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

Decision

Title of Matter:	Parvinesh Kumar v Nanuku Auberge Resort Fiji	(Worker) (Employer)
Section:	Section 211(1)(a) Employment Relations Promulgation	
Subject:	Adjudication of Employment Grievance (Unjustifiable or Unfair Dismissal)	
Matter Number(s):	ERT Grievance 122 of 2016	
Appearances:	Mr D Nair for the Worker Ms N Choo and Mr D Sharma, R Patel Lawyers, for the Employer	
Date of Hearing:	15 December 2016	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	10 February 2017.	

Background

1. This is a referral made to the Tribunal in accordance with Section 194(5) of the *Employment Relations Promulgation* 2007. The referred matter relates to a grievance lodged by Mr Parvinesh Kumar, following his termination of employment from Nanuku Auberge Resort. According to the Preliminary Submission filed by the Grievor on 26 August 2016, he had been employed at the Resort as the Director Finance from 14 January 2015, up to the date of termination on 25 May 2016.[1] The Grievor claims within his submissions, that while on a period of inpatient sick leave between 3 May 2016 to 30 May 2016, that his employment was terminated by his Employer. The reason that was provided to the Worker within his termination letter was "that (his) services will no longer be required by the Company".

2. In response, the Employer through its legal representatives submits that the termination was one that is provided for within the terms of the contract between the parties,that allows for the giving of four weeks' notice, or the payment in lieu thereof.

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[1] It is noted that in his Evidence in Chief, the Grievor states that he commenced his employment at the resort on 14 July 2014. Given that the Employee was also only issued the letter on 30 May 2016, also gives rise to when in fact his employment did come to an end. The date of 30 May 2016 is to be preferred in this regard.

3. Both parties filed Preliminary Submissions in this matter.[2] In addition, Affidavits were filed by the Grievor on 28 November 2016[3] and by Mr Vincent Mistry, the Human Resource (HR) Manager on behalf of the Employer, on 18 November 2016.

Evidence before the Tribunal

The Case of the Grievor

4. The first witness called was Mr Kumar. According to the Grievor on the day of his dismissal from employment, he received a call from the Human Resource Manager Mr Mistry and was asked "where (he) was?". Mr Kumar told the Tribunal that he arrived to the office car park after returning from sick leave and was intercepted by Mr Mistry and told "don't go to the office". In his evidence Mr Kumar stated that he was instructed to go to the General Manager's residence. The Grievor said that he was ultimately met by the General Manager of the Resort, who "asked (him) to resign". The witness told the Tribunal that in response to this request that he indicated to Mr Mark Stanford, the General Manager, that he was "not going to, because (he) ha(d) not don't anything wrong". The Grievor said that he went home at this point and collected the work 'cabinet key' and was escorted by Mr Mistry to the office. According to Mr Kumar, he was not allowed to talk to staff; he packed up his personal items and took his bag. The Grievor advised that he was then required to wait for his final cheque to be provided to him and gave evidence that he "waited the whole day around the General Manager's residence office".

5. Mr Kumar told the court that following his termination, he was made aware of the fact that his position had been readvertised by the Employer. [4] The Worker gave evidence that he had initially informed the HR Manager Mr Mistry that he was going to hospital around 3 May 2016, where he was admitted until 8 May 2016. He was issued with a Medical Certificate[5] that indicated he was fit to return to work on 30 May 2016. Mr Kumar said that prior to his termination, that there had been no negative performance feedback from the Employer. Mr Nair as his legal representative referred to the Affidavit filed by Vincent Mistry where at Paragraph 7, it was stated that the Grievor's termination was due to repeated non-performance and inefficiency. Mr Kumar rejected that this was the case.

6. Upon cross examination by Counsel, the Grievor was taken to a document setting out a schedule of monies due at termination.[6] Mr Kumar's attention was drawn to the tail end of that document where it had been signed for acknowledgement purposes in the presence of Mr Mistry. The acknowledgment read:

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2 See submissions filed by the Grievor/Worker on 26 August 2016 and the Employer on 14 September 2016.

3 Referred to in proceedings at Exhibit G1.

4 See Annexure "PK-04" to his Affidavit dated filed on 28 November 2016.

5 See Annexure "PK-03" to the Affidavit of Parvinesh Kumar.

6 See Exhibit E 2 and note that this document was inadvertently dated 30 June 2016, rather than 30 May 2016.

"I, Parvinesh Kumar, hereby acknowledge receiving the correct amount due to me and hold no other monetary claims against Nanuku Auberge Resort in regards to my employment."

7. Mr Kumar told the Tribunal that he had signed the document in circumstances when he was "not in a very good state", but nonetheless admitted to having read and signed the document. Under cross examination, the Grievor conceded having 'text messaged' Mr Mistry regarding his initial absence from work, asking that he pass on the message to the General Manager. According to the Grievor, on 8 May 2016 after being released from hospital, he had a 45 minute discussion with Mr Stanford. At that time, he said that he had advised the General Manager that one of his staff would collect and deliver the medical certificate that he had obtained from the CWM Hospital to Mr Stanford. This he said took place. According to Mr Kumar, he was later contacted on 16 May 2016 by the General Manager who had wanted a meeting with him, however indicated that he subsequently had several conversations on the telephone with him during the period of absence. Mr Kumar gave evidence that his General Manager told him not to return to work until 30 May 2016 and to rest during this period.[7]

8. Under cross examination and when recalling the events on 30 May, the witness said that he was handed a letter by the Human Resource Manager in the presence of the General Manager. Mr Kumar said he felt he was "treated like a criminal'. According to Mr Kumar, he was taken to his home and retrieved work items that included his uniform and a cabinet key. Mr Kumar told the Tribunal, that he was now earning one-third of his previous wage with his new employer. Counsel for the Employer Mr Sharma, then took the witness to various performance issues, firstly, in relation to accounting practices. Mr Kumar told the Tribunal that he had not been made aware of any performance concerns from the Finance Manager of the company who was located in America. Mr Sharma took the Grievor through various issues such as a lack of reconciliation of accounts in the 'Quick Books' for 2014 – 2015; FNPF payments being made late on multiple occasions; Fringe Benefit Taxation payments not being processed on time and Housing for Employees, not being processed as part of payroll. The Grievor did not accept the allegations of poor performance.

9. Finally, it was put to the witness, that he had made no 'back up plan' in the event of a long term absence such as the one that he had. In response, the Grievor replied that "he didn't know he was going to get sick". In re-examination, the Grievor was first asked about why he had made no other protest to the General Manager at the time of termination. In short, his response was that he had used the grievance process through the Labour Office as that vehicle. Mr Kumar told the Tribunal that there had been no challenge at all to the Medical Report that he had submitted to his Employer, following his visit in hospital. In relation to the proposition that somehow the Grievor was reporting to the Finance Manager in America, he responded that the General Manager Mr Stanford, was the officer that he reported to in Fiji.

The Case of the Employer

10. Mr Vincent Mistry, Human Resource Manager was the only person to give evidence on behalf of the Employer. As mentioned, earlier he had prepared an Affidavit sworn on 18

[7] Such a comment if true and it is uncontested, seems to be at odds with a termination letter that was drawn up on 25 May 2016, prior to the return date.

November 2016 and this was admitted into evidence as part of his Evidence in Chief.[8] Mr Mistry told the Tribunal that he had commenced his employment with the Employer in 2013. According to Mr Mistry he was contacted by the Grievor via text message on 3 May 2016 and advised that he was in hospital. Mr Mistry said that he had been asked by Mr Kumar, if he could pass on the message to the General Manager, Mark Stanford. Mr Mistry explained the process for the handling of sick leave requests and indicated that a form would be completed and approved by the employee's immediate report, who in this case would have been Mr Stanford, prior to having the entitlements verified by Human Resources.

11. Mr Mistry advised the Tribunal that Mr Stanford was no longer working for the company, however recalls that he was called into his office and had explained to him, "the company's stance" on Mr Kumar's continuous absence from work. According to Mr Mistry, he was told that this absence, would "hinder his continuance with the company". Mr Mistry said that on 25 May 2016, he came to "the conclusion to prepare the (termination) paperwork for Mr Kumar". According to the witness the decision for the action to terminate the contract, had come from Mr Stanford after discussions with the company's head office in Chicago. He said that once the letter was prepared that Mr Stanford held onto it, until it was issued on 30 May. The witness told the Tribunal that he was to meet Mr Kumar in the work car park when he was to return to work on 30 May and that when the Grievor arrived, that he asked to escort him to the General Manager's Office. Mr Mistry recalls saying to the Grievor while walking to the office, that

    "this could turn out not to be a good day for us".

12. According to the Human Resource Manager, when the Grievor met with the General Manager Mr Stanford, he was given the option to resign, though he declined to do so. Mr Mistry said as a result, he was provided with the termination letter. According to Mr Mistry, as part of the company's employee exit 'checklist', certain company property needed to be retrieved and on that basis he escorted the Grievor to his home. He said that while waiting in the Grievor's home, that Mr Kumar's wife had made him a cup of tea. In response to questioning by Counsel, the witness stated that the termination process was not a "spectacle" and that the only persons privy to the process were himself, the General Manager and the lady who had prepared the final cheque and payment calculation.

13. In relation to the issues pertaining to the Grievor's work performance, according to Mr Mistry, these arose after his departure. He said that some of the issues had been discussed between a Ms Pittman and a Mr Oplinger from the American office. According to the witness, the General Manager had elected to 'pay out' the notice period under the contract, rather than have the Grievor at work during that time, because of the concerns that were held that the Grievor may engage in some form of 'sabotage'. [9]

14. Under cross examination, the witness said that he had already been engaged as a Human Resource Officer when the Grievor commenced his employment with the Resort. Mr Mistry said that Mr Kumar had been recruited by a former General Manager and that he himself

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[8] See Exhibit E3.

[9] There was simply no evidence whatsoever that the Grievor would have engaged in conduct of that type.

had not been involved in that recruitment activity. According to the witness, he "got on very well" with the Grievor. Mr Mistry told the Tribunal that he was under instructions from Mr Stanford not to contact the Grievor while he was absent from work. He said that around 25 May 2016, that the General Manager had "called me into work and expressed concern about the Grievor's long absence from work and that his impression of the Finance Team was that it was 'leaderless'". Mr Mistry said that the decision had come from the General Manager Mr Stanford, that the company needed to move forward and that the Finance Team needed " a leader to be there".

15. Mr Mistry advised the Tribunal that on 30 May, there was no restriction imposed on the Grievor that he could not talk to anyone, though noted that there was no handover of work. In response to questioning from Mr Nair, the witness said that there were no adverse reports on the Grievor's Personnel File held by the Employer. Mr Mistry stated that he had not seen any Audit Report subsequently undertaken that revealed highlights in relation to poor accounting practices of the Grievor. Upon questioning by the Tribunal, Mr Mistry advised that during the Grievor's first year of employment, that sick leave was not an issue. He said that it was only when Mr Kumar had gone to New Zealand some time around January or February 2016 for a holiday, did he fall ill while on annual leave and as he understood, was admitted to a hospital.

Submissions of the Parties

16. The Respondent Employer has provide a comprehensive overview of the relevant case law and potted history of what may be described as 'unfair dismissal' law in Fiji. As a starting point to the way in which the current case should be determined, the *Employer's Closing Submission*[10] firstly speaks of the acceptance of the doctrine of 'payment in lieu of notice' ay common law, in the case of *Central Manufacturing Company Limited v Kant*[11]. The submission then turned to the decision of *Wong v Land Transport Authority*[12]. Specifically, the Tribunal is referred to the extract of decision at Paragraph 2.26, in which the Legal Tribunal stated:

> *Needless to say, the fairness of a contract is not judged just by looking at the terms and conditions alone and whether it is in compliance with the law. One has to also look at the benefits to both parties on an equal footing. In my opinion, to make an employment contract mandatory to be carried out for a fixed three year duration without an exit clause is equivalent to an unfair term in the contract. Both parties cannot stand to gain anything within such an arrangement. A prudent, reasonable and modern labour law cannot force parties to stay in a contract when that intricate good faith working relationship, based on mutual trust and respect between parties have either deteriorated or reached a point of no return. Or simply the employee has found better working conditions and wishes to end the current contract to take up a new one with his/her prospective (new) employer. It makes sense to have flexibility and mutual understanding to terminate contract as and when the parties require.*[13]

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10 Filed 17 January 2017.

11 [2003] FJSC 5

12 ERT 55 of 2011.

13 With respect to the Legal Tribunal, this Tribunal does not accept that in many cases, the parties at contract would be on an equal footing. Such a view was also not shared by the Minister for Industrial Relations when introducing the Employment Relations Bill 2006 into parliament. (See Hansard of the House of Representatives, 22 June 2006 at p579).

17. Finally, the submissions of the Employer raise the decision of Wati J in *Carpenters v Isoa Latianara*[14] in which case, the Employment Court, has stated quite clearly

> *It is not the aspect of right to be heard that leads to unfair dismissal. It is the manner of treating the employee in carrying out the dismissal that must be considered. The employer's actions must be assessed to ascertain whether the employee was treated with fairness, respect and dignity in carrying out the dismissal.*[15]

18. The submission of the Employer continues, that:

> *The Employer in this case reserved the right to terminate Grievor's employment on a "with or without cause" basis therefore the requirement that any reasons be given for his termination is misconceived as per Yash Kant (supra)*[16]

19. In response, the Grievor submits that consistent with *Carpenter's* case, there cannot be a hybrid of termination methods.[17] That is, a termination that is founded on both cause and no cause. It is submitted that at the time of termination, misconduct was not an issue.[18]

Impression of the Evidence and Analysis

20. This Tribunal recognises and reinforces the view of Wati J, that there cannot be a hybrid of termination methods. That is, that in the first place, a termination is brought about either with cause or without. It cannot be both.[19] Having said that, it is the further view of this Tribunal that there would be very few cases (if any) where an Employer could not actually identify what it was, that gave rise to the termination. That is, what was the cause? In the context of modern employment law and against a backdrop of *International Labour Standards*[20] that more and more shape the way in which such law is to be interpreted, it would appear that an individual does have some right to understand at termination, at least why the contract was being brought to an end. Such a right to be at least informed, would appear consistent with the view of the Supreme Court in *Central Manufacturing* that "there is an implied term in the modern contract of employment that requires an employed to deal fairly with an employee, even in the context of dismissal". For how else otherwise could it be claimed that an Employer was exercising such duty, if it was to 'surprise' an Employee with a notice to terminate in circumstances that otherwise gave her or him, no

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14 ERT No 7 of 2011.

15 See at Paragraph 31 of that Decision.

16 See Paragraph 21 of the *Employer's Closing* Submission filed on 17 January 2017.

17 Note the reinforcement of that question, at least insofar as it needs to be assessed on a case by case basis, as per Wati J at [24].

18 See *Grievor's Submissions In Reply* filed on 30 January 2017 at Paragraph 1.7.

19 Although having said that, it could possibly be the case that at a subsequent time after termination, issues may have surfaced that could have otherwise further justified the termination of employment. (see *Shepherd v Felt and Textiles of Australia Ltd* [1931] HCA 21; (1931) 45 CLR 359 (4 June 1931)

20 See for example, *C158 – Termination of Employment Convention* 1982 (No 158)(22 June 1982); and *R166 – Termination of Employment Recommendation,* 1982 (No 166) (22 June 1982).

understanding that this may occur. For that reason, Section 114 of the *Employment Relations Promulgation* 2007 provides a useful intervention, where it states:

> *If a worker is dismissed, the employer must, when dismissing the worker provide to the worker with a written statement setting out the reasons for the dismissal.*

21. This is a deliberate statutory intervention that is brought about within the framework that is the *Employment Relations Promulgation.*[21] The requirement is at complete odds with the proposition within the Employer's submissions that claims "the requirement that any reasons be given for his termination is misconceived". It is likely that for this reason, this Tribunal is given jurisdiction to deal with such grievances at Section 230(2) of the Promulgation

> *If the Tribunal .....determines that a worker has an employment grievance by reason of being unjustifiably or unfairly dismissed.*

22. The Tribunal has a clear authority to determine if the reasons for Mr Kumar's dismissal are justified and the dismissal fair.[22] So what is meant by the term 'dismissal'? And when does it warrant an interrogation by the Tribunal to ascertain whether it is one that is justified or fair? Section 4 of the Promulgation defines dismissal to mean:

> *"any termination of employment by an employer including those under section 33".*

23. The essence of the submissions of the Employer is that as the termination had taken place having regard to Section 29 of the Promulgation and compensation paid in lieu of providing that actual notice period, then no further inquiry should take place. This is an argument that is intermittently raised before the Tribunal. In cases of this type, the underlying assumption being that once notice of termination is provide in accordance with the contractual terms, no further right at statute would lie. Whilst making this observation, the Tribunal nonetheless notes the views of the Supreme Court, that there is now an implied term at common law that an employer can make payment in lieu of notice.[23] While all that is said, it would seem a superfluous way in which the drafting of the Promulgation took place, if it was the case that Section 230(2) of the Promulgation did no more than ensuring that scrutinisation of the provision for payment for notice and that a worker was not humiliated or treated in an undignified manner, when the dismissal decision was delivered. The expressions 'unjustifiably dismissed' or 'unfairly dismissed', must be provided with a meaning well beyond whether there has been compliance with entitlements at termination.

What is an Unjustifiable Dismissal?

24. 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

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21 Compare and contrast the absence of any such provision in the *Employment Act* (Cap 92).

22 See Annexure PK01 to the Affidavit of the Grievor filed on 28 November 2016.

23 See *Central Manufacturing Company Limited v Kant,* op cit.

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, discriminatory grounds based on attribute, absence due to maternity leave or temporary absence from work because of illness or injury.

25. 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."*
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> *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.*

26. 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:-

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24 The use of the word dismissal may or may not have negative connotations to it and so is used in a similar way to termination for these purposes.

25 See [1995] IRCA 333;62 IR 371 at 373

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.

27. 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.

What is an Unfair Dismissal

28. The term 'unfair' is not defined within the Promulgation, 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.[26] 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.[27] At that stage, there was only one concept contained within Clause 230 of the Bill and that

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26 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.

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

was to allow the Tribunal to resolve grievances in the case where it was claimed that a Worker had been "unjustifiably dismissed".

29. It was only during the committee stage and following recommendations made within the *Report of the Sector Standing Committee on Social Services*[28] 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". [29] 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. [30]

30. In 2003, albeit in the context of a different statutory regime, the Supreme Court of Fiji in *Central Manufacturing Company Limited v Yashni Kant,*[31] 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.*[32]

31. In a 2005 decision by the Permanent Arbitrator in *Fiji Bank and Finance Sector Employees Union v Life Insurance Corporation of India* ,[33] 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

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

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

30 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)

31 [2003] FJSC 5; CBV0010.2002 (24 October 2003)

32 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.

33 [2005] FJAT 9; Award 10 of 2005 (17 February 2005)

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. Yet without more 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. 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"*[34]
>
> *(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"*[35]
>
> *(the fact that the Bill) recognised the inherent imbalance of power and influence in the employment relationship"*[36]

33. Of course in many other countries, the definition of 'unfair dismissal' is more readily accessible. For example in Australia, at the core of the definition of "unfair dismissal" at Section 385(b) of the *Fair Work Act* 2009, is whether a dismissal was harsh, unjust or unreasonable. Section 387 of that Act, thereafter sets out the criteria for assisting in reaching a view in that regard based on:-

> *(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and*
> *(b) whether the person was notified of that reason; and*
> *(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and*
> *(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and*
> *(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and*
> *(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
> *(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and*
> *(h) any other matters that the FWC (Fair Work Commission) considers relevant.*

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34 See p575 of the Hansard, 22 June 2006.

35 Ibidem, p579.

36 Ibidem.

34. In the case of South Africa, within Sections 186 and 187 of Chapter VIII of the *Labour Relations Act,1995* [37] many illustrations are given as to circumstances that may give rise to claims of dismissal or unfair labour practice. For example, a dismissal is deemed to occur, where:

> *an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it*[38]
>
> *an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another;*[39] *or*
>
> *an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.*[40]

35. Section 188 of that Act further provides:

> *(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-*
> *(a) that the reason for dismissal is a fair reason-*
> *(i) related to the employee's conduct or capacity; or*
> *(ii) based on the employer's operational requirements; and*
> *(b) that the dismissal was effected in accordance with a fair procedure.*
>
> *(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.*[51]

36. And by way of one far away example in the case of Spain, a termination is 'unfair' if based on other than justified reasons, or where improper procedures are followed.[41] It is safe to say, that universally, whilst there are a myriad of approaches adopted as to what constitutes unfair dismissal, broadly speaking many countries have embraced a similar theme, in drawing the distinction between justification and fairness. The term 'fair' or the adverb 'fairly' is commonly used to describe something which is free from self interest or prejudice. An approach marked by reasonableness, impartiality and honesty. One that is not harsh. Treating people justly and without favouritism or discrimination. For example, applying the terms of an employment policy consistently to all workers could be a relevant case in point. Again, the *Statement of Reasons for Dismissal* that is required to be issued by virtue of Section 114 of the Promulgation serves as the legitimate starting point for commencing any inquiry. The question should be asked, as to whether the reasons provided together with the

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37 See Act No 66 of 1995 as amended.

38 See Section 186(1)(b) of the Act.

39 See Section 186(1)(d) of the Act.

40 See Section 186(1)(e) of the Act.

41 Background paper for *the Tripartite Meeting of Experts to Examine the Termination of Employment Convention*, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166) (April 2011), p48

corresponding evidence, demonstrates a rationale for termination that is justifiable and impartial. Whether a decision is justifiable, may also in some cases (not necessarily all) be influenced by whether a Worker was provided with any procedural fairness or natural justice prior to the decision being made. That is, the reason could be justifiable, but the implementation of the decision still could be executed unfairly.

37. Whilst this requirement for procedural fairness or natural justice may not be an absolute requirement where there is no clear statutory instruction for it to occur, it nonetheless may still be a relevant consideration when forming a view whether a worker has or has not been unfairly dismissed. The provision of the *Statement of Reasons*, provides a far more level playing field in the employment relationship, by removing the somewhat artificial doctrine of 'without cause' and requiring the Employer to provide reasons for the dismissal. This is a fundamental difference in the legislative framework brought about with the *Employment Relations Promulgation* 2007 and what previously existed as the legislative backdrop when the decision of *Central Manufacturing* was issued. Even at that point in time in 2003, before the new statutory regime had come into play, the Supreme Court had acknowledged the view as expressed in the case of *Mahmud v Bank of Credit and Commerce International SA (in liq)*[42],

> *"that an employment contract was no longer to be regarded simply as a commercial contract but rather, as a relational contract".*

38. This acknowledgement supports the view that there are different considerations at play when the issue of the termination of an employment contract is being considered. The dismissal of an employee purportedly without cause, is not akin to cancelling the order of a carton of dalo or pineapples under the terms of a commercial contract.[43] There are significant consequences that arise when a Worker's employment is terminated 'by surprise'. A loyal Worker with family, household and financial obligations may have their entire social and economic stability destroyed by one indifferent decision, in the case where an Employer felt that commercially it was well within its rights to simply terminate 'without cause'. The situation can be aggravated all the moreso, where the Worker was completely oblivious to the fact that the decision to terminate was to take place and where her or his conduct and work performance, had otherwise been long standing and exemplary.

Overall Findings

39. In the present case, the evidence before the Tribunal though, is that the position previously filled by the Grievor was readvertised and filled.[44] According to the only witness called by the Employer, Mr Mistry, there was no record, nor discussions pertaining to the quality of the Worker's work, prior to reaching the decision to terminate his services. The issue on this occasion, appears more driven by the fact that Mr Kumar had been absent from work for an extended period of time and that the Employer was concerned about the impact that this absence had on its ability to properly ensure the effective financial management of the business. In many respects that is an understandable concern, however the manner by which the termination has been brought about, without any further inquiry of the Worker's

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42 [1998] AC 20

43 Though it is recognised that are nonetheless many comparable contractual features that overlay all forms of contract.

44 See Annexure PK04 to the Affidavit of the Grievor filed on 28 November 2016.

capacity to continue in his employment and without any truthful explanation of why the dismissal was brought about, renders the approach unfair. In *Smith and ors v Moore Paragon Australia Ltd*[45], a Full Bench of the then Australian Industrial Relations Commission identified the traditional considerations that gave rise to the frustration of an employment contract in the case where an employee is so incapacitated by illness or injury that she or he cannot work.

40. Those considerations were:-

    (a) The terms of the contract, including the provisions as to sickness pay;
    (b) How likely the employment was likely to last in the absence of sickness;
    (c) The nature of the employment
    (d) The nature of the illness or injury and how long it has already continued and the prospects of recovery; and
    (e) The period of past employment.

41. In the present case, the Worker had returned to work. There was no sign nor evidence of any ongoing incapacity. His evidence was not contradicted insofar as it was argued that he had been told to remain away from the workplace, until he was fit for duties. There was no evidence that the Worker had not recovered from his illness. His evidence was that he was told to remain off work until 30 May 2016. On that basis, the Statement of Reasons provided to the Worker appears not to be entirely honest, nor on that basis within the spirit of what is required to meet the objectives of Section 114 of the Promulgation. While post termination, the Employer now claims to have identified issues during the Worker's employment that rendered his technical skills and competence less than satisfactory, there was no direct evidence to support that claim.

42. The Tribunal finds that the circumstances that have given rise to the subject dismissal have not been honestly reflected within the *Statement of Reasons*.[46] The evidence is suggestive of the fact that the Worker was terminated in his employment, because of a near four week absence from work due to illness. Such a termination is arguably discriminatory for the purposes of Section 75 of the Promulgation, having regard to the fact that such an absence of that kind, would likely render the ground of discrimination that is the illness, as a form of 'disability' as that concept is generally accepted in discrimination law. There is no evidence of any discussions canvassing adjustment or reasonable measures that could have occurred in the intervening period. That is not to say that it would be reasonable for the period of absence to extend ad infinitum, but without any inquiry of the ongoing capacity of the Worker to continue to perform and in circumstances where the Worker had the approval of the Employer to be away in any event, presents a far different scenario. There was simply no inquiry made of the Worker as to whether or not his condition that had given rise to his absence had now resolved, or at least was being appropriately managed. As a consequence of the Employer's arbitrary conduct, the Worker was not able to find work for a four month period and after that time, has incurred a substantial reduction in earnings from that which he was previously receiving. The Tribunal is of the view that had the Worker not taken a period of absence from work due to ill health, that it is likely that his employment would have continued for some time. He had an expectation that his work would continue. It is not sufficient to argue as the Employer has sought to do, that in any event the contract is terminable by the giving of four week's notice. The exercise of that right without a justified

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45 [2004} AIRC 57; PR942856 20 January 2004 at [48].

46 In this case the termination letter dated 25 May 2016.

explanation as set out in the Statement of Reasons for dismissal is not an unfettered one. This is why the Statement of Reasons provision appears to have been inserted into the Promulgation and is doneso in manner comparable to that of the New Zealand law.[47]

43. The Tribunal cannot appreciate why it was that the Employer had thought it should summarily terminate the Worker in such circumstances. If it is claimed, subsequently, that the services provided by the Worker were not of the quality required, such an issue could have been addressed speedily within the context of the ordinary performance feedback of the Employer or otherwise promptly brought to his attention upon his return to work. The Worker appears to have been 'caught by surprise' upon his return to work. Such an approach in this circumstance, is anathema to the duty of good faith, trust and confidence that, unless there be signs of contradictory conduct, would be anticipated as underpinning the employment relations. This is not a case where the Employer could have alleged that its trust and confidence in the Worker at the time of termination no longer existed. There was also no evidence placed before the Tribunal as to what temporary measures had been put into place during the Worker's absence to backfill his position, nor any evidence as to why it was not reasonable to have a contingency plan in the event of an unexpected or unintended absence. Even General Managers may get ill and be taken by surprise by that state of affairs.

44. The Statement of Reasons issued by the Employer within its termination letter were defective, insofar as they did not reveal the true state of affairs. The position of the Worker following his termination was readvertised. If his performance was an issue, that should have been cited as the reason that it was claimed to have justified the dismissal. If the reason was because of the extended period of absence,[48] again that issue should have been flagged.[49] A possible enquiry that may have subsequently flowed from that revelation may have then dealt with issues as highlighted in *Smith and ors v Moore Paragon Australia Ltd* above. The dismissal of the Worker was neither justified nor fair. While it is noted that the *Employer's Preliminary Submission* filed on 14 September 2016, cites the case of *Valentine v Shell Fiji Limited,*[50] where it is stated that "Fiji does not have legislative provisions protecting employees from arbitrary or unjustified dismissal", that view has been overshadowed and rendered historical, by virtue of the *Employment Relations Promulgation* 2007. It is a matter of public record that this law was ten years in the making and as result of extensive and intensive dialogue among the social partners, including the ILO, NGOs, various national and international agencies and the general public.[51]

45. The Employer has neither provided an honest justification for the termination of the Worker so as to comply with Section 114 of the Promulgation, nor in my view been fair in its treatment of him giving rise to his termination. On either count, there has been a breach of obligation as envisaged within the legislative framework that is the *Employment Relations Promulgation*. For the above reasons and having regard to the above considerations, the

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47 See Section 120 of the *Employment Relations Act* 2000.

48 This period was identified in the materials and evidence as being from 3 May 2016 to 29 May 2016.

49 Whether that would have been a lawful termination in such circumstances would be highly unlikely in any event.

50 [2005] FJHC 407; HBC0169j.2002s (4 November 2005)

51 See report of Mr Vayeshnoi (Minister for Labour, Industrial Relations, Employment, Local Government, Urban Development and Housing) to Eleventh Sitting of the *Ninety-Seventh Session of the International Labour Conference*. Geneva 2008. RP No 18.page 46.

Tribunal finds that the Worker has been unjustifiably and unfairly dismissed. The Worker should be entitled to compensation for the lost earnings during the four month period in which he did not work. In addition and having regard to the fact that his wage level is now substantially less than his previous earnings, some additional factoring of compensation is required, so as to allow for the transitioning of income in this regard. I award an additional two month's payment of salary equivalence on that basis. In relation to the loss of housing allowance and for the adjustment factor, I award three months allowance equivalence.

46. Having regard to those elements, the Tribunal awards the Applicant Worker the following amounts:-

    (i) Loss of earnings for a 6 month period @ $55,000 per annum ($1057.70 per week @24 weeks = $25,384.80

    (ii) $1300.00 per month rental allowance x 3= $3,900.00

    Total Compensation= $29,284.80

Decision

47. It is the decision of this Tribunal that:-

    (i) The Employer is ordered to pay the Grievor the amount of $29,284.30 as compensation arising out of the grievance. Such an amount to be paid within 21 days of today's date.

    (ii) The Applicant is free to make application to this Tribunal for costs within 21 days hereof.

Mr Andrew J See
Resident Magistrate