of monitoring alcohol consumption. Mr Hughes was of the view that this was not necessary, as the hotel was responsible for the service of alcohol. That situation does not accord with contemporary human resource management practice, where designated staff in such circumstances, would be charged with that task. The second issue, that is equally as concerning, is the fact that the Grievor appears to have submitted to the effects of the intoxication quite suddenly, as there was no evidence that prior to 10.00pm, some time after the awards ceremony had concluded, had Ms Buna’s conduct caused any concern or attention.
33. Nonetheless, the conduct of the Grievor appears on all accounts to have been highly offensive and disruptive to the proceedings. Even if it were the case that other attendees were under the influence of alcohol and I am inclined to the view given the quantity of alcohol purchased for the event that some of them would have been, the behaviour was totally inappropriate. That being said, the Tribunal does not accept the evidence of either Mr Puamau or Ms Francis that they were genuinely in fear of their safety at the relevant time.¹⁹ It would seem that the Grievor had lost all sense of control and in any event, presumably with hotel security staff in attendance, could have easily been brought under control should the situation have arisen. One question that comes to mind, is why wasn’t this conduct detected and arrested much earlier?
34. With no Action Strategy in place, it is unsurprising that the events that followed took place. The Employee had no control of her conduct and was incapable of direction. A family member or next of kin should have been contacted and failing that, the Employee should have been taken to a safe place until she sobered up. If that meant it was a holding cell, so be it. To use the words of Cambridge C in the case of *Gregory v Qantas Airways Limited*²⁰

¹⁷ At Paragraph 32 of the Closing Submission.

¹⁸ See Paragraph 35 of the Decision.

¹⁹ In both cases, when these witnesses gave evidence in the Witness Box, their demeanour did not suggest that they were persons easily to be intimidated, or who would have been genuinely fearful of their safety at a crowded corporate event.

²⁰ [2015] FWC 1154.

(she) was highly intoxicated to such an extent that (she) was dispossessed of an ability to act with conscious intention.

Decision by Employee to Resign

35. The Employee sought to resign from her employment following the preliminary findings made by the Employer into the events of that evening. The Employer appeared prepared to allow this to take place, however sought to do so in circumstances that would deprive the Grievor of the accrued entitlements of long service leave that would otherwise be available should she have resigned without incident. A further condition that the Employer sought to impose, was a recognition by the Grievor that had she not resigned, her employment would have been terminated for breach of the Code of Conduct in any event. Why any Employer, or lawyer for that matter, would see the need to have that condition contained within any settlement arrangement, simply is hard to comprehend. Such an offer is what is often referred to as 'putting a gun to the head of an employee'. There was no empathy or understanding offered to the Grievor as demonstrated by the language of the correspondence contained within the Preliminary View provided to her. It was a heavy handed approach that appears solely designed to ensure that the Company would not otherwise have to pay to the worker, the accrued long service leave entitlements, that had the incident not occurred, would have freely been available to a long serving employee.
36. The Grievor was clearly a victim of her own doings. Yet there is no evidence that the incidents that took place that evening, were part of any planned or intended occurrence. There was no direct evidence brought before the Tribunal in proceedings, of this type of incident having occurred previously.²¹ In fact the Tribunal had been told by the Grievor under cross examination that she had been to similar events organised by the Employer. It clearly seems to have been a situation that was in many respects out of her control. Yes the Grievor could have remained on non-alcoholic drinks all evening and yes she could have stopped drinking once she felt that the impact of the alcohol was taking effect, but she did not. This will not be the first and last case of this type. What it calls for though, is a more sophisticated understanding as to the way in which alcohol is provided and managed at work functions.
37. It should be no surprise to anyone that individuals react to alcohol consumption differently. There is significant variability in biological responses to alcohol, determined by factors such as sex, body size and composition, age, experience of drinking, genetics, nutrition and individual metabolism.²² A person could be affected differently as a result of their health, fitness (being tired, ill or stressed), state of mind (unhappy or depressed) or whether or not they had been taking medication.²³ For whatever reason, the Grievor lost all sense of control. She claims to have had consumed only three glasses of wine and there is no evidence to the contrary that has been put by the Employer.²⁴ The Grievor's conduct should have been apprehended as soon as it was detected. Annexure WG2 to the Affidavit of William Greig contains an email communication, where he states :

²¹ Although it is noticed within the notes of the Disciplinary Meeting dated 13 July 2016 (See Annexure EH7, that there is some reference to an altercation having occurred at a Christmas Party in 2015.

²² See *Australian Guidelines to Reduce Health Risks from Drinking*, National Health and Medical Research Council (2009) p20.

²³ See *Factors Affecting Intoxication*, Club Training Australia (20 August 2012).
<https://clubtraining.com.au/2012/08/20/factors-affecting-intoxication/>

²⁴ Keep in mind, it would appear that the video footage of the function was made available by the hotel.

Between 10-11 pm, I noticed that Ruci was behaving rather oddly falling over on the dance floor and later chasing after one of the guests...

38. Ms Francis on the other hand, claims that:

At about 10.30 pm, a lot of delegates were dancing. I was dancing as well. I started noticing that Ruci was becoming rowdy to the point of annoying delegates and guests. She was forcing people to dance with her.²⁵

39. Why was it that Ms Buna was not taken home until 11.30pm?²⁶ If Ms Buna's conduct was so aberrant as at 10.00 pm, why didn't Mr Greig or someone charged with the task of monitoring responsible consumption of alcohol, approach the Grievor at that time and evaluate the situation. Had that taken place, it is likely that the events that followed could have been avoided. The Employer must assume some responsibility for the events that have transpired. Again, the Tribunal does not accept that the culpability of the Grievor is cast in the same way as that of any of the Respondents in the case of *Whitbread Beer Company v Williams & Ors*²⁷ where far more deliberate conduct appears to have occurred. In the case of Mr Williams for example, his conduct extended beyond the evening in which he was intoxicated, where the same sentiments and abusive comments were made to his supervisor, the following day. This was repeated and deliberate conduct. In the case of Messrs Turner and Stocker, their altercation involving physical fighting and the separation and restraint of the parties by outside persons, took place after consumption of alcohol for approximately seven hours in circumstances where they appear to have been largely still in control of their faculties, albeit not their conduct. It is certainly a case that is also distinguishable from that referred to by the Employer within its Closing Submissions of *O'Connell v Wesfarmers Kleenhart Gas Pty Ltd t/a Kleenhart Gas*²⁸ where the Applicant "chose to run his case on the basis that either the behaviour did not occur or that he was provoked" or where a National Business Development Manager knowingly said to a female colleague while drinking at a yacht club bar following a team building exercise, to "be quiet or I'll touch your vagina like everyone else has done tonight".²⁹

Was the Decision to Terminate and Not Allow the Grievor to Resign Unfair?

40. As this Tribunal stated in the case of *Parvinesh Kumar v Nanuku Auberge Resort Fiji*, the term 'unfair' is not defined within the legislation, though the inclusion of the expression 'unfair dismissal' came about, following amendments made to the *Employment Relations Bill, 2006* as submitted to the House of Parliament by the then Honourable Attorney General and Minister for Justice on 30 November 2016.³⁰ From a historical perspective it is worth noting that the expression "unfairly dismissed" was not contained within the original Bill as first presented to the House of Representatives on 22 June 2006.³¹ At that stage, there was only one concept

²⁵ See Paragraph 5 of the Affidavit of Ms Doreen Francis, dated 14 February 2017.

²⁶ See Affidavit of Peni Puamau dated 14 February 2017 at Paragraph 17.

²⁷ Appeal NO EAT/160/94 (10 March 1995).

²⁸ [2015] FWCFB 8205 (18 December 2015)

²⁹ See *Glenn Rogers v Allianz Insurance Australia T/A Club Marine Insurance* [2017] FWC 537. (30 January 2017)

³⁰ See Reply to debate, *Parliamentary Debates House of Representatives Daily Hansard*, 30 November 2006. (Employment Relations Bill No 8 of 2006); See also *Parliamentary Debates House of Representatives Daily Hansard*, 22 June 2006 at pp 567-582; See also Second Reading Speech in *Parliamentary Debates House of Representatives Daily Hansard*, 14 September 2006 at pp 951-985.

³¹ See *Parliamentary Debates House of Representatives Daily Hansard*, 22 June 2006 at pp567-582.

contained within Clause 230 of the Bill and that was to allow the Tribunal to resolve grievances in the case where it was claimed that a Worker had been “unjustifiably dismissed”.

41. As previously stated, it was only during the committee stage and following recommendations made within the *Report of the Sector Standing Committee on Social Services*³² that the concept of “unfairly dismissed” was introduced. The Committee had recommended that the term “unfairly” be substituted for the originally proposed “unjustifiably”, on the basis that “this is the term used in the courts”.³³ The original Bill had otherwise no mention of this concept. It is a matter of record that when the final amendments were put to the House having embraced and considered the Committee’s Report, that both concepts, that is ‘unjustifiably’ and ‘unfairly’ dismissed were retained. Of assistance in understanding more about the way in which this notion of ‘unfair dismissal’ came about, one needs to consider some of the ways in which the term may have been used in the courts at that time.³⁴
42. In 2003, albeit in the context of a different statutory regime, the Supreme Court of Fiji in *Central Manufacturing Company Limited v Yashni Kant*,³⁵ stated:

*In our view, the Court of Appeal correctly held 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. The content of that duty plainly does not extend to a requirement that reasons be given, or that a hearing be afforded at least where the employer has the right to dismiss without cause, and to make a payment in lieu of notice. It does extend, however, to treating the employee fairly, and with appropriate respect and dignity, in carrying out the dismissal. Each case must, of course, depend upon its own particular facts. However, where, as in the present case, the dismissal is carried out in a manner that is unnecessarily humiliating and distressing, there is no reason in principle why a breach of this implied term should not be found to have occurred.*³⁶

43. In a 2005 decision by the Permanent Arbitrator in *Fiji Bank and Finance Sector Employees Union v Life Insurance Corporation of India*,³⁷ a dismissal of an employee was deemed ‘unfair’ on the basis that the Grievor was not provided with procedural fairness in accordance with the disciplinary process set out within the terms of a Collective Agreement. Some other illustrative examples of where the term ‘unfair dismissal’ was used in the Courts and Tribunals prior to the introduction of the Employment Relations Bill, include *Fiji Airline Pilots Association v Air Pacific Ltd* [2005] FJAT 13; Award 14 of 2005 (9 March 2005); *Fiji Bank and Finance Sector Employees Union v Colonial National Bank* [2006] FJAT 31; Award 33 of 2006 (30 May 2006); and *National Union of Hospitality Catering and Tourism Industries Employees v Hotel Takia* [2006] FJAT 56; Award 45 of 2006 (1 September 2006)

³² See *Parliamentary Paper No 49* of 2006 (September 2006) at pages 269 and 324. (Paragraphs 9.259.4 and 11.25 respectively)

³³ Refer to the *Report of the Sector Standing Committee on Social Services on the Employment Relations Bill, 2006*. Parliamentary Paper No 49 of 2006.

³⁴ Though it is recognised that this is only an informative measure and cannot be used as a means of seeking to interpret the specific provisions. (See for example, *Wacando v The Commonwealth* (1981) 148 CLR 1)

³⁵ [2003] FJSC 5; CBV0010.2002 (24 October 2003)

³⁶ As mentioned earlier, that view at least insofar as it pertains to there being no *requirement that reasons be given*, has now been displaced by the statutory requirement that exists at Section 114 of the Promulgation.

³⁷ [2005] FJAT 9; Award 10 of 2005 (17 February 2005)

44. Yet without further signposts, it is hard to understand to which specific decisions dealing with 'unfair dismissal' was the recommendation of the *Sector Standing Committee on Social Services*, directed to in 2006. One thing that is quite clear from the Second Reading Speech of the *Employment Relations Bill 2006*, is that it was proposing a major paradigm shift and statutory intervention both in the market place and in the way in which the relationship between employers and workers took place. As previously noted, such a backdrop was not present when the decision of the Supreme Court in *Central Manufacturing* came about. Within the Second Reading Speech, the Honourable Minister for Industrial Relations stated that the Bill supported and was underpinned by :

*"(the) notion that the employment relationship itself should be conducted in a manner that conducts good faith, respect, fair dealing and mutual trust and confidence between all the parties"*³⁸

*(the fact that) the principle of good faith underpins the Bill.. The simple requirement of the concept is that the parties to employment relationships..deal with each other in good faith, and that those dealings are based on mutual trust, sincerity, honesty, humility, confidence, fair dealing and a genuine desire to settle their differences"*³⁹

*(the fact that the Bill) recognised the inherent imbalance of power and influence in the employment relationship"*⁴⁰

45. The Tribunal is of the view that the Employer was not justified in terminating the employment of the Grievance in the manner in which it did. The conduct of the Employer was unfair in its execution. It was unfair insofar as it was harsh. It was not a decision that came about by way of fair dealing or by virtue of an equal bargaining power of the parties. It was not executed fairly.⁴¹ Of course the conduct was such that it would impact significantly on the relationship between the Employer and the Grievor. Clearly the employment relationship was likely to be no longer sustainable. Only a rare employer would offer an olive branch to an employee in such circumstances. Yes, it was embarrassing, undesirable and outside of what was expected of an employee. But it must be understood that the Grievor had no knowledge of that conduct whatsoever. It is an all too frequent occurrence that takes place within an adult drinking culture, where on occasions individuals do lose control of their faculties. This is not to be excused, but it is to be understood. A responsible employer would have had a responsible alcohol consumption in place that was monitored by a designated person. What individuals do, beyond a supervised work function, in their own homes or at other locations once the nexus between work and private life is broken, is entirely another issue.

46. Ms Buna was a long serving employee. The Employer has identified in its submissions and Affidavit material, earlier warnings issued to her, in which she had been absent from work without notice or authorisation. For a production worker, that is a significant breach of obligation. When offering to resign, the Grievor was to relinquish access to her livelihood. Her hope was that she be able to leave without the stigma of having to say that she was dismissed in employment. In effect this was so she could find another job. The Employer and its advisors

³⁸ See p575 of the Hansard, 22 June 2006.

³⁹ Ibidem, p579.

⁴⁰ Ibidem.

⁴¹ See Wati J in of *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuinaruku* ERCA 9 of 2014; at [61].

deprived her of that opportunity. It was also suggested during proceedings that perhaps her drink had been 'spiked'. Yet neither side sought to explore that point. Be that as it may, the end result is that the Grievor finds herself without work and receiving a maintenance amount of \$60 per week in order to survive. The Grievor's conduct could have been seen as an aberration and an act of a person out of character, or brought about by extenuating or other circumstances.⁴² Instead no compassion appears to have been shown whatsoever. The transcript of the disciplinary meeting makes clear that the Grievor could not recall any of the issues that were put to her. The starting point for the meeting, may have been to ask the Grievor, if everything was ok? and was there any personal or medical problems that she may have been experiencing that led to the dreadful course of events that transpired. One would have thought in the circumstances, this may have been the case, particularly having regard to the events that transpired at Cunningham, that left the Grievor without her handbag, unattended and in a most vulnerable position.

47. Put simply, a middle aged intoxicated woman who was not in control of her faculties, was left by three company managers at a shop some distance from her home. This seems to be the case, despite the fact that one of those managers appears to have known where her house was located and had been speaking to a neighbour.⁴³ Why didn't the managers wait until the police arrived? Mr Greig claimed within his Affidavit, that "a team from Valelevu Police Station was on its way to assist Ruci".⁴⁴ The Grievor's handbag was kept in the car by Mr Puamau and she ultimately returned home at 4.00am, wearing different clothes than she had left with when attending the function. It is also claimed that she had no underwear. The Employer seems to assume no responsibility for this outcome and for the fact that the Grievor is now without work after working for the company for 31 years. Had the Employer intervened when it was initially noticed that the Grievor was "behaving rather oddly", none of the subsequent events that transpired, including her dismissal in employment, are likely to have eventuated. After all, if the Code of Conduct is arguably to apply to the Grievor during the events that transpired, so to would the Employer's health and safety obligations needed to be discharged in the interest of the Grievor's safety.

The Complaint Made by the Grievor to the Fiji Police

48. The relationship between the Employer and the Grievor is clearly at an end. There is also a good deal of hurt and perhaps animosity that seems to have been directed toward the Grievor, after it was the case that she had made a complaint to the Fiji Police. Within the *Employer's Preliminary Submissions* it states:

In October 2016, the Grievor made a false complaint to the Valelevu Police Station Sexual Offence Unit that the Managers had raped her on 3 July 2016 while dropping her home from the Conference Dinner, The spiteful intention in this complaint is inherently evident as the complaint was made despite her having no recollection of the night, Ruci's husband had alleged that she had come home with a different set of clothes with no underwear on⁴⁵

49. The submission further states, that

⁴² For example, the Grievor may have been the victim of ongoing domestic violence or was suffering from some other affliction at that time.

⁴³ It is noted that this person was not called to give evidence on behalf of the Employer.

⁴⁴ See Paragraph 41 of his Affidavit.

⁴⁵ See Paragraph 7.1. of the Employer's Preliminary Submissions

In January 2017, the allegations were found baseless by the police and the Grievor subsequently apologised for falsely accusing GFIL senior management.⁴⁶

50. The Grievor in her Affidavit dated 14 March 2017, attests to the fact that on Wednesday 6 July 2016,

After the meeting with Latieta Gaga, my husband and I went to the Valelevu Police Station to report the state I was in upon returning home on Sunday morning according to the information given to me by husband. (Coming home in a different set of clothes and without any undergarments).⁴⁷

51. This issue of when the complaint was initially made to the Fiji Police was not explored any further in proceedings by either party. On its face, the Minute prepared by Detective Constable Vatusevu refers to a Report:-

- No SV Rpt# 299/07/16
- Dated 26/09/16.

52. It is unclear whether the report number refers to a complaint made in July 2016, by reference to the Report Number 299/07/16, or whether the date of the report, 26/09/16, was the actual date in which the complaint was initially received. In relation to the matter before the Tribunal, nothing significant turns on that fact, although it is more likely that the version of events provided by Ms Buna, explains why the report number is given the reference 299/07/16. In any event, Detective Constable Vatusevu made clear in the giving of her evidence, that the original complaint levelled at the three managers, was one of rape. The Tribunal notes that during proceedings that the Grievor made clear that the complaint arose more out of the state of not knowing what had transpired that evening and the fact that she had returned to her home, in different clothes and without underwear. The Grievor is well entitled to make such a complaint, if she believed it to be true. The fact that the complaint may not have been made for several months after the alleged event, is determinative of nothing. There are many well-known reasons why women do not automatically report such cases. The Tribunal is not inclined to accept the theme that arises within the Employer's material, that this somehow was retaliatory conduct. Any concerned family member would want to know what happened to their spouse or mother or daughter or sister, in such a situation.

53. There are several other observations that should be made here. First and foremost, the circumstances of how the Minute provided from the Fiji Police has come about, is somewhat unclear. It is also undated, however the Tribunal notes that at Paragraph 7.3 of the *Employer's Preliminary Submissions* that it is asserted that in January 2017, "the allegations were found baseless by the Police". Whether that is the date of the Minute is not information that is clear, albeit that it may be known to the Employer. As reproduced earlier, the Minute states that:

"upon enquiries and investigations been done so far and found out that there are no evidence according to Ruci Bun's (sic) complaint" (and that) "Ruci Buni have (sic) apologized and she have (sic) admitted that she didn't know what happened to her on that particular day".

⁴⁶ See Paragraph 7.3 of the Employer's Preliminary Submissions.

⁴⁷ See Paragraph 34 of the Affidavit of Ruci Buna dated 14 March 2017.

54. Something clearly took place on that early morning after the Grievor was taken to Cunningham, where she returned home at 4.00am, in different clothes and with no underwear.

Conclusions

55. In all, the Tribunal accepts that the dismissal of the Grievor by the Employer in the circumstances that it was executed, was not justified and or, was unfair by its harshness, particularly when the Grievor had offered to resign. The Grievor was free to resign whether with or without notice. If it was the case that the Employer sought to terminate her employment within any notice period, then that would have been a different issue. But to seek to place conditions on a long serving employee in these circumstances, when clearly she was remorseful and cognisant of the enormity of the consequences to her livelihood and future job prospects, was to put it simply, totally unnecessary. It appears only motivated to deprive the Grievor of her entitlement to long service leave, that she would have been able to have had access to, had she resigned from her employment. A compromise situation could have easily been reached. The conduct was harsh in the circumstances.
56. Having found that the dismissal in these circumstances was not justified and or unfair, the Tribunal seeks to consider remedies. Based on the circumstances of the case, reinstatement clearly is not an option and compensation for loss of income is not appropriate, having regard to the conduct issues involved. The Grievor has caused significant distress to the Employer and some of its employees and this issue must be taken into consideration when evaluating the overall compensation, if any, that should be provided based on the facts of this case. This is so, despite whether or not the conduct took place in circumstances largely outside of the control of the Grievor. In this regard the Tribunal has also had regard to the earlier warning letters issued to the Grievor, as set out within Annexure EH1 to the Affidavit of Earl Hughes. Subject to one issue below, there is otherwise no justification to make any Order pertaining to loss of earnings, based on the facts of this case.


Entitlement to Long Service Leave

57. The one issue that warrants some attention is that pertaining to the Long Service Leave entitlement. The language of Clause 13(e) referred to within the relevant *Tuckers Collective Agreement* makes the entitlement to the benefit available, except in the case for termination of employment for cause. The Tribunal accepts that the Employer had intended to summarily dismiss the Employer. To some extent regardless of whether or not the Employee resigned, had that happened during any notice period, the requirement to pay the entitlement would have been avoided. This is where that issue of harshness comes about. The Grievor did not have the same bargaining position as the Employer at the relevant time. The summary dismissal of the Grievor appears a harsh response, in the case where the Grievor was willing to resign. The Tribunal is of the view that the Employer should pay to the Grievor, the amount of the 50% of the accrued long service leave entitlement that she would have otherwise received, had she resigned without incident. The punishment of having no further employment with the Employer after 31 years, seems a sufficient penalty. The complete deprivation of accrued entitlements, in these circumstances, would otherwise seem unjust. Should the parties be unable to reach agreement upon the calculation of this amount, either party is at liberty to apply for the reconvening of this matter, but only for that purpose.

Decision

It is the decision of this Tribunal that:-

- (i) The grievance of Ms Ruci Buna be upheld, insofar as she was unjustifiably and or unfairly dismissed in employment, in circumstances where she had otherwise sought to resign from her employment.
- (ii) The Employer be required to pay to the Grievor 50% of the accrued long service leave entitlement as provided for within Clause 13(e) of the relevant Collective Agreement, as due and calculated up to 20 July 2016.



Mr Andrew J See
Resident Magistrate