



Employment Relations Tribunal

Decision

Title of Matter: Joseph Vinesh Ram
v
Life Insurance Corporation of India (LICI)

Section: Section 211 (1)(k) *Employment Relations Act 2007*

Subject: Adjudication of Grievance Arising Out of Dismissal

Matter Number: ERT Grievance No 94 of 2018

Appearances: Mr R Vananalagi, Vananalagi and Associates, for the Grievor
Mr D Nair, Oceania IP the Employer

Date of Hearing: Thursday 13 September 2018

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 9 May 2019

KEYWORDS: Summary Dismissal arising out of employment; Section 211 Employment Relations Act 2007; Ongoing absenteeism and illness; Breach of Trust and Confidence.

CASES CONSIDERED

Commonwealth Bank of Australia v Barker [2014] HCA 32 (10 September 2014)
Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2; ERT Grievance 122.2016 (10 February 2017)
Peni Koro Lagi v Calm Fire Professionals [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)
Malik & Anor v Bank of Credit and Commerce International SA (in liquidation) [1997] 3ALL ER 1
Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuinaruku [2017] FJHC92 ERCA 9 of 2014 (8 February 2017)

Background

[1]The Grievor was summarily dismissed in his employment as a Messenger with the Respondent Employer, by letter dated 12 February 2018. The reasons provided by the Employer within its dismissal letter, state that the Grievor had demonstrated gross misconduct and gross negligence during the course of his employment. The grievance has been referred to this Tribunal in accordance with Section 194(5) of the *Employment Relations Act 2007*.

Case of the Employer

[2]In matters of this type, the practice is to allow the Employer to present its case in the first instance. The advantage of doing this, is that it gives the Tribunal an understanding as to what is claimed is the justification for the dismissal decision.

Anand Kaur

[3]The first witness to give evidence on behalf of the Respondent Employer was Ms Anand Kaur, who at the relevant time was the Human Resource Manager at LICl. Ms Kaur told the Tribunal that one of the incidents that gave rise to the claim of dishonesty against the former employee, was as a result of the fact that Mr Ram had returned to work following the taking of two days sick leave and provided a medical certificate indicating that he should have still remained off work, as he was unfit for duties¹. In response to this early return to work, the Employer by letter dated 31 January 2018, inquired of Mr Ram as to why he had returned to work before the date of expiration of his certificate². The Grievor stated in his handwritten response of that same date³, that *“only my left side of neck and left shoulder is painful....I am able to do table work.”* In a subsequent letter prepared by Ms Kaur, dated 2 February 2018, she advised the Grievor that he would be required to produce a proper fitness certificate before he could resume his duties⁴.

[4]Ms Kaur told the Tribunal that the Grievor had a long history of absenteeism due to illness and through Counsel for the Employer, identified various documents that supported that fact. For example, in January and February 2018 alone, the Grievor had taken 13 days leave due to apparent absence for illness⁵. In the six months between May 2009 and September 2009, the Grievor had been absent from work for 25 days. In the two months of May and June 2012, the Grievor had taken eight days leave, despite having been counselled for a pattern of absenteeism only 12 months earlier. In the period January 2016 to March 2016, the Grievor appeared to be absent other than for annual leave, in the order of 30 days⁶ and for the period May to July 2016, a further 24 days⁷.

[5]During cross examination, Ms Kaur was shown photographs of the file storage room, in which the Grievor claimed to be filing approximately 300 paper based files per day⁸. It was put to the witness by Mr Ram, that the workplace was hazardous to his health due to airborne dust arising out of the confined area in which he was to file papers as part of his duties. Ms Kaur referred the Tribunal to the findings of an OHS Committee Meeting held on 25 September 2017, in which it found no substance to the claim that the working conditions of the Employer, were hazardous to the health of the Grievor⁹.

Ms Daina Dalakubu

[6]The next witness to give evidence was Ms Daina Dalakubu who is the Assistant Manager, Human Resources. During the course of her evidence, Ms Dalakubu stated that the Grievor:

¹ See relevant medical certificates obtained by the Grievor at Exhibit E1.
² See Exhibit E3.
³ See Exhibit E4.
⁴ See Exhibit E5.
⁵ See Exhibit E10.
⁶ See Exhibit E13
⁷ See Exhibit E14.
⁸ See Exhibit G5.
⁹ See Exhibit E16.

- Had a significant period of absenteeism over the past five years;
- Had exhausted annual leave and sick leave on many occasions and would thereafter take leave with a loss of pay; and
- Was given counselling and warning letters in relation to his absenteeism.

[7] In response to the complaints that the Grievor had been making regarding his inability to undertake his work without pain, the Witness claimed that these were new inventions and was of the view that Mr Ram had feigned the presentation of his disability in this regard.

Mr Rakesh Chand

[8] The final witness for the Employer, was Mr Rakesh Chand, an Insurance Officer employed at LIC. Mr Chand gave the following evidence:-

- He had been a colleague of the Grievor;
- Was the Union Representative for the workers engaged at LIC; and
- Did not consider the condition of the Filing Store Room as being dusty nor hazardous to Mr Ram's health.

The Case of the Grievor

[9] According to Mr Ram, when he returned to work on 31 January 2018, initially he was not challenged by anyone as to his fitness for work. The Grievor stated that the following day on 1 February 2019, he had been approached by Ms Kaur, who had recognised that his medical certificate dated 30 January 2018, indicated that he was not fit for duties until 1 February 2018 and so had issued a written request that Mr Ram return to the issuing medical practitioner, in order to ensure that the certificate aligned with his attendance.

Letters dated 31 January 2018 and 2 February 2018

[10] Mr Ram gave evidence that he was concerned that he was provided with the letter dated 31 January 2018 on the following day and believed that it was misleading insofar as it appeared to give the impression that the Employer had taken issue with the Grievor's attendance at work on that same day, whereas in fact one full day had passed before the issue was raised. The letter provided to the Grievor, stated in part:

After going through the said medical certificates it is noted that in medical certificate dated 30.01.2018 it is mentioned that you will / should be fit to resume duty on 01.02.2018. You were well aware of this and still signed the attendance register today

You are hereby required to give your written explanation in writing why you have signed the attendance register today when the doctor has given the Medical Certificate for your fitness to resume duty on 01.02.2018

[11] On 2 February 2018, the Grievor received a second letter from his Employer, in the following terms:

It has been observed that full medical clearance has not yet been produced by you till date You are advised to produce a proper fitness certificate before your resume your duties certifying that you are fit to be able to perform your duties and responsibilities as mentioned in our letter dated 31.03.2008.

[12] It was in response to that second request that Mr Ram met with Ms Kaur on 5 February 2018 and recorded the discussion that was later transcribed as follows¹⁰:-

Joseph: *Good Morning Madam, Sorry I'm here, Madam I want you to change this date to make it 1st of Feb coz this was wrong I didn't receive on 31st*

Madam: *It will be 31st only receive on that 31st only*

Joseph: *Madam you gave me on 1st Feb its wrong. I don't want to do anything wrong.*

Madam: *You have taken on 31st and you have given a letter on 31st*

Joseph: *But Madam you have, also I took the letter outside and you have changed your word now.*

Madam: *31st will be 31st.*

Joseph: *Madam you have changed your words*

Madam: *You have taken that letter on 31st and the one you replied on 31st*

Joseph: *Ok can I have the copy of the three letters*

Madam: *Afterwards that is with.....*

Joseph: *Because I'm going somewhere*

Madam: *You will get the letters later.*

Joseph: *Madam you are lying*

Madam: *On 31st you have given me this letter*

Joseph: *But this letter when you gave me?*

Madam: *Dated 31st and its 31st*

Joseph: *Madam you are lying. How come big lady like you*

Madam: *It's not about lying*

Joseph: *You printed the letter and issued on hand 01st February not on 31st that's lying.*

Madam: *What I am trying to say the letter will be dated 31st January.*

Joseph: *But I received on 01st February.*

Madam: *When did you reply?*

¹⁰ See transcript of recorded conversation provided at Exhibit G2.

Joseph: *Three letters I reply on 31st January.*

Madam: *You didn't reply three letters on 31st only two letters you gave me on 31st. Joseph sometimes I'm telling you think on that part.*

Joseph & Madam: *Arguing about letter.*

Madam: *How can you reply the letter on 31st*

Joseph: *Because you told me to put the date 31st.*

Madam: *Nothing like that*

Joseph: *Madam you changed your word you said you are like my big sister.*

Madam: *It's not about big sister. Some things you have to do on your own also where you taking my point you twisting it follow everywhere.*

Joseph: *You told me to get false sick sheet, if I would have done that what would have happen to me now. General Manager said in front of you that I want compensation I didn't say that anytime.*

Madam: *The reason I tell you to change the sicksheet because you joined on the 31st January I only said to bring the 31st sick sheet.*

Joseph: *But you told me to go and get it from any doctor.*

Madam: *I told you to go to the same doctor and change it.*

Joseph: *The doctor said no and you said go and get it from any doctor, remember you also called me 6-7 night time.*

Madam: *Yes I wantedDon't you trap me. You are trying to catch my words that's the place I want to save you. Joseph listen where I want to save you that's the place where you trying to trap me.*

Joseph: *Madam remember that day when General Manager saying things to me you heard it.*

Madam: *I heard it.*

Joseph: *He said he's against me and he got eye on me. What wrong did I do to him? I'm sick now what I do.*

Madam: *He also yells at me.*

Joseph: *But that's wrong.*

Madam: *Everyone got different ways I'm telling you nicely. If it was someone else wouldn't explain. I also said that day to give it to me on 31st. I said or no. for whom did I say to bring on 31st.*

Joseph: *For me.*

Madam: *You trying to catch me on my own words. Its clearly that I cannot explain you the reason.*

Joseph: *Madam I don't know how long it will take for my medical because I think I won't get paid for that.*

Madam: You will get paid for that day.

Joseph: Ok have a nice day

Madam: Joseph what you going to do think properly.

Joseph: I will do everything correctly. But this is wrong. Date of the letter should be 01st, I want to do everything correctly I don't want to lie about anything because it's regarding my health. The pain I'm going through Madam.

Madam: You came to the office on 31st

Joseph: I came to the office on 31st but I didn't receive this letter on 31st

Madam: When did you reply me?

Joseph: I gave it on the 01st of February but you told me to date it 31st Januray.

Madam: When I gave you 31st dated than it will be 31st dated.

Joseph: There was two separate letters for 31st.

Madam: Think why I told you that day I won't say much more or else you will catch me.

Joseph: but this is wrong.

Madam: You gave me on 31st than it will remain 31st.

Joseph: But I receive on 1st February but you make me sign on the wrong date.

Madam: No wrong date.

Joseph: Madam the letter I received and read on 01st February not on 31st That's what I'm telling you.

Madam: You will change the date.

Joseph: I have to Madam because when I took this letter I let other people see you gave me letter on that day I'm telling you.

Request to Produce Comprehensive Medical Report

[13]Mr Ram acknowledged that by letter from his employer dated 8 February 2018, he had been required to produce a comprehensive medical report from a specialist medical practitioner, prior to returning to work¹¹. The Grievor told the Tribunal that he had sent a further text message to the Human Resource Manager in response to that correspondence¹², although received no further reply.

[14]On 9 February 2018, the Grievor wrote to the General Manager to report what he says was the wrongdoing of the Human Resource Manager. The letter stated inter alia:-

¹¹ See Exhibit E7.

¹² See Exhibit G3.

I Joseph Vinesh Ram would like to know why this was done to me

Madam Gurpreet asked me to sign a letter dated 31.01.18 which I received on 01.02.18 at 8.30am. She told me to reply also dated 31.01.18. I took the letter to my Union Rep Rakesh and told him on 01.02.18 at 8.40am.

When I gave my reply on 01.02.18 at 9am Madam Taina was also present with Miss Gurpreet's office, Why was I told to write two letters on 31.01.18. Total of 3 letter were written by me.

Madam Gurpreet forced me to go and get a new or changed the date of my sick sheet which was from 30.01.18 to 01.02.18. On 31.01.18 around 2.30pm working hours to go to Raiwaqa Health Centre to change the date or get a new sick sheet 31.01.18. Doctor said no and I returned back to the office at 3.30pm. Later in the afternoon around 6-7 pm on 31.01.18 Madam Gurpreet called and asked me to get a sick sheet anyhow for 31.01.18.

I informed Rakesh and Taina regarding this matter.

Sir I got all my evidence and I'm not lying.

Hope to get a reply from you.

[15] It was several days after receiving that letter, that the Grievor received a dismissal letter. For the sake of completeness, the dismissal letter is reproduced in part as follows:-

This has reference to your letter dated 9th February, 2018 through which you have made serious allegations against Manager HR, Ms Anand Gurpreet Kaur. The matter was investigated and it was revealed that you have made false allegations against her.

On several other occasions you have been given the opportunity to rectify the issue regarding your sickness and fitness to resume your duties. However, your recent actions has demonstrated breach of trust and confidence that was bestowed upon you as an employee.

This also has reference to your letters dated 31st January 2018 through which you tried to falsify the medical certificate issued by Medical Officer, RHC Hospital. You have not only tried to tamper with the official records but it also amounts to misrepresentation of the facts.

Due to your gross misconduct and gross negligence, you are hereby summary dismissed from your employment with immediate effect, under Section 33 1(a) and (e) of the Employment Relations Act.

Was the Dismissal Decision Justified ?

[16]The question at the end of the day is whether or not the Employer was justified in dismissing the Grievor. This Tribunal in *Kumar v Nanuku Auberge Resort Fiji*¹³ has previously addressed the considerations that are relevant when determining whether or not a dismissal is justified, in this way:

“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 at work is justified or not, has been enshrined in international labour law for many years. The Termination of Employment Convention, 1982 (No. 158) adopted at the 68th International Labour Convention session in Geneva, sets out within Part II, Division A, a framework for assessing whether or not a dismissal is justified. Article 4 for example, provides that “The employment of a worker shall not be terminated unless there is a valid reason for such termination concerned with the capacity of conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Articles 5 and 6 thereafter provides additional illustrations of circumstances that would not constitute a valid reason for termination. These include union membership, filing a complaint or participating in proceedings against an employer, discriminatory grounds based on attribute, absence due to maternity leave or temporary absence from work because of illness or injury.

Northrop J in Selvachandran v Peteron Plastics,^[25] provided the following clarification when a comparable question was being asked as to whether a termination decision was a valid one. In that case, his Honour stated:

Subsection 170DE(1) refers to "a valid reason, or valid reasons", but the Act does not give a meaning to those phrases or the adjective "valid". A reference to dictionaries shows that the word "valid" has a number of different meanings depending on the context in which it is used. In the Shorter Oxford Dictionary, the relevant meaning given is " Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value." In the Macquarie Dictionary the relevant meaning is "sound, just, or well founded; a valid reason."

In its context in subsection 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of subsection 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered 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

¹³

[2017] FJET 2 at 24-27.

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 justifiable¹⁴. 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.”

Reasons for the Dismissal Decision

[17]The dismissal letter provided to the Grievor on 12 February 2018 relies upon several grounds for the summary termination of Mr Ram:-

- i. False allegations made against Ms Kaur relating to the request made by her to the Grievor that he provide a revised medical certificate certifying he was fit to return to work when he did;
- ii. Failure to rectify the issue regarding fitness to resume duties;
- iii. A breach of trust and confidence; and
- iv. Alleged tampering with a medical certificate.

Breach of Trust and Confidence

[18]The implied duty of trust and confidence is one that has its origins in the United Kingdom, arising as a result of the repudiatory conduct of an employer, not an employee¹⁵. As an expression, it is one that may be easily bandied about, however the term is to be given a legal meaning. As was said by Nicholls J in *Malik & Anor v Bank of Credit and Commerce International SA (in liquidation)*¹⁶

It is expressed to impose an obligation that the employer shall not –

Without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

[19]The same obligation is said to hold true for an employee and as such, there are several key issues that arise. First and foremost, is the need to identify the specific conduct that is in question. The conduct needs to be deliberate. Thereafter, it then needs to be determined as to whether such conduct is likely to have destroyed or seriously damaged the relationship of confidence and trust between the parties. The Tribunal finds the correspondence written by Mr Ram to be somewhat unfortunate in its language, but unlikely to have any deliberateness to it, in a manner that can be seen to have destroyed or seriously damaged the employment relationship. The conduct essentially comprised of an allegation that the Human Resource

¹⁴ The Fijian jurisprudence now sees a similar consideration taking place under the separate notion of ‘unfair dismissal’ as is clarified in *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuaruku* [2017] FJHC92; ERCA 9 of 2014 (8 February 2017)

¹⁵ See analysis in *Commonwealth Bank of Australia v Barker* [2014] HCA 32 (10 September 2014)

¹⁶ [1997] 3All ER 1 at 15

Manager had asked him to do something improper, by suggesting that the Grievor have a further medical certificate obtained, or revised. If the allegation had no basis to it, the Employer was free to make that finding, but it would be a rather odd state of affairs, if an employee could not appeal to the General Manager of an organisation, in a case where the employee genuinely, albeit erroneously held a view, that she or he was being asked to undertake an administrative action that the employee felt was improper. This was not a direct challenge to Mr Ram's supervisor, nor the organisation at large.

[20] The reality of the situation was that the Grievor had returned to work on 31 January 2018, without initially any challenge being made to the fact that his sick leave certificate indicated that he "*will/should be fit to resume duty on 01/02/18*". The Grievor claims to have received a letter dated 31 January 2018 on the following day and he appears to have been upset with the fact that he had worked that full day without any issue being raised by his employer. On 1 February 2018, when approached by Ms Kaur, the Grievor was already certified fit to resume work, at least for light duties. In any event, Mr Ram responded to that initial communication and he in turn also backdated his communication to the Employer. The Employer was unsatisfied with the response and again wrote to Mr Ram on 2 February 2018, repeating its request that the Grievor provide full medical clearance before he return to work. The Employer was entitled to do this, although there are no submissions before the Tribunal as to whether or not the Employer was able to provide the Grievor light duties in the interim period. Thereafter, the parties seemed to be at cross purposes with each other.

[21] Mr Ram appeared frustrated with the fact that he was being asked to get additional medical information, when he felt that he had already returned to work at least for one day and seemed upset that there was now a challenge being made to his ongoing fitness to work. It is important to note though, that he did not refuse to provide further medical information. In ordinary circumstances the discussion between the parties would have focused on the question of light duties and whether or not, the Grievor could undertake his role, albeit perhaps with some modification. The Grievor appears to not have fully understood what was being asked of him and instead, appeared to have been threatened by what was being sought. To that end, it is unlikely that the conduct was of a kind that would meet the requirements of *Malik*.

Failing to Provide Comprehensive Medical Report

[22] The second issue relates to the request by the Employer, that Mr Ram provide a comprehensive medical report supporting his continuing fitness to work, by 14 February 2018. As the dismissal letter was issued on 12 February 2018, the Grievor was simply unable to meet this deadline. The Employer's argument is that other events had overtaken the request, but as has been mentioned above, those events that specifically related to the Grievor's letter of 9 February 2018, were not of a kind that would bring about such a situation. The Employer was clearly frustrated by the Grievor's conduct. The absenteeism and complaints that were made by Mr Ram regarding various workplace health and safety concerns¹⁷ and his physical workplace environment¹⁸, had become a source of frustration for the Employer. The Employer had had enough and in many respects this is understandable in the circumstances, though the issue should have been one brought to a head in a more structured and measured fashion. To summarily dismiss an employee at work, warrants conduct that is completely incompatible with the ongoing employment relationship. As frustrating as the present situation may have been,

¹⁷ See Exhibit E 15.

¹⁸ See Exhibit G5.

the events that emerge through the evidence of the parties, do not give rise to the justifiable summary dismissal of the employee.

Alleged Tampering with a Medical Certificate

[23] During proceedings, the Employer was unable to adduce any evidence that linked the Worker to any tampering of the medical certificate in question.¹⁹ Ms Kaur gave evidence that she did not add any notation to the certificate where in relation to the Grievor's capacity that he was fit for light duties, went on to state "until cleared for heavy duty by specialist". The Grievor also gave evidence that he had not made any alteration to the certificate and that the document 'as is' was provided to him by his doctor. On the basis of an absence of evidence, this allegation simply cannot be substantiated. The Employer would have been free to have required the Medical Centre who issued the certificate, to clarify its authenticity if it wished to, but elected not to do so. The date of the medical certificate appears clear and there is simply no reason why the certificate cannot be accepted as being issued without alteration.

Conclusions

[24] This seems a case, where it was only going to be a matter of time before the employment relationship would have come to an end. This problem of absenteeism had been going on for many years. Having said that, the environment as depicted in Exhibit G5, is not without its problems. Workers who undertake this type of work, can find the work environment oppressive. Not only may they be exposed to airborne dust which they inhale, but paper lice as well. It is here, where lawyers and HR Officers alike, need to put themselves into the shoes of the worker. Neither side produced any evidence of any testing that may have been undertaken by an occupational hygienist for example, to support the claims or counter claims in this regard. The Tribunal accepts the evidence of the Grievor, that a good deal of his daily work would be involved in filing activities and that this activity was causing him some form of medical distress. For the above reasons, whilst the Employer was correct in seeking that the Grievor provide medical clearance before he returned to work, it was pre-emptive to bring the employment to an end in the manner that it did, whether before the employee had been given the opportunity to submit to that request, or at least until such time as the 14 February 2018 deadline had passed.

Remedy

[25] An appropriate remedy in this case is compensation. The Grievor has been employed with the organisation since 2007. A more structured human resource management approach would have likely yielded a compulsory retirement based on medical grounds, or a determination that the Grievor lacked the capacity to undertake the inherent requirements of the position. The problem for the Employer, is that it did not allow the Grievor to respond to the 14 February 2018 deadline that it alone had set. The Grievor claimed to be in the process of organising an assessment by a medical specialist and there is no reason why this evidence is not to be accepted.

[26] In *Peni Koro Lagi v Calm Fire Professionals*²⁰ this Tribunal stated:

¹⁹ See Medical Certificate M 2406307

²⁰ [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)

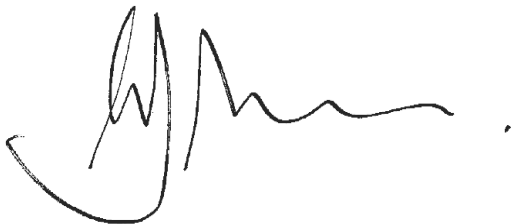
There are a variety of considerations that can be relied upon when making a determination as to what would be an appropriate amount of compensation to be awarded to a Grievor in the case where it has been established that they have been unjustifiably dismissed in employment. These would include: the length of service with an employer; the likely remuneration received if the employment had continued; attempts made to mitigate any loss of income; any other income received by the Grievor prior to any decision being reached by the Tribunal; the capacity of the employer to pay; and any other special features of the case.

[27] In this case, given that the worker had been employed for ten years of service, a compensation outcome of one week's wages for each year of service would be appropriate in the circumstances. This would take into account not only the lost income, but recognition that at some stage, the Grievor would need to have found alternative employment to which he too was suited. There is nonetheless an aspect of the Grievor's own conduct that has contributed to all of this. The request to have obtained the clarification from his doctor as to his fitness for work was a reasonable one, however the problem for the Employer was that the day in dispute where the Grievor worked, had already passed. The Grievor was directed to obtain further clarification in relation to his fitness to work and he initially appeared to resist the request. That resistance has contributed to the subsequent conduct of the Employer and for that reason a discounting of the compensation amount of 25 percent, is appropriate. The final compensation amount payable shall equate to 7.5 weeks of salary (\$2,370.00). Finally, in light of the circumstances of this case and the fact that the Grievor initially expended the costs of \$700.00 in order to be legally represented, a contribution towards the costs of that amount will also be proportionately awarded as costs following the event. That amount is calculated at \$525.00.

Decision

[28] It is the decision of this Tribunal that:-

- (i) The Employer must pay the Grievor the salary equivalence of 7.5 week's wages (\$2,370.00) within 21 days.
- (ii) The Employer pay costs to the Grievor in the amount of \$525.00, within 21 days.



Andrew J See
Resident Magistrate

