



## Decision

<b>Title of Matter:</b>	<b>Pita Waimuka</b>	<b>(Grievor)</b>
	<b>v</b>	
	<b>Outrigger Beach Resort</b>	<b>(Employer)</b>
<b>Section:</b>	<b>Section 211(1)(a) Employment Relations Promulgation</b>	
<b>Subject:</b>	<b>Adjudication of Employment Grievance</b>	
<b>Matter Number:</b>	<b>ERT Grievance 4 of 2017</b>	
<b>Appearances:</b>	<b>Mr D Urai, NUHCTIE, for the Grievor</b> <b>Ms J Lal and A Naryan, Neel Shivam Lawyers for the Employer</b>	
<b>Date of Hearing:</b>	<b>8 April 2017</b>	
<b>Before:</b>	<b>Mr Andrew J See, Resident Magistrate</b>	
<b>Date of Decision:</b>	<b>25 July 2017</b>	

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### Background

1. This grievance has been referred to the Tribunal in accordance with Section 194(5) of the *Employment Relations Promulgation 2007*. The Grievor was terminated in his employment by letter dated 3 November 2016, following what the Employer says were repeated incidents of failing to carry out the duties of a Food and Beverage Outlet Manager. Specifically, the final and determinative complaint against the Grievor related to his failure to have the pool side area of the resort, prepared as part of the early morning shift, so that the hotel was presented in the best possible light for guests upon commencing to use the facilities at the start of the day.
2. The Grievor's case is that his dismissal was not justified on the basis that there had been no complaint by hotel guests pertaining to the reported incident on 2 November 2016 and that he was unfairly and unreasonably terminated at work.

### The Case of the Employer

3. The Employer provided the Tribunal with some background information pertaining to the employment arrangements governing the Grievor's former contract. This included the *Employee Handbook*<sup>1</sup>, a Job Description of Duties,<sup>2</sup> an Orientation Checklist and the Disciplinary Guideline

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<sup>1</sup> See Exhibit E1

Policy.<sup>3</sup> In addition, the Employer submitted to the Tribunal a copy of the Grievor's Performance, Planning and Development Review (Jan 2016)<sup>4</sup>, together with a series of Notices of Disciplinary Action that had been issued to the Grievor during the most recent course of his employment. These included:

- Notice of Disciplinary Action dated 10 February 2015<sup>5</sup>;
- Notice of Disciplinary Action dated 4 December 2015<sup>6</sup>;
- Notice of Disciplinary Action dated 11 March 2016<sup>7</sup>;
- Notice of Disciplinary Action dated 25 April 2016<sup>8</sup>;
- Notice of Disciplinary Action dated 14 October 2016<sup>9</sup>; and
- Notice of Disciplinary Action dated 3 November 2016<sup>10</sup>.

4. It was the final Notice of Disciplinary Action dated 3 November 2016, that gave rise to the termination of the Grievor's employment. In effect, the Employer argues that there had been an ongoing and progressive set of performance related issues that have led to the justification of the termination of employment.
5. The Employer relied upon the evidence of Mr Christopher Hamilton, the Executive Assistant Manager of the Resort to explain the rationale for the decision to terminate. In summary, the evidence of Mr Hamilton was that the hotel was a 'five star resort' and that it had to provide service standards at that level for those who pay and expect that service. Mr Hamilton drew the Tribunal's attention to the annual performance rating that had been provided to the Grievor and indicated that it was well below the acceptable standard required. Mr Hamilton provided the Tribunal an overview of the other performance infringements contained within the Notices of Disciplinary Action.
6. The second witness to give evidence on behalf of the Employer, was Ms Sharon Naidu, the Director of Human Resources. Ms Naidu spoke of the attempts to implement a Critical Improvement Plan for the Grievor in response to concerns that had been raised by Mr Hamilton regarding the Worker's performance.

#### **The Evidence of Mr Waimuka**

7. The Grievor commenced his employment at the resort in January 2014. The Grievor indicated that at the outset of his employment, the work was difficult being required to work in the hot sun for in excess of 10 hours per day. In relation to complaints made regarding the Grievor's capacity to train and brief his staff, he indicated that this was never of concern. In response to the allegation that he had spoken inappropriately to one of the overseas female guests,<sup>11</sup> this too

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<sup>2</sup> See Exhibit E3.

<sup>3</sup> See Exhibit E4.

<sup>4</sup> See Exhibit E5.

<sup>5</sup> See Exhibit E6.

<sup>6</sup> See Exhibit E7.

<sup>7</sup> See Exhibit E8.

<sup>8</sup> See Exhibit E9.

<sup>9</sup> See Exhibit E11.

<sup>10</sup> See Exhibit E12.

<sup>11</sup> In relation to comments attributed within Exhibit E7.

was clarified and in part denied. More fundamentally, in relation to the allegations concerning the failure to keep tidy the pool side area for the commencement of the resort day, the Grievor attributed some of this to the fact that insufficient staff had been allocated for the morning shift and that he was not aware of the fact that one designated person had failed to come to work.

### **The Justification of a Dismissal in Employment**

8. In *Kumar v Nanuku Auberge Resort Fiji*<sup>12</sup>, this Tribunal has set out the basis on which a dismissal decision can be justified as follows.

*As a starting point, at least in the context of 'unjustifiable dismissal', the question needs to be asked, having regard to the Statement of Reasons provided, whether a termination based on those reasons was justified. The question post Central Manufacturing v Kant, where a new regulatory regime is 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<sup>[24]</sup> 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 68<sup>th</sup> 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,<sup>[25]</sup> 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*

<sup>12</sup>

[2017]FJET2 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.*



9. The Tribunal accepts that in the instant case, there was justification in the ultimate termination of employment. It would appear that the Grievor was not performing his work to the standard required by the resort. He had been issued with many performance infringement notices and there was simply no evidence of any improvement to his overall performance as an Outlet Manager.

#### **Other Issues**

10. While the termination may be justified when viewed in a rather clinical manner, it would also appear that there could have been other options available to the Employer, when addressing this matter of performance. The most obvious to the Tribunal is that the Grievor could have been demoted in his role as Outlet Manager- Food and Beverage, on the basis that he did not have the 'eye for detail' or service understanding, that was required of this role.
11. The Tribunal is of the view that the Employer should consider the re-employment of the Grievor to a lesser role, should one become available at a later stage. This is a recommendation only and is not a remedy outcome ordered by the Tribunal.
12. The grievance is otherwise dismissed on the basis that the decision of the Employer was justified in the circumstances.

#### **Decision**

It is the decision of this Tribunal that the grievance of Mr Pita Waimuka be dismissed.

**Mr Andrew J See**  
**Resident Magistrate**