

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



## Decision

Title of Matter: Eliesa Hereniko (Worker)  
v  
China Railway First Group (Fiji) Co Ltd (Employer)

Section: Section 211(1)(a) Employment Relations Promulgation

Subject: Adjudication of Employment Grievance (Unjustifiable or Unfair Dismissal)

Matter Number(s): ERT Grievance 123 of 2016

Appearances: Mr E Hereniko, Self-represented litigant  
Ms P Antonio, for the Employer

Dates of Hearing: 9 December 2016  
25 January 2017

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 7 March 2017.

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### 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 Eliesa Hereniko on or around 31 May 2016, where it is claimed that he was terminated in his employment, due to exercising his responsibilities as both a member of an employee Local Management Consultative Committee and as the Chair of the Occupational Health and Safety Committee.
2. The parties agreed to undergo a 'without prejudice' mediation process under the auspice of this Tribunal, in a bid to see if the matter could be resolved. Unfortunately, when the mediation took place on 7 October 2016, no resolution of the issues in dispute could be achieved.
3. The hearing of this matter was initially set down for 9<sup>th</sup> and 13<sup>th</sup> December 2016. It is worthwhile noting that at the request of the Grievor, various *Summons to Witness* were issued requiring the attendance of employees and managers of the Employer to attend to give evidence. On the first day of hearing, it became clear that several persons had failed to attend without excuse. The assistance of the Employer was sought to make clear to those employees, that attendance was

compulsory. The matter was adjourned and fresh Orders to Appear were issued to Mr Joji Sugaturaga<sup>1</sup> and Mr Keresi Tukana, both who had failed to attend on the previous occasion.

#### Evidence before the Tribunal

4. The Grievor himself gave evidence in these proceedings. He had also prepared a Statement (Exhibit W1) that was accepted as forming part of his Evidence in Chief. In his evidence, the Grievor indicated that he was 41 years of age and had five children. He said that he commenced his employment on 20 May 2015 as a Vehicle Traffic Controller at the Nadi Suva Roads Upgrade (NASRUP) Project, engaged to work on 'Section 2B' (Kings Road from Nakasi Junction to Davuilevu Roundabout). Mr Hereniko told the Tribunal he was paid under a contract of employment, initially at the rate of \$3.03 an hour and that the position was subject to a three month probation period.<sup>2</sup> Mr Hereniko spoke of the initial works that he had undertaken in his role and gave an overview of the history of the 'build up' of workers on site, particularly those involved in traffic management and control. According to the witness, on 1 December 2015, during a meeting with management of the project, he was chosen to be the Chairperson of the Labour Management Consultation Committee (LMCC). In this role as Chair, the Grievor had on behalf of that committee raised various labour grievances with the Employer in a letter dated 11 December 2015. According to the *Response to the Employer's Preliminary Submission*,<sup>3</sup> the Grievor states that on 1 February 2016, he was approached by the Occupational Health and Safety Officer, to lead the Occupational Health and Safety Committee (OHS Committee).
5. The Grievor gave an account of the expansion of works on the project and claimed that he was ultimately alerted by his supervisor, to "be careful" in the way in which he was undertaking his roles on these Committees. Mr Hereniko stated:

*It was on the 22nd of April after a toolbox meeting that I raised a grievance with the supervisors present concerning the time signed on the time sheet on work carried out the day before ... I was pulled back by the arm from my supervisor, Mr Wong So who told me "niko-worka worka". When I returned from work that same afternoon I was called by the STMS Mr Joji Sugaturaga and behind closed doors he revealed that Mr Wong So had given the directive that my contract was not to be renewed. The news was relayed to him by Ms Eileen, the translator and the reason behind what transpired that morning. However Mr Joji Sugaturaga assured me that it was not going to happen because he went to see Mr Wong So and asked him that my contract be renewed. He also advised me to be careful when conducting my role as the Chairman of the LMCC.....*

*In the month of May at a work site-CH:1700 RHS I called out to a Chinese Supervisor for not wearing his helmet, a Personal Protective Equipment which is a safety (OHS) requirement and which he declined twice. I then took his picture showed it to him and advised him that I was going to take it up in the next safety meeting, With pointed fingers he replied,*

*"for me okayla, for you worka worka finish go home"....*

<sup>1</sup> The Grievor's immediate supervisor.

<sup>2</sup> The Grievor advised the Tribunal that within the second month into his probation, his wage rate was increased to \$4 per hour.

<sup>3</sup> See document filed on 3 September 2016.

*I did mention it in the safety meeting but it was all too late because I had already received my notification informing me that my contract was not renewed.*

6. The Grievor identified further concerns that he had raised with the Employer in relation to various matters<sup>4</sup> and said that he had received a reply to the written concerns that he had raised. It is maintained by the Grievor, that "it was in his capacity in carrying out these roles that led to (his) dismissal".<sup>5</sup>
7. The second witness compelled to appear to give evidence, was Mr Joji Suguturaga, the Health, Safety and Environment and Traffic Manager. Mr Suguturaga was the immediate supervisor of the Grievor whose duties included acting as the site traffic management supervisor for all sites. The witness told the Tribunal that he had been working at the construction project since its commencement. He indicated that upon the Grievor's appointment to the project, that he had assigned him to supervise other Traffic Controllers. He said that:

*"Mr Hereniko was my 'ZIC' and he looked after sites and did tool box meetings... they identified hazards... he was a member of the OHS Committee".*

8. Mr Suguturaga indicated that the Grievor had not volunteered for the role of OHS Committee member, but that he had been chosen to act in that capacity by himself. The witness was asked about a grievance raised by employees following a tool box meeting,<sup>6</sup> where in relation to 'sign on sheets', it was claimed that they were being asked to record five hours work instead of nine. According to Mr Suguturaga following that complaint being made to Management, he can recall being visited by a Ms Eileen from the company, although cannot recall the conversation. When questioned by the Tribunal in relation to the incident involving Mr Lee, the witness stated that the Grievor was asked to go home. He said that 'Eileen' came to my office and I called Mr Hereniko. He told the Tribunal that "there was (a) different work culture.." Mr Sugaturaga told the Tribunal that he had been contacted by Ms Eileen following what he described had been an argument between Mr Lee and Mr Hereniko, because of a failure of Mr Lee to wear a helmet. Mr Sugaturaga's evidence was that he had advised the Grievor that he would go to his supervisor, Mr Manku and speak to him and see if Mr Hereniko could be provided with another chance. The upshot of this was that a renewal contract was issued. The witness told the Tribunal that in May 2016, he was not advised of the ultimate decision to dismiss<sup>7</sup> the Grievor until he had been informed of this at a tool box meeting. He told the Tribunal, that he "didn't have time to speak to Mr Manku" before that decision took place.
9. The next witness summoned to appear on behalf of the Grievor was Mr Keresi Tukana. Mr Tukana gave evidence that he was engaged on the 2B Project and then later on the Suva Water Pipe Project. The witness told the Tribunal that he was not aware of any feedback pertaining to the Grievor, suggestive of the fact that his work performance had been poor.

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<sup>4</sup> Grievances raised on 7 March 2016 and responded to on 6 May 2016.

<sup>5</sup> See Paragraph 2, 'Background' within the Response to the Employer's Preliminary Submissions.

<sup>6</sup> The Tribunal notes that according to Mr Hereniko this meeting took place on 22 May 2016.

<sup>7</sup> Non renew the contract of the Grievor.

### The Case of the Employer

10. In the preliminary submissions of the Employer filed on 26 September 2016, it was submitted that the Employment Contract of the Grievor was for a "fixed period of time, 26 April 2016 to 26 May 2016". Reference was made to Clause 13 of the Contract<sup>8</sup> that states:

*Either party to this Agreement may terminate employment subject to providing a seven (7) days written notice or by payment of an equivalent one (1) week salary thereof*

11. The Employer argues that this contract was brought to an end by a letter written to the Grievor by the Project Manager advising of the non-renewal of the contract, where it states, inter alia:

*...pursuant to your contract of employment clause 13, we regretfully inform you that the management has decided not to renew your contract.*

12. The Employer only called one witness to give evidence in proceedings, Ms Jamila Bano, who was the Human Resource Administrator, responsible for human resource policies, contracting and co-ordination. Ms Bano explained the process for the renewal of contracts that she said entailed, making up a form, providing a picture of the employee in question and circulating that among the supervisors to seek their advice as to whether they needed the employee or not. According to Ms Bano, Mr Manku advised Eileen that he didn't want the Grievor's contract renewed. The witness told the Tribunal, that after issuing the notice of non-renewal, the role was not backfilled. Ms Bano stated that the Grievor's role was an Assistant Traffic Controller and that the Employer only engaged thereafter Traffic Controllers.

13. Under cross examination, the witness stated that she was aware of some cost cutting that had been undertaken at that time, but could not recall why the Employer subsequently recruited Traffic Controllers. The witness was referred to Exhibit 3, a document entitled, '2B Monthly Safety Meeting 29/02/16' and shown a table at Item 4 of that document, where it stated a "senior TC was called to provide a training & tool box meeting on TC to temporary TCs." Ms Bano conceded that this reference within the document could have been referring to the Grievor as a Senior Traffic Controller. It was put to the witness, was the Grievor a traffic controller before his dismissal? Ms Bano responded, "I don't know". Ms Bano indicated that presently there were 10 traffic controllers engaged on site. According to Ms Bano when she was made aware of the impending termination of the Grievor, that she did go to the OHS Officer, concerned that the company still needed Mr Hereniko. She also admitted in evidence to having advised the Grievor once he received his termination letter, that he should approach the Project Manager and ask him to reconsider the decision. The witness conceded that in her view, the Grievor had been an "asset" to the Employer.

14. Nonetheless, in re-examination, Ms Bano made clear that any decision for ongoing employment was that of the Manager and that since the dismissal, no Assistant Traffic Controllers had been engaged.

### The Nature of the Contract and the Dismissal

15. The first issue to reconcile, is the nature of the employment contract existing between the Employer and the Grievor during the relevant time. That is, whether it was for a single fixed

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<sup>8</sup> See Exhibit E1.

period, or whether it can be regarded as being one of an indefinite nature. Section 28 (1) of the *Employment Relations Promulgation 2007* makes clear that each party to a contract is conclusively presumed to have entered into a contract for an indefinite period, but does not apply to the following situations at sub-section (2), that are:-

- (a) a contract for one fixed period which is expressed to be not renewable;
- (b) a contract for a fixed task; or
- (c) a daily contract where the wages are paid daily.

16. Based on the evidence before the Tribunal, this is not a contract that has been for 'one' fixed period of time. For that reason, Section 29(1)(b) of the Promulgation is relevant to this analysis as it sets out the minimum statutory notice period required to be given to persons engaged under contracts of an indefinite period where the contract period is one week, but less than a fortnight. Correctly, the Employer identifies that the period of notice required in such circumstances is one week. The term 'dismissal' is defined at Section 4 to mean, "any termination of employment by an employer including those under section 33." This would include the terminations provided for within Section 29.<sup>9</sup>
17. While the Employer has provided the Employee with a cordial termination letter, it nonetheless has failed to provide a Statement of Reasons for his dismissal. In accordance with Section 114 of the Promulgation, a Worker is entitled to understand the reasons for the dismissal. No such reasons have been provided. The only justification provided by the Employer during the initial course of proceedings, was that it believed it was legally entitled to terminate the employee, by virtue of Section 28(1) of the Promulgation. That simply is no longer the law in this country. Reasons must be provided and they must be justifiable.
18. So that this situation is well understood, it may be worthwhile revising the *Report of the Sector Standing Committee on Social Services on the Employment Relations Bill, 2006 (Bill No 8/2006)*<sup>10</sup> where the question of what should constitute 'dismissal' for the purposes of the Promulgation was considered. The report states:

*"dismissal"*

*9.7.19 Mr Apted enquired why should termination on notice be a dismissal.*

*Deliberations*

*9.7.20 It was clarified to the Committee that when this provision is read with Clause 114, the unintended effect of the Bill is to abolish the right to terminate an employment contract on notice, without cause. This is a policy decision for the effect of these provisions ie to abolish the right to end a contract with an employee without giving reason.*

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<sup>9</sup> For a comparable way in which the UK law has been determined, see *Johnstone v BBC Enterprises Ltd* [1993] UKEAT 173\_91\_1003

<sup>10</sup> See *Journal of the House of Representatives and of the Senate 2006* (Volume 4 of 5) at pp30-31.

19. It is a matter of record that these particular amendments were adopted by the House of Representatives upon the resumption on debate of the Bill on 30 November 2006.<sup>11</sup>
20. Further and in some respects more importantly, it would seem that the Employer had misinterpreted the statutory provision in relation to the termination of contracts at Section 28(1). In this regard, the Tribunal has had regard to the *Employer's Preliminary Submissions*<sup>12</sup> at Paragraph 4.4 where it stated:

*Further to 3.7 above, Section 28(1) of the Employment Relations Promulgation covering Presumption as to new contract, it is clearly stipulated that "each party to a contract is conclusively presumed to have entered into a contract for an indefinite duration unless the contract is for a fixed period which is expressed to be not renewable".*

21. As was pointed out to the Employer's Representative Ms Antonio, at a case review on 7 October 2016, the Employer has erroneously stated the law. What Section 28 provides is as follows:

*(1) Subject to subsection (2) each party to a contract is conclusively presumed to have entered into a contract for an indefinite duration.*

*(2) Subsection (1) does not apply:*

*(a) to a contract for one fixed period which is expressed to be not renewable.*

22. The Employer has both misquoted and misapplied the law. The issue that delineates the correct interpretation of the provision from that which was submitted, are the words, "to a contract for one fixed period" not "unless the contract is for a fixed period". It is undisputed between the parties, that the Grievor had been engaged under a series of contracts for a 12 month period. This satisfies the requirement that the contract had been in place and been so for more than one fixed period. The expression 'contract' in that sense, is referring to the employment relationship between the parties, not the nature of the period in which it is entered into as part of that relationship.
23. In *Kumar v Nanuku Auberge Resort Fiji*<sup>13</sup>, this Tribunal held that for a dismissal to be deemed an 'unjustifiable dismissal', it would need to be one that is not otherwise sound, defensible or well founded; not capricious, fanciful, spiteful or prejudiced. The dismissal of the Employer in such circumstances was not sound or defensible. It appears to have been brought about without an informed understanding of how the relevant provisions within the Promulgation are to work. It seemed to have been done on the assumption that there would be no remedy for the Grievor if the contract was not to be renewed; that it was free to terminate his contract, without fear of any repercussion.
24. While Ms Bano did indicate that the Employer had been looking at cost cutting measures at the relevant time, such evidence does not seem to sit right with the fact that the company had employed additional Traffic Controllers after the Grievor's departure. The Tribunal is not swayed by the Employer's reliance on a job title drawing a distinction between Assistant Traffic Controller and that of Traffic Controller. It would seem at the time of the Grievor's initial engagement, he was employed in a manner to assist Mr Suguturaga. He was clearly seen to have good skills in

<sup>11</sup> See Parliamentary Hansard 30 November 2006 at pp 1870-1886.

<sup>12</sup> As filed on 26 September 2016.

<sup>13</sup> [2017] FJET 2; ERT Grievance 122.2016 (10 February 2017)

this area and as Exhibit 3 appears to demonstrate, was in fact regarded as a 'Senior Traffic Officer' within the company. Mr Suguturaga himself regarded the Grievor as his '2IC'. There was clearly dissatisfaction that arose out of the Grievor's conduct as an OHS Committee person seeking to enforce the compulsory compliance with 'hard hats' on site. While Mr Suguturaga attributed the difference and complaint that had transpired as one arising out of cultural differences, that in itself is insufficient justification to give rise to a dismissal of a hardworking and diligent employee. Based on the evidence before me, the stronger case and inference being able to be drawn from the materials is that the reason for termination arose out of the way in which the Grievor had sought to carry out his role as an OHS Committee person. This was a role according to his supervisor that he was asked to perform, not one that he had volunteered or took it upon himself to perform. Clearly there were safety issues on site that warranted the intervention of the Grievor. So much is able to be concluded, having regard to the extract of the Safety Minutes provided at Exhibit 3.

25. The Tribunal has formed the view that the termination came about in response to the way in which the Grievor had undertaken his duties and various complaints that had been flagged with the Employer. Ms Bano herself as the primary Human Resource Co-ordinator, was of the view that the decision to terminate the Grievor's employment at the time, appeared inconsistent with business needs and was one that should have been reviewed.<sup>14</sup> In such circumstances, the Tribunal concludes that the termination was not justified. That the Grievor was unjustifiably dismissed.

#### Appropriate Compensation to be Awarded

26. It is noted within the Second Reading Speech of the *Employment Relations Bill 2006*, by the then then Honourable Minister K Datt, that

*Consistent with the emphasis on the maintenance of the employment relationship wherever practicable, reinstatement becomes the primary remedy for grievance where that is sought by the complainant.*<sup>15</sup>

27. The Grievor has indicated that he does not wish to be reinstated because of what he regards as the essential breach of trust and confidence in the Employer. Instead, he seeks damages for compensation in the amount of \$40,000.00. At the time of termination, the Grievor had been in receipt of a wage rate of \$4.00 per hour. Based on a standard weekly number of hours of 45, the basic take home pay, without overtime and additional penalties can be calculated at \$180.00 per week.

28. It is noted that following the termination of contract, that the Employee was engaged by a related entity of the Employer for the period 15 June 2016 to 14 August 2016.<sup>16</sup> In some ways, this further employment by the related entity, provides a mixed message as to the degree of

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<sup>14</sup> While it is accepted and acknowledged that Ms Bano was not responsible for the making of such decisions, it is nonetheless a telling indicator, as to how the principal Human Resource Co-ordinator had read the situation at the time.

<sup>15</sup> See Parliamentary Hansard of the House of Representatives, 22 June 2006, p580.

<sup>16</sup> As advised by the Grievor to the Tribunal on 12 September 2016 at a report back hearing of the parties.

discontent shown by the Employer to the Employee.<sup>17</sup> While I recognise that this is a separate employment relationship, it is nonetheless reflective of the bonafides of the broader Employer to ensure no real detriment was caused to the Employee. Although the reality of the situation is that the Grievor is now no longer working and remains unemployed.

29. I take into account the submission of the Grievor where he states, that he had relied on his role with the project as supporting his eligibility for a bank loan and that the Project Manager of the Employer had endorsed a letter to the bank to the effect that Mr Hereniko was a "Full Time Employee" with the company. The Employee is entitled to compensation for a dismissal that was not justified. He could have been counselled in relation to any impression that he may have been over exuberant in his role, not that there is any evidence of this, but he was not.

30. Having regard to the almost punitive way in which the contract was brought to an end, the Tribunal believes that an amount equivalent to six months base wages equivalence is reasonable in the circumstances. That amount has been calculated in the sum of \$4,320.00. While the Tribunal recognises that this calculation is based on standard hours, it nonetheless has been moderated in this way to account for the two months of employment that the Grievor was able to secure at a related entity.

#### Decision

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

- (i) The Grievor has been unjustifiably dismissed in his employment.
- (ii) That compensation in the amount of \$4,320.00, should be paid to the Grievor within 28 days hereof.

A handwritten signature in black ink is written over a blue circular official stamp. The stamp contains the text "EMPLOYMENT RELATION TRIBUNAL" around the perimeter and "OFFICIAL" in the center, with a small star at the bottom.

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

<sup>17</sup>

Though equally it may have been a convenience and meeting an immediate labour need of the related entity.