



Decision

Title of Matter:	Gulsher Mohammed	(Grievor)
	v	
	Kilavata Carriers Limited	(Employer)
Section:	Section 211(1)(a) Employment Relations Promulgation	
Subject:	Adjudication of Employment Grievance (Unfair or Unjustifiable Dismissal in Employment)	
Matter Number:	ERT Grievance 120 of 2016	
Appearances:	Mr D Nair, for the Grievor Messrs R Chand and S Singh, for the Employer	
Date of Hearing:	Monday 23 January 2017	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	19 July 2017	

Background

1. This grievance has been referred to the Tribunal in accordance with Section 194(5) of the *Employment Relations Promulgation 2007*.
2. The Grievor told the Tribunal that he had commenced work with the Respondent Employer some nine years ago and had been working as a heavy vehicle driver at the time of his dismissal in June 2016. According to the former employee, he had sought one day's leave from the son of the Company Director, who it was claimed was the usual point of contact for such requests. The Grievor's evidence, was that there were no leave forms available for such purpose and upon commencing his day's leave, was contacted by the Company Director and chastised for not attending work on that day. It would appear that the Company Director himself had not been aware of the leave approval and as a result, had committed the services of the Grievor and the vehicle that he had been driving, for haulage works.
3. Arising out of an apparent Impasse between the Grievor and the Company Director, the employee was subsequently advised of his termination of employment. At the time of

termination, he had been residing in a company supplied flat and had owed his former employer, an amount of \$450.00.

The Issues

4. At issue is whether the Employer is justified in terminating the employment of its employee, based on the circumstances of the case. Clearly the answer to that question is no. The problem though, is that because of the disagreement that took place between the Company Director and the Grievor, thereafter, neither side returned to work or invited the other to do so.
5. The Grievor contends that he was told not to return to work and in the absence of any direct evidence from the Employer, the Tribunal has no reason why it should not accept that version of events. Mr Suka who appeared on behalf of the Company and advised that he undertook the role of Fleet Co-ordinator, provided the Tribunal with an indicative Time and Wages Records for various periods in 2015 and 2016. (See Exhibit L1). These records are incomplete and would not be compliant records as required for the purposes of the *Employment Relations Act 2007*.
6. In considering the length of the Grievor's service with the Employer, The Tribunal was advised that the Grievor had been absent from work for at least a period of three months to work overseas and on another occasion to undertake farming works. Whether that arrangement be deemed as leave without pay, or in fact has severed the employment contract and caused a new one to be entered into, is only of some importance. The fact that the Employer cannot provide accurate time and wages records, a copy of a written employment contract or any other leave records, all creates a backdrop that is unfavourable to the Employer.

Was the Decision Justified to Dismiss the Grievor ?

7. In *Kumar v Nanuku Auberge Resort Fiji*¹, 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^[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,*

¹ [2017]FJET2 at [24] to [27].

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 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.

Conclusions

8. The Grievor is seeking compensation for the manner in which his dismissal came about, in circumstances that he says were not justified. The Tribunal accepts that there is no justification in a dismissal decision, because two family members running a company failed to communicate the fact that one had approved the leave of an employee, without the knowledge of the other. This would appear a dismissal that was not well founded. There appears an element of spitefulness that motivated the Employer in circumstances where the father and son had not communicated their respective wishes for whether or not the Grievor should have been at work on the said day.
9. The Tribunal finds that the Employer has therefore unjustifiably dismissed the Grievor and orders that an amount of compensation in the amount of 12 week's wages equivalence, be paid in compensation.
10. That amount is calculated based on wages records, suggestive of a weekly wage of \$220.00 per week, equating to the gross sum of \$2640.00.

Decision

It is the decision of this Tribunal that:-

- (i) The Employer pay to the Grievor the sum of \$2640.00 within 21 days hereof.



Mr Andrew J See
Resident Magistrate