

Decision



Employment
Relations Tribunal

Title of Matter: LABOUR OFFICER on behalf of the Dependents of the Deceased, Suliano Tabualevu (Applicant)
v
NUKUVULA DEVELOPMENT COMPANY LIMITED (Respondent)
trading as Paradise Taveuni Resort

Section: Section 6 *Workmen's Compensation Act 1964*

Subject: Compensation for death arising out of accident

Matter Number(s): ERT WC 115 of 2018

Appearances: Ms R Kadavu, for the Labour Officer
Ms A L Vono, Gibson & Company on behalf of the Respondent

Date of Hearing: 27 April 2019

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 5 June 2019

KEYWORDS: Section 5 *Workmen's Compensation Act 1964*; Claim for Compensation; Death arising out of accident.

CASES CITED:

Fiji Sugar Corporation Ltd v Labour Officer [1995] FJHC39; Civil Appeal No 0010 of 1994, 17 February 1995.

Labour Officer v Post Fiji Ltd [2017] FJET 3; ERT WC97.2016 (13 February 2017)

Labour Officer v Fiji Meat Industry Board [2018] FJET9; ERT WC 107 of 2016 (12 February 2018).

Raiwaqa Buses Ltd v Labour Officer [2011]FJHC174; HBA23.2008 (18 March 2011)

The Labour Officer v Wood & Jepsen Surveyors and Engineers [2013] FJET 4;

Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu [1994] FJHC 180; (9 December 1994).

Background

[1] This is an application made for worker's compensation in accordance with Sections 5 of the *Workmen's Compensation Act 1964*. The application filed on 16 November 2018, claims that on 23 January 2016, the deceased suffered a personal injury by accident arising out of and in the

course of his employment. At the time of his demise, the deceased was employed at the Paradise Taveuni Resort, owned by the defendant company and worked as a Dive Attendant, when he suffered a heart attack at his workplace whilst snorkelling¹.

The Case of the Labour Officer

Labour Officer Shangini Sen

- [2] The first witness to give evidence on behalf of the Labour Officer, was Ms Shangini Sen, an Assistant Labour Officer (Workers Compensation), employed at the Ministry of Employment, Productivity & Industrial Relations. Ms Sen told the Tribunal that the Ministry became aware of the fatality on 25 January 2016, when the Employer had forwarded a Form LDC1, notifying that the deceased had suffered a heart attack at the workplace whilst snorkelling. According to the Assistant Labour Officer, in response to this notification, the Ministry investigated the event, then prepared a Notice of Claim (Form LDC2) and served it on the Employer, seeking compensation on behalf of the dependants of the deceased. The compensation amount sought was \$29,952.00, being an amount prescribed at Section 6(a) of the *Workmen's Compensation Act 1964*, equating to five times the annual salary amount paid at the time of the Worker's demise.
- [3] During cross examination, Counsel for the Employer asked the Assistant Labour Officer, had she found out about the worker's physical requirements of the job, to which the Witness responded, that she had spoken to Ms Litiana Maivuniwi, the Duty Manager and Ms Sia Keresi, a member of the housekeeping staff². When asked by Counsel for the Employer why these two employees were interviewed, the Witness responded, that these were the names that were provided by the Employer. Ms Sen told the Tribunal that two statements had been obtained from the deceased's widow in 2017 and 2019, on the basis that the initial statement provided was not adequate.
- [4] When questioned by the Tribunal, Ms Sen advised that the Ministry had written to the Employer on 1 February 2016 indicating that an investigation into the fatality was underway and requesting various information be provided, including the contact and names of a list of workers who could be interviewed. According to the Witness, up and until March 2017, there had been no response whatsoever to that request³. The Witness told the Tribunal that she had contacted Ms Maivuniwi who was also responsible for the resort's human resource management function and despite her undertakings to provide same, never did so. The Tribunal was told that when the departmental officers attended the employer unannounced in March 2017, that Ms Maivuniwi offered for herself to be interviewed.

¹ A *workplace* is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.

² It is noted within the Respondents Submissions filed on 5 June 2019, that the Respondent questions the usefulness of such statements, as coming from persons not directly involved with the deceased's duties. That really is a question for the Employer as to why this was the best evidence that it wished to provide the Labour Inspector at that time. The evidence is what it is, not particularly useful but demonstrative of the approach taken by the Employer when assisting in the investigation.

³ The Tribunal acknowledges the devastation that was caused by Tropical Cyclone Winston shortly after the request was made.

Dr Rauni Tikoinayau

- [5] Dr Tikoinayau is an expert medical officer engaged by the Ministry to undertake all assessments on workers compensation injury and death cases. Dr Tikoinayau has extensive experience and qualifications in occupational medicine, including having undertaken an underwater medicine course at the HMAS Penguin Royal Australian Navy Base, located in Sydney, Australia. The medical expert was referred to the Death Case Medical Opinion Form dated 5 December 2017⁴, that he had completed for the purposes of this claim and confirmed his diagnosis, that the deceased worker had suffered a cardio pulmonary arrest and was an uncontrolled hypertensive. The doctor's assessment was that the worker died while snorkelling and that the physical exertion whilst undertaking that activity, likely aggravated the hypertension leading to cardio pulmonary arrest and death. The doctor confirmed that he was of the view that the death was work related and had referred to the medical certificate provided by the Taveuni Hospital on 25 January 2016, in which it had reported the deceased as having uncontrolled hypertension. Dr Tikoinayau explained the way in which the exertion of the snorkelling activity would have increased the heart rate and blood pressure, thereby bringing about a cardiac arrest. Dr Tikoinayau was referred to a medical report from Dr Naduva of the Taveuni Hospital, where it had indicated that the deceased had been diagnosed with hypertension in 2014 and was last seen in the hospital clinic in November 2015 and was given aspirin and enalapril medications to control his blood pressure. During cross examination, it was put to the Witness, that it may have been the case that the deceased Worker had not been taking his medications at the relevant time. Dr Tikoinayau was inclined to that view and said that there was a high possibility that this was the case and that this would have given rise to the heart rate and blood pressure increases, that brought about the heat attack.

Ms Litiana Maivuniwi

- [6] Ms Litiana Maivuniwi is a Duty Manager at the Paradise Taveuni Resort, who told the Tribunal that her job responsibilities included "looking after staff". Ms Maivuniwi confirmed that she had earlier provided to the Ministry a statement.⁵ The witness told the Tribunal that snorkelling was part of the job of a Dive Attendant and that the deceased had undertaken training to perform that task. Ms Maivuniwi claimed that management provided training in relation to the safety of guests and where to take them out and that the training had been conducted by the former Dive Shop Manager, Mr Maikele Lakovi. The Witness said that she was unaware whether any training certificate was provided to Mr Tabualevu and that she was unaware of any compulsory or scheduled medical assessments being undertaken to ensure he was fit for work.
- [7] Ms Maivuniwi gave evidence, that once every three months, the deceased would complain of "body aches and headaches" and that she would send him home. The witness told the Tribunal that she reported to the Director of the company and that she would normally have a daily conversation with him. According to the witness, she would advise the deceased that he "should rest and come back when he is fit", but that "he would step up and work even if he was unwell". According to Ms Maivuniwi she was advised of Mr Tabualevu's death, by the Director Mr Gorton. On the day in question, the witness recalled seeing the deceased leaving for snorkelling with the rest of the diving team and the guests. In cross examination, the Witness told the Tribunal that she was not aware of any other medical condition that the deceased suffered from, other than body aches. Ms Maivuniwi confirmed that Mr Tabualevu had not suffered any illness or accident previously as a consequence of being involved in the diving activity.

⁴ See Folio 53 of the Applicant's Disclosures.

⁵ See Exhibit L6.

[8] The Tribunal asked of the Witness, which other staff had gone out with the deceased on the day in question. Ms Maivuniwi advised that it was Mr Maেকেle Lokovi, the Dive Manager and Mr Walter Mitchell, the Dive Master. When asked by the Tribunal as to why those persons were not identified as being persons who could have assisted the Ministry with its inquiry, the Witness stated, because they were no longer employed by the Respondent.

Alowesi Marialina

[9] Ms Alowesi Marialina, is the wife of the deceased. Ms Marialina gave evidence that her husband had been working at the resort for approximately 9 years, as a Snorkeller/Diving Attendant and as an entertainer at night. The Witness told the Tribunal in her evidence, that in 2015, her husband had indicated to her, that he had high blood pressure and that two weeks before his demise, he had been suffering from chest pain. Ms Marialina stated that each week her husband would attend a 'check up' at the health centre, but that she could not recall if he was on medication. Ms Marialina told the Tribunal that she was notified of the deceased's death by the Manager of the resort. In cross examination, the Witness restated that she was not aware of the fact that her husband was on any medications for his blood pressure.

Mr Tomasi Lewai Kama

[10] Mr Kama is the National Director of the National Occupational Health and Safety Service, in the Ministry of Employment, Productivity and Industrial Relations. The witness gave evidence that in his role, he was responsible for overseeing the implementation of the *Health and Safety at Work Act 1996*, the Regulations and Codes of Practice. Included as part of those responsibilities, Mr Kama was responsible for the *Health and Safety at Work (Diving) Regulations 2006*. The Witness gave his views as to why the activity of 'snorkelling' fell within the scope of those Regulations. It was Mr Kama's opinion, that the combined effect of the principal Act and Regulations, created a situation where the employer in charge of a workplace where snorkelling took place, needed to ensure the adequate training of its workers; that snorkelling equipment was in good order, fit for purpose and that workers were physically fit and based on their age⁶, certified as physically fit to undertake their tasks.

The Case of the Employer

Christine Lusía Riley

[11] The first witness to give evidence on behalf of the defendant Employer was Ms Christine Lusía Riley, who was the Shop Manager at the resort. According to the Witness, at the time of the fatality in 2016, she was working as the Dive Shop Manager and that in her role she was required to communicate with guests and she also undertook the role of a dive instructor. Ms Riley told the hearing, that she had known the deceased since 2012 and recalls calling him to come to work on that day and that he had prepared the snorkelling gear before jumping on the boat with "Maেকেle and Walter". Ms Riley stated in her evidence, that she could not recall whether or not the deceased looked unfit on that day, but indicated that he had not complained of any chest pain, nor claimed that he was suffering from any other illness or disease. Ms Riley stated, that she did not know if the deceased had been on medication. The Witness was shown a Certificate of Workplace Registration issued on 5 October 2015⁷ and it

⁶ See requirements for medical examinations set out within Regulation 10(2) of the *Diving Regulation*.

⁷ See Exhibit E1.

was put to the Witness, that this was in effect a certificate of compliance. Ms Riley was of the view that snorkelling was not a dangerous or risky activity.

- [12] During cross examination, Ms Riley was not able to say whether the snorkelling equipment that was being used by the deceased at the time of his demise, had earlier been inspected and deemed as fit for use. When questioned by the Tribunal, Ms Riley was not able to provide any further information pertaining to any additional inquiries made by the Employer as to how the fatality came about. Ms Riley told the Tribunal that she “can’t remember” whether she prepared a report following the death of Mr Tabualevu. In relation to the deceased’s sick leave history, Ms Riley claimed that the worker would drink too much kava approximately 3 times a month and would be on sick leave as a result.

Dr Viriglio de Asa

- [13] The final witness to give evidence on behalf of the Employer, was Dr Viriglio de Asa who is a registered specialist in internal medicine and the holder of a Post Graduate Diploma in Cardiology. Dr de Asa gave evidence by telephone, due to his inability to attend the hearing in Taveuni. The medical expert indicated that he was requested to provide a medical report for Sun Insurance Co Ltd⁸ and said that he formed his opinion reliant in part, on the earlier reports provided by Drs Tikoinayau and Naduva. At the outset, Dr de Asa gave the view that work stress cannot be concluded as the direct cause of the Worker’s death and made clear that it was difficult to conclude that hypertension was the major factor in this particular case. In reaching his view, Dr de Asa stated that he based it on the fact that the deceased’s hypertension was controlled, and that he could not determine the level of stress that the Worker was exposed to through his work. As to why the hypertension may have been triggered, Dr de Asa suggested that this may have been a multifactorial problem, for such reasons as the Worker had been non-compliant with his medication, or that there were other underlying and undiagnosed complaints that may have contributed to the elevated blood pressure, such as underlying renal or kidney disease, an abnormal lipid profile or an underlying cardiomyopathy (disease of the heart muscle).
- [14] In cross examination, the doctor told the Tribunal that the Worker who was a known hypertensive, should have found the activity of snorkelling to be more resting and thereby not exacerbating such a condition. When questioned by the Tribunal, the doctor nonetheless accepted the proposition that if the Worker had not been taking medications and had therefore been suffering from uncontrolled blood pressure, that the exertion could have triggered the heart attack depending on the degree of hypertension.

Was the Deceased a Workman for the Purposes of the Act?

- [15] Section 2 of the *Workmen’s Compensation Act* 1964 defines workman (Worker) to mean:

any person who has, either before or after the commencement of this Act, entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, or otherwise, whether the contract is expressed or implied, is oral or in writing, whether the remuneration is calculated by time or by work done, and whether by the day, week, month or any longer period:

Provided that the following persons are excepted from the definition of "workman":-

⁸ See Folio 67 of the Applicant’s Disclosures.

- (a) a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club;*
- (b) an outworker;*
- (c) a member of the employer's family dwelling in the employer's house or the curtilage thereof; or*
- (d) any class of persons whom the Minister may, by order, declare not to be workmen for the purposes of this Act.*

[16] The Tribunal is satisfied that the deceased was a workman for the purposes of Section 2.

Was the Respondent the Employer of a Deceased Workman?

[17] Section 3 of the Act, reads:

"employer" includes the Government and any body of persons corporate or unincorporate and the personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person; and in relation to a person employed for the purposes of any game or recreation and engaged or paid through a club, the manager, or members of the managing committee of the club shall, for the purposes of this Act, be deemed to be the employer;

[18] There is no doubt that the Employer was captured by the definition at Section 3 of the Act.

Did the Worker Suffer a Compensable Injury?

[19] Section 5(1) of the *Workmen's Compensation Act 1964* provides as follows:

If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workmen, his employer shall, subject as hereinafter provided be liable to pay compensation in accordance with the provisions of this Act

[20] It appears well accepted that there are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act 1964*.⁹ These are:-

- (i) Personal injury by accident;
- (ii) Arising out of employment;
- (iii) In the course of employment.

Did the Worker Suffer A Personal Injury by Accident?

[21] Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*¹⁰ set out in detail what was to be meant by the expression "injury by accident". The medical certificate issued on 25 January 2016, states that the deceased suffered from a cardiopulmonary arrest, due to uncontrolled

⁹ *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)

¹⁰ [1995] FJHC 39; Hba0010j.94b (17 February 1995)

hypertension. It is not disputed by the parties that the deceased suffered from a heart attack at work, whilst snorkelling. This first limb is therefore satisfied.

Was the Worker's Death by Accident Arising Out of Employment?

[22] Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*¹¹, sets out the relevant considerations when determining whether or not a worker suffered an accident arising out of employment. His Honour relied on Lord Sumner's characterisation in *L & YR v Highley*¹² to apply the following test:

"... Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was whereby in the course of that employment he sustained injury.

[23] As his Honour further stated:

The expression is not confined to the mere "nature of the employment" as formerly held in several cases, but it "applies to the employment as such - to its nature, its conditions, its obligations, and its incidents.

[24] The Worker died while undertaking snorkelling activities on behalf of the Employer. Dr Tikoinayau was of the view that the increased heart rate caused by this exertion, increased the blood pressure of a known and uncontrolled hypertensive, giving rise to the cardio pulmonary arrest. Dr de Asa, could not rule out that possibility, in the event where the high blood pressure was not being managed¹³. The Tribunal has considered the evidence of the deceased widow, who claims her husband had been complaining of chest pains two weeks before his demise; the fact that she also claimed to have been unaware of him taking any medications during that period; the reports of the deceased complaining of body pains to Ms Maivuniwi, as all suggestive of the work activity exacerbating underlying pre-existing health conditions that may have given rise to the heart attack. The view of Dr Tikoinayau is preferred in the circumstances and the activity of snorkelling, based on these sets of facts, seen as exacerbating the pre-existing hypertensive condition of the Worker, giving rise to the heart attack.

[25] It is submitted by the Respondent within its *Submission* dated 4 June 2019, "that the cause of the aggravating factor was the deceased not taking his medication, leading to hypertension and the resulting heart attack". If that be the case, it does not alter the statutory inquiry, which is to ask what was it that the deceased was doing at the time of his demise? The answer is, that he was undertaking snorkelling activities as directed by his Employer. He was clearly not in a fit state to undertake those tasks given his medical condition. The Employer has demonstrated no

¹¹ [1994] FJHC 180

¹² (1917) AC 352 at 372

¹³ The medical opinion of Dr de Asa was made on the understanding that the hypertension was being managed by medication.

evidence whatsoever as to what steps it undertook to ensure the health and safety of the deceased in accordance with the requirements of the *Health and Safety at Work Act 1996* and supporting regulations. The fatality arose out of the employment.

In the Course of Employment

[26] In *Travelodge*, Pathik J stated:

The two conditions which must be fulfilled before an accident can be said to have occurred "in the course of employment" are:

(a) the accident must have occurred during the employment of the workman and

(b) it must have occurred while he was doing something which "his employer could and did, expressly or by implication, employ him to do or order him to do"

[27] The Tribunal is satisfied that these two elements have been satisfied. The Employer has conceded that the deceased had been called in to work and deployed to undertake that task.

Conclusions

[28] Within the *Respondent's Submissions*, reference is made to the case of *Labour Officer v Fiji Meat Industry Board*¹⁴ in which the Tribunal has demonstrated a willingness to reduce the amount of compensation, having regard to non-work related factors. This is not a case that lends itself to such an approach. The higher the risk of exposure to injury, the stronger the requirement that the Employer put in place all necessary safeguards to minimise or remove such risk. In this case, the fitness of the worker, was at issue.

[29] The Employer simply has shown no evidence of any precautionary measures that it had adopted to avoid such a mishap.

[30] As mentioned above, the combined evidence at Paragraph [23] above, is suggestive of a worker who was simply not physically fit at that time. The case of the Applicant is made out and the dependants of the Worker entitled to the compensation payable in the amount of \$29,952.00. In addition, in accordance with Order 32 rule 8 of the *Magistrates Court Rules 1945*, interest shall be awarded as and from the date the application was filed, being 16 March 2018. An interest amount calculated at the rate of 5 percent per annum for 444 days (being the date from which the application was filed to the date of decision, shall also be awarded in the amount of \$1,821.75. That is, a total compensation amount in the sum of \$31,773.75 is payable. The Tribunal has summarily assessed costs in this matter at \$1,500.00.

Decision

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

- (i) The Respondent pay compensation to the Labour Officer on behalf of the dependants of Suliano Tabualevu, in the amount of \$31,773.75, within 28 days hereof.

¹⁴ [2018] FJET9; ERT WC 107 of 2016 (12 February 2018).

- (ii) The Respondent pay costs to the Labour Officer in the amount of \$1500.00, within 28 days hereof.



Mr Andrew J See
Resident Magistrate