Employment Relations Tribunal

Decision

Title of Matter:	**Samueli Naloma** **v** **Air Terminal Services (Fiji) Ltd**
Section:	**Section 211 (1)(k)*Employment Relations Act 2007***
Subject:	**Adjudication of Grievance Arising Out of Dismissal**
Matter Number:	**ERT Grievance No 25 of 2017**
Appearances:	**Mr K Tunidau, Kevueli Tunidau Lawyers, for the Grievor** **Mr N Tofinga, Fiji Commerce & Employers Federation, for the Employer**
Date of Hearing:	**Friday 16 February 2018** **Tuesday 13 March 2018** **Monday 19 March 2018** **Monday 13 August 2018**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**8 February 2019**

KEYWORDS: Dismissal arising out of employment; Section 211 Employment Relations Act 2007; Employee Theft and Misconduct, Breach of policies and procedures; Circumstantial evidence in civil proceedings and balance of probabilities.

CASES CONSIDERED

Adler v Australian Securities and Investments Commission [2003] NSWCA 131; (2003) 46 ACSR 504 (8 July 2003)
*Australian Securities and Investments Commission v Macdonald (No 11***)** [2009] NSWSC 287 (23 April 2009).
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336 (30 June 1938)
Granada Tavern v Smith (2008) FCA 646 (15 May 2008)
Holloway v McFeeters [1956] HCA 25; 94 CLR 470 (6 June 1956)
Jackson v Lithgow City Council [2008] NSWCA 312 (24 November 2008)
Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2; ERT Grievance 122.2016 (10 February 2017)
Morley v Australian Securities & Investments Commission [2010] NSWCA 331 (17 December 2010)
Qantas Airways Limited v Gama (2008) 167 FCR 537; [2008] FCAFC 69 (2 May 2008)
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]Samueli Naloma commenced employment with the Respondent Employer on 9 November 2015 as a PPT Loader Cargo at the Nadi Airport. On 26 September 2016, Mr Naloma was stood down from duties without pay, pending an investigation into allegations levelled against him regarding pilferage and tampering of a consignment of mobile phones that had arrived at the Nadi Airport on Flight FJ 910 and were being held within the Cargo Bond area of the Employer, whilst waiting customs clearance and release. A Disciplinary Inquiry Committee was formed under Article 26 of the *Memorandum of Agreement* ("**the Master Agreement**") between the Employer ATS and the Federated Airline Staff Association ("FASA'). On 28 November 2016, the findings of the Committee were as follows:

> *The Disciplinary Inquiry Committee took into account all the evidence gathered at the hearing and considered all mitigating circumstances before delivering their decision. Allegations of Pilferage were inconclusive, however the committee concluded that you were tempering (sic) with unclaimed goods and bonded assignments. This is a major concern as it is a breach of Customs Regulations and will have negative impact on the company. The committee therefore finds you guilty of charge 2C(i) and (ii).*
>
> *The committee further deliberated and have recommended that you:*
> *Samueli be demoted to Cargo Services Assistant PPT Year 1 for a duration of 12 months and will not have access to the bond area or airside. After serving 1 year, he will undergo refresher training immediately before being restated as a PPT Cargo Loader.*

[2]Article 26D of the *Master Agreement* makes provision for an appeal against the Disciplinary Inquiry Committee decision, where either the Union or Employer are dissatisfied with the outcome. In this instance both parties appealed against the decision and an Appeals Committee was thereafter constituted. The Appeals Committee unanimously decided the following:-

1. *After much deliberation the Committee concluded that (Mr Naloma was) guilty on the grounds that (he) had carried out tasks that (were) not part of (his) job and also (was) seen in an unauthorised area tampering with a bag after which had already been cleared by the Cargo Bonds Officer ("CBO"). (Mr Naloma was) seen removing the bag from the CBO cleared cargo pallet to the ULD, which was approximately 5 meters away for several minutes as viewed in CCTV footage then replacing the bag onto the pallet with reasons unknown is deemed an act of intend (sic) and agreed to be an unlawful and act and a breach in the customs regulation.*

2. *The appeal committee also considered Company's submission through the Appeals letter and unanimously agreed to overturn the recommendation of the DI Committee for the alleged to be reassigned to PPT Cargo Service Agent due to the nature and seriousness of the offence you are hereby terminated*

[3]Whether an Appeals Committee has the capacity to terminate the employment of an employee, perhaps is an issue that should be left for another day, needless to say by letter dated 27 January 2017, Mr Naloma was advised of his dismissal and provided reasons for that decision in accordance with Section 114 of the Act. A grievance was lodged with the Ministry of Employment,

Productivity and Industrial Relations on 17 February 2017 and the matter was brought before the Mediation Service on 21 and 28 March 2017. As a result of the mediation between the parties being unsuccessful, the matter was referred to this Tribunal in accordance with Section 194(5) of the *Employment Relations Act* 2007.

Application by Employer to Strike Out Grievance

[4]On 12 May 2017, the Employer made application by way of a Notice of Motion, to strike out the grievance on the grounds that it was frivolous and vexatious and had little or no chance at all to succeed. Having heard the parties in relation to that Motion, the Tribunal was disinclined to bring the matter to an end, without giving the Grievor the opportunity to be heard. One reason for that was that the Employer had submitted to the grievance and attended two mediation sessions in a bid to resolve the matter. It could hardly be said that the Employer through such participation, did not regard the grievance as one that was not real and had no standing.

[5]When the matter was ultimately scheduled to consider some of the preliminary factual issues, the Tribunal sought to resolve the matter by way of a determinative conference. During that conference, Mr Tofinga for the Employer drew the attention of the Tribunal to the fact that the finding that formed the basis of the dismissal decision, was that Mr Naloma had been "rummaging through a consignment" and "not pilfering". As part of that process, the Employer released a 34 minute Close Circuit Television (CCTV) movie file from 12 September 2016, that captured some of the conduct in question and much time was spent analysing that footage to endeavour to understand the arguments of the parties. On that same day, an Interim Decision was issued by the Tribunal, providing initial impressions of the evidence and making clear to the Grievor, that on its face, the case of the Employer appeared compelling. For that reason, the parties were encouraged to attempt to resolve the matter independently of the Tribunal process. Unfortunately efforts in this regard were unsuccessful and the matter was thereafter scheduled for a hearing proper commencing on 16 February 2018.

[6] The following relevant material has been filed by the parties in this matter:-

- *Employer's Preliminary Submission* filed on 5 April 2017;
- *Affidavit of Richard Donaldson* dated 7 April 2017
- *Worker's Preliminary Submission* filed on 24 May 2017;
- *Employer's Closing Submission* filed on 2 July 2018;
- *Submissions for the Grievor* filed on 6 September 2018.

The Case of the Employer

Mr Richard Donaldson

[7]The first witness to give evidence on behalf of the Employer was Mr Richard Donaldson, who is the Manager Human Resources, ATS. During the giving of his evidence Mr Donaldson:-

(i) Was able to identify the various procedural steps followed by the Employer in relation to the Disciplinary Inquiry, Appeal and dismissal decision;
(ii) Was not able to clarify what specific training the Grievor undertook in relation to the *Customs Act and Regulations*;

(iii) Conceded there was insufficient evidence to conclude that the Grievor had stolen any mobile phones;
(iv) Conceded that the Grievor was entitled to go into the Bond Area of the site;
(v) Recognised that the Grievor would have gone through a security checkpoint when coming in and out of the Bond Area;
(vi) Advised that on the day in question, the Grievor was working under the supervision of Vikash Nadan[1];
(vii) Agreed that the Appeals Committee felt it unnecessary to call the Grievor to attend its meeting and clarify any evidence;
(viii) Conceded that as a party to the appeal, the Grievor was denied access to that process;
(ix) Stated that the Master Agreement between the Union and Employer does not explicitly state that the Grievor had a right to be heard during the Appeals process; and
(x) Did not believe that it was unfair that two of the employees who participated on the Appeals Committee were sub-ordinates to Mr Khalesh Kumar, the Manager, Ramp and Cargo Services, who had appealed the Disciplinary Inquiry Committee decision on behalf of ATS.

Mr Khalesh Kumar

[8]The next witness to give evidence was Mr Khalesh Kumar, who is the Manager Ramp & Cargo Services and in that capacity was the overarching manager of the Grievor. It was Mr Kumar who had appealed against the Disciplinary Inquiry Committee decision, for reasons that included he found the decision to demote the Grievor too lenient, when it had been determined that the employee had been found guilty of rummaging through goods[2]. The witness made clear that the Grievor was "*only suppose to maintain and keep goods securely in the premises*". According to Mr Kumar, following the incident, he no longer had trust and confidence in the Grievor. Mr Kumar stated in his evidence that :-

(i) He was not summoned to attend the Appeals Committee to speak to his appeal;
(ii) The Grievor had undergone six weeks training in relation to the handling of goods under the Customs Act;
(iii) The Team Leader, is in charge of the process for the offloading of goods from an aircraft, including the documentation;
(iv) If there is any spillage of containers or items, that there is a process to complete, including a form to fill out, referred to as a 'Cargo Spillage Report';
(v) No spillage was reported by the Team Leader for that shift on any of the cartons, bags or boxes that had been offloaded;
(vi) He had no proof that the Grievor had stolen a mobile phone;
(vii) Security Officers were reported to have advised that the Grievor had "nothing on him" when passing through the security area; and
(viii) CCTV footage showed the worker picking up a bag and taking it inside a Storage Container, yet there was no evidence of him opening the bag, or of the bag being tampered with; the cargo was cleared and no discrepancy recorded by the Team Leader.

1 It is most strange that this person was not called by the Employer to give evidence.
2 This is an issue that is central to this case and will be addressed further on within the judgment.

The Case of the Grievor

[9]Samueli Naloma worked in the role of a Cargo Loader, Cargo Bond Area at ATS. The Grievor explained the physical work environment and the security protocols required for accessing and exiting the Bond Area. In his evidence, Mr Naloma stated that :-

(i) He was not trained in the Customs Act and its requirements; nor shown the Act and its Regulations;
(ii) Was trained in the manual handling of cargo by one of the supervisors in that area;
(iii) Was subjected to allegations of pilferage, tampering of cartons and rummaging and ultimately taken to the Airport Police post for questioning;
(iv) Was stood down from work and thereafter issued with a Stand Down letter;
(v) He was called to attend a Disciplinary Inquiry Meeting, although not represented by anyone at that forum, nor reminded of his right to be represented[3]; nor understood the procedures involved;
(vi) He was not provided with any Bundle of Documents disclosing the evidence, prior to the meeting;
(vii) He came before an Inquiry Panel, none of whom introduced themselves to him at the start of the process;
(viii) He was not in attendance at the Disciplinary Inquiry when the case of the Employer was put;
(ix) Was asked during that Inquiry to describe what he was doing during various times within the 34 minutes CCTV footage, to which he responded that:-
- He was cleaning up in the afternoon shift, picking up rubbish around the area;
- I checked one of the cartons to clarify that number (to ensure that number belonged to that consignment);
- I checked it just to clarify as it had a different colour ;
- Cleaned up the area and went out and came back to store baggage that were checked;
- Found a bag not with a consignment number and lifted it up;
- I checked the bag around 3 or 4 times and found similar tags on it with other bags; I then took it and put cargo in the Bond.

(x) During the Disciplinary Inquiry, that no-one asked him about his knowledge of the Customs Act or Regulations;
(xi) During the Disciplinary Inquiry, he was asked about his knowledge of five missing mobile phones, to which he indicated he had no knowledge;
(xii) Did not attend the meeting for very long, although noted that the Company Advocate, Ms Adi Verara was allowed to remain[4];
(xiii) Went home and two days later was advised of the outcome and appealed against that decision.

[10] According to the witness,

(i) He was served a copy of the Company's appeal documents but was not given an opportunity to respond to that appeal;
(ii) Had expected that he would be called by the Committee to speak to his case;
(iii) Claimed that Mr Russell Holden, the Committee Chair advised him that "if they need me they will call me";

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3 This issue was discovered to be untrue or incorrect.

4 The Employer denies that this was the case.

(iv) Waited outside the conference room for more than one hour, whilst committee members just walked passed him;
(v) Was ultimately told to go home for good and that he had been terminated.

[11] During cross examination, the Grievor admitted to having previously been employed as a Freight Imports Clerk and it was put to him by Mr Tofinga that in this role, he would have had access to the Bonded Warehouse, to which Mr Naloma, denied. Mr Tofinga also questioned the Grievor in relation to his knowledge of weigh bills and warehousing under the Customs Act and he too denied having had any first- hand experience with these issues. It was put to the Grievor that the Company Representative at the Inquiry, Ms Adi Varara, did not remain within the Disciplinary Inquiry Meeting, an issue that the Grievor said that he was not able to confirm. When challenged in relation to the allegations of rummaging of a bag, the Grievor stated that he had lifted up the bag in question as it did not have a consignment number on it. Mr Naloma further stated, that he took the bag inside a container to raise it onto an elevated position, as he had a sore knee and did not want to bend it that day[5].

[12] Mr Tofinga sought clarification from the Grievor in relation to his understanding of the way in which goods were cleared out of a customs controlled area and Mr Naloma appeared to have a working knowledge of what was required to release consignments. Mr Tofinga challenged the Grievor's claim that he was denied or did not know that he was entitled to have a representative appear on his behalf at the Disciplinary Inquiry Committee meeting and Mr Naloma repeated that he was neither trained nor told of that right. Mr Tofinga then showed the witness Exhibit E3(u), a letter addressed to the Grievor dated 1 November 2016 from Mr Donaldson, that made clear of the right to be represented at the Inquiry Meeting by a representative. Mr Naloma accepted that this was the case.

Mr Maftoa Pene

[13] Mr Maftoa Pene, was at the relevant time, the Manager Technical Services, ATS and was appointed to be the Chair of the Disciplinary Inquiry. As a witness subpoenaed to give evidence by the Grievor, Mr Tunidau initially sought to clarify from Mr Pene, his understanding of the processes of the Appeal Committee, including the rights of each party to be heard and respond to the allegations and counter allegations. Mr Pene conceded that no evidence was sought from the Security Officers who were on duty during the relevant period. The witness agreed that the Grievor was in a role that he could lift goods and assist with their labelling if removed and confirmed that there was no evidence that Mr Naloma had rummaged through any items. The Chair of the Disciplinary Inquiry acknowledged that the Grievor was not questioned in relation to his knowledge of the Custom Act and Regulations.

[14] It was at this juncture, it became obvious to the Tribunal that a greater analysis of the CCTV footage was required and the Employer was directed to provide the Grievor the same. When the proceedings resumed several days later, Mr Pene was asked to describe the events that he claimed were prejudicial to the Grievor. Relevant issues recorded by the Tribunal arising from the oral evidence of this witness were identified within the footage are as follows:

[5] The video footage clearly shows the Grievor limping whilst walking.

Time Record 12/9/2016	Event/Description
22: 42.20	Bond Area
42.38	Group of employees verifying consignment[6]
43.00	Unknown Driver of forklift[7]
43.41	3 persons in area
43.57	Aircraft Containers
44.26	Forklift Driver[8]
44.40	Grievor
45.38	Consignment – with possibly rubbish nearby
45.51	2 employees[9]
46.0	4 unidentified persons[10]
46.29	Unknown person in jacket
46.39	Unknown person
47.33	Unknown person and no knowledge of what they are doing.
49.31	Unidentified objects on ground (possibly belts and tie downs)
49.51	The Grievor – limping on left leg, coming from the Office of Cargo Supervisor[11]
50.06	Cargo belts
50.17-30	Grievor bending down taking a possible suitcase; could not determine open or closed (admits no evidence of rummaging.
51.40	Grievor undertaking unknown task for 1 minute
52.32 -46	Grievor near unknown consignment of boxes; picks up what looks like a box, no evidence of rummaging[12].
54.50	Grievor seen behind boxes, left hand not visible.
55.35	Unidentified person
55.57-57.54	Grievor – cannot see what he is doing; moving head
57.49	Rubbish
58.22	Person presumed to be Grievor removing rubbish
59.08	Grievor carrying something
23.01.41	Unidentified person[13]

6 Note these employees are seen in that position for nearly 5 minutes. There was no evidence that emerged as to who those employees were and what in fact they were precisely doing.

7 Note this person was not interviewed in relation to allegations of theft of mobile phones.

8 Unknown person who was not interviewed by Disciplinary Inquiry Committee.

9 No inquiry made as to what they were doing.

10 No inquiry made as to what they were doing.

11 Was not asked why he came out of office.

12 Witness conceded that the DI Committee did not find out who were the fellow employees at that time or where the Supervisor was positioned at this time.

[15]In cross examination, Mr Pene indicated that he had undertaken the task of being the Chair of a Disciplinary Inquiry on approximately three previous occasions and confirmed that members of the panel had no concerns with the process that had been adopted. The witness stated that he did not inquire as to why the Grievor appeared to be removing rubbish away from a rubbish area and had made no inquiries as to the fact that rubbish trucks were used for the removal of stored rubbish on the site.

Mr Russell Holden

[16]Mr Russell Holden at the relevant time was the Manager Catering Services. At the time of this hearing, Mr Holden had been employed with ATS for approximately 7 years. The witness gave evidence in his capacity as the Chair of the Disciplinary Committee and indicated that he undertook this task of Appeal Committee member, together with Mr Faiyaz Ali and Mr Sekaia Nakautia. During the giving of his evidence the witness:-

(i) Stated that he looked at the outcomes of the Disciplinary Inquiry and discussed that with members of the Appeal Committee;
(ii) Conceded that the Grievor had a right to be present before the Committee and that not to allow him to attend was unfair "under those terms";
(iii) Acknowledged that he "obviously..hadn't" considered the Grievor's appeal at all and only considered the appeal made by the Employer;
(iv) Agreed that he had acted unfairly to the Grievor;
(v) Stated that there was no conclusive evidence that the Grievor had been involved in the theft of mobile phones;
(vi) Maintained that the Disciplinary Inquiry found that the Mr Naloma was guilty of being in an area, without authorisation;
(vii) Admitted that the Grievor had been found not guilty of "pilfering";
(viii) Disagreed with the proposition put by Mr Tunidau, that there was no evidence of tampering;
(ix) Agreed that the Grievor "perhaps" did not have full knowledge of the Customs Act and Regulations; and "supposed that (it) was unfair"; and
(x) Agreed that the "whole consideration of the Appeal insofar as the Grievor was concerned was unfair".

Pakeeza Mohammed

[17]At the time of hearing, Mr Pakeeza Mohammed had been employed with ATS for 21 years. The key issues arising out of the evidence of the witness were as follows:-

(i) That the Committee called Mr Kumar, in his capacity as Manager Cargo & Ramp Services, to provide evidence of the breach of the Customs Act;
(ii) That it "appeared (the Grievor) was not too clear" in relation to whether he had received any training pertaining to the Act; and that he appeared not to have knowledge of such matters;

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[13] Note the Grievor claimed to have finished duty at 11.00pm and the Witness conceded that no verification of that fact was undertaken by his Committee.

(iii) That the Grievor was not in the area where he should have been at the relevant time;
(iv) That the decision to find the Grievor guilty of breaching Custom Act and procedures was based on presumptions;
(v) That the Grievor should not have been handling goods that had already been checked in by his supervisor;
(vi) That the other Committee Member, Mr Turuva[14], had verified procedures undertaken by the Cargo Bond Officer and that the Grievor was moving goods that he was not required to move.

[18] During cross examination, the witness was shown footage at 22:58:21 and was asked to clarify the unravelled set of rubbish that the Grievor was seen carrying earlier. Mr Tofinga asked the witness to clarify where it was that the Grievor appeared to be heading with that rubbish and the witness replied, "going into an area ……..checked in goods..awaiting for customs clearance."

[19] Pakeeza Mohammed told the Tribunal that the reason given by the Grievor as to why he was handling boxes, was that he "was tagging them". In relation to the video evidence that showed the Grievor picking up a bag and taking it into a container[15], the witness said that he was checking stickers. According to Mr Mohammed, he had no record of the Grievor's specific response as to why he had taken the bag into the container[16].

Ms Nanise Rokobiri

[20]The final witness to give evidence was Ms Rokobiri, who was also a Member of the Disciplinary Inquiry Committee. According to the witness:

(i) The Grievor was not made aware of the provisions of the Customs Act that he was said to have breached; nor were those provisions "spelt out";
(ii) "We didn't talk about (the) Customs Act, we just found him guilty";
(iii) The Grievor was "rummaging through the boxes..picking up papers on top of boxes..it was rubbish.. he eventually explained it was rubbish".

[21]In cross examination, the following exchange with Mr Tofinga ensued:

Mr Tofinga: *You said you saw Mr Naloma tampering in the rubbish?*

Ms Rokobiri: *According to that video footage, papers on the box- that is what I saw*

[22] The witness was then referred to various aspects of the CCTV footage and confirmed that the relevant parts were viewed by all of the Committee members present. The following evidence was adduced as part of the cross examination:-

(i) Footage @ 44:40 - Agreed that it was the Grievor;

14 Mr Turuva did not give evidence before the Tribunal.
15 See at 22: 44:40 and 22:50:18.
16 Remember here, that there was no evidence that this bag had been tampered with, or that there was anything deemed missing.

(ii) Footage @ 49:50 - Agreed that it was the Grievor;
(iii) Footage @ 50:15 - Agreed that it was the Grievor;
(iv) Footage @ 50:18 - Agreed Grievor carrying a bag;
(v) Footage @ 50:24 - Agreed Grievor carrying a bag;
(vi) Footage @ 51:34 - Agreed Grievor carrying a bag;
(vii) Footage @ 52:29 - Agreed same person picking up bag;
(viii) Footage @ 58:21 - Agreed Grievor Picking up rubbish on top of consignment[17].

[23]Ms Rokobiri restated that she believed that the Grievor was not proficient in the relevant provisions of the Customs Act and its Regulations, as he had received no formal training. The witness stated that she had no knowledge of any earlier training that the Grievor may or may not have had in previous employment.

The Issues

Was the Dismissal Decision Justified?

[24]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*[18] looked at the question as to what is an 'unjustifiable dismissal', 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:*

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17 The Witness was asked did she know whether the Grievor had placed the rubbish on top of the assignment, or was it already on top? She responded, "he put it on top."

18 [2017] FJET 2 at 24-27.

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

In its context in subsection 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of subsection 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly, see what was said by Wilcox CJ in Gibson v Bosmac Pty Ltd, 5 May 1995, unreported, when Considering the construction and application of section 170DC.

A comparable set of criteria for setting out the "test for justification" is located within Section 103A of the Employment Relations Act 2000 (NZ), that provides:-

103ATest of justification

(1)For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

As can be seen in the New Zealand case, issues of procedural fairness are intertwined within the notion of whether or not the decision to terminate, is justifiable[19]. 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."

The Dismissal Decision

[25]There are some interesting issues that can be observed arising out of the dismissal decision dated 27 January 2017, some of which have not been well canvassed in proceedings. The most obvious would appear to be the following extract drawn from the dismissal letter:

Allegations were received of pilferage and tampering of consignment 260-30390555 HB 6YM198 containing mobile phones. Subsequently a report was lodged with Border Police and Investigations are continuing. 5 pieces of mobile phones were reported missing.

You were identified as one of the employees to whom the allegations have been levelled at. The initial report indicates that you had assisted in checking of flight FJ910 on the 10th of September 2016 and knowledge of the consignment…..

On the 12 of September 2016, between the hours of 2242 and 2255 it was seen in the CCTV footage that you were searching a bag belonging to another customer and later picking the box containing the mobile phones and rummaging the boxes. The act of searching and rummaging through uncleared goods is breach of custom regulations related to the responsibilities of bond keeper and its employees. The act is depicted as an attempted pilferage.

[26] The letter later continues:

The Appeal Committee, having reviewed the DI appeal file decided that there was no need for the company, yourself or FASA rep to appear before them since documents were in order. The Appeal Committee unanimously decided the following:

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[19] 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 Vatuinaruku* [2017] FJHC92; ERCA 9 of 2014 (8 February 2017)

1. *After much deliberation the Committee concluded that the (sic) you were guilty on the grounds that you had carried out tasks that was not part of your job and also seen in an unauthorised area tampering with a bag after which had already been cleared by the Cargo Bonds Officer ("CBO"). You were seen removing the bag from the CBO cleared cargo pallet to the ULD, which was approximately 5 meters away for several minutes as viewed in CCTV footage then replacing the bag onto the pallet with reasons unknown is deemed an act of intend (sic) and agreed to be an unlawful act and a breach in the customs regulations…..*

[27] Let us look at these allegations in turn.

The Grievor Being "Identified" As One of the Employees that Allegations of Mobile Phones (Theft) Were Levelled At

[28].This claim was not pursued during proceedings. It is unclear what the case of the Employer really was in this regard. The inference from the dismissal letter, is that a person or persons had identified Mr Naloma as having been involved in the theft of the mobiles phones, yet there was no mention of what was the basis for those allegations. It is noted that the initial submission prepared by the Manager Cargo & Ramp Services, Mr Kumar, seeking approval for the constitution of a Disciplinary Inquiry[20] states that *"Samueli Naloma was identified as one of the employees to whom the allegations have been levelled at",* yet beyond that, the Employer does not reveal who has made the allegations, on what basis and who else was involved. As a result throughout proceedings, the Employer seemed unable to provide a case theory as to how the phones actually went missing. In this regard it seems quite amazing that through no part of the process, were security personnel interviewed. That is, one would assume that the phones needed to be taken out through one of the exit points of the compound. The CCTV footage as provided by the Employer has captured many workers in that Cargo Bond Area, yet the only evidence before the Tribunal related to the Grievor, his supervisor and another Cargo Bond Officer who was interviewed as part of the process, but not called to give evidence.

Searching a bag belonging to another customer

[29]Mr Maftoa Pene, who was the Chair of the Disciplinary Committee, acknowledged that there was no evidence that the Grievor had rummaged through any items. Mr Pene accepted that the video footage did not show the bag in question being opened, nor was there any subsequent reporting of any missing items pertaining to that bag. Although the witness did state when he viewed the footage with the other DI members, that "*what we saw on footage was that he was ..(doing things) ….that he should not have been doing."* Mr Kumar also acknowledged that there was *no evidence* of the Grievor going through the bag. This issue is a very important one as the dismissal decision incorporates this finding of the Employer where it states:

that you were searching a bag belonging to another customer

[30]The problem for the Employer is that there is not one witness, nor one moment of video footage that has been supplied in proceedings, showing the Grievor "searching a bag".

[20] See Exhibit E3(c)

Picking the box containing the mobile phones and rummaging the boxes.

[31]The various witnesses in proceedings seem to have different understandings in relation to this issue. Mr Kumar wrote in his Appeal against the Disciplinary Inquiry decision[21], that:

> *It was not Samueli's job to verify the boxes and for him to even be touching them, let alone resealing them was a breach.*

[32] When giving his oral evidence, Mr Kumar stated that the Grievor was only suppose to maintain and keep goods secure in the premises. Mr Donaldson on the other hand agreed that the Grievor was entitled to handle items in the bond area, though later clarified that he was "not (the) best person to answer". One would have thought that the better person to give evidence as to what it was that the Grievor was supposed to be doing at the relevant time, would have been either his Supervisors or co-workers. In any event, the Employer makes the point that there does not appear to be any reason why the Grievor was doing what he claimed to do and why was it taking him nearly six minutes in the video to perform that task[22].

Other Issues and Evidence

[33] Because of the scarcity of good evidence substantiating the claims of either party, it is worthwhile reviewing the remaining available statements and exploring what else may be assisting in the analysis:-

(i) A handwritten statement by Mr Vikash Nadan, the Grievor's supervisor, indicates that on 10 September 2016, he was the Cargo Bond Officer in charge of the Flight FJ 910 that transported the consignment of mobile phones and that he had ensured the cargo was checked[23] and stored with due care and attention and that there was no sign of any pilferage or any missing cargos[24].

(ii) A Statement prepared by a Cargo Bond Officer[25], claimed that (on an unspecified day), the Grievor had approached him and asked for some 'tape' in order that he could retape a carton that he discovered was opened. The maker of that statement claimed that there were three people working that day in the bond area and that he was not aware of an open carton, but that he told the Grievor that he should re-tape it[26].

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21 See Annexure RD07 to the Affidavit of Richard Donaldson.

22 He may have in fact been performing several tasks at that time.

23 See Exhibit E3 (r) Cargo Manifest dated 10 September 2016.

24 See Exhibit E3(k) and note that this version of events is consistent with that given by the Grievor in his Statement dated 26 September 2016. (See Exhibit E3 (f).

25 Exhibit E3(j).

26 This Cargo Bond Officer (CBO) was not called to give evidence by the Employer, nor is there any records of interviews of the other employees who had worked on that shift. As this statement was tendered through Mr Donaldson, it is regarded as hearsay evidence and can only be given weight that accords to such a characterisation. There is no reference to which date the events contained within the statement actually refer and that is a critical issue.

(iii) In a Statement provided by Mr Naloma to the Employer[27], he stated that on 21 September 2016, whilst moving pallets into the bond, that he came across a white empty carton, that he picked up and "placed it on the stack of tuplins (sic) outside".

(iv) On 23 September 2016, a preliminary claim was made by the relevant Airfreight Operations Company, to ATS, stating that "upon customs examination we found that the packages were tempered (sic) and 5 phones were missing.

(v) That the Grievor was suspended from work on 24 September 2016.

(vi) That during the Disciplinary Inquiry Hearing on 24 November 2016, the Committee record that the Grievor had requested the tape to seal the box on 12 September 2016, whereas in the Grievor's statement he claims that day was 21 September 2016.

(vii) That the Grievor's Appeal against the Disciplinary Inquiry findings, suggests that he did request tape to reseal a damaged box that contained mobile telephones.

(viii) That the finding of the Appeals Committee on 26 January 2017, stated that there was evidence of tampering with a bag, a position that Mr Holden appeared to resile from, when giving his evidence to the Tribunal.

What Date Was the Tape Supplied for Resealing the Damaged Box?

[34] From the evidence before the Tribunal, it is unclear whether the Grievor had requested tape to seal a damaged box containing mobile phones, on 12 September 2016. Much turns on this date, as this is the day in which the Employer has sourced the CCTV footage that in turn formed the basis of his decision to stand down and subsequently terminate the Grievor. This is reasonably significant at one level, as it may demonstrate how flawed the Employer's investigation process actually was. On 10 September 2016, the evidence is that the Grievor checked in the consignment of the 48 mobile phones from the flight FJ910 and personally stacked them on a pallet outside the bond beside the check in area[28]. The CBO in charge of that flight, Mr Nadan stated there was no signs of any pilferage or missing cargo from that flight and that the cargo was checked and stored. In the Statement that was provided by a Mr Joseva Degei, Cargo Bond Officer, it would appear that he had been working on the day shift of an unspecified date and that some time just after the Grievor had commenced afternoon shift, he had asked for tape to reseal a carton. If the Employer is suggesting that this activity took place on 12 September 2016, then why did it not source the relevant CCTV footage for around 4.00pm, the time that Mr Degei suggested that the request for tape had been made. Instead the footage that the Employer relies upon, is that pertaining to the end of the Grievor's shift at almost 11.00pm.

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27 See Exhibit E3(f).,

28 Whether this version of events complements the Statement of Mr Nadan at Exhibit E3(k) is hard to acertain, but the Employer has not challenged this account.

[35]The Tribunal finds it highly unlikely that the 'request for tape', coincided with any of the activities shown on the CCTV footage as provided to the Tribunal for that date. Even if it was the case that the Grievor was incorrect in saying that his request for the tape took place on 21 September 2016 and that the date should have been 12 September, there is no correlation between the timeline given by Mr Degei to that of the footage. There is no evidence whatsoever of Mr Naloma sealing any boxes or stealing any mobile phones.

The Bag That Was Picked Up and Shown in Video Footage on 12 September

[36] As was mentioned earlier, in relation to this bag in question, the Employer concedes there was no claim as to any missing goods. The Grievor stated that he was only tagging the bag as its tag was missing. The Employer has been unable to refute that claim. So what remains?

General Allegation of Interfering with Goods Already Checked in

[37] As Mr Tunidau correctly pointed out at the earlier stages of these proceedings, the video footage supplied to the Tribunal in the course of the hearing, represented only 34 minutes in time. A time period from 10.42pm to 11.16 pm on 12 September 2016. But what does the video footage capture in the remaining period in question? That is, from the time the cargo was first unloaded when Flight FJ 910 arrived into Nadi Airport on 10 September[29], until the time that it was discovered that the mobile phones were missing some 13 days later. This was estimated to be a period of 18,720 minutes[30]. What would the video footage have showed the Grievor doing during that period? Would he have been seen lifting bags and boxes, removing rubbish, replacing lost tags and sealing damaged boxes? It is all hard to know, but the evidence in this regard is very poor. The physical description of what it was that the Grievor actually does in the ordinary course of his working day remains unclear and it would seem that there are mixed understandings from the various witnesses that gave evidence as to what this actually entailed. Certainly he was authorised to handle goods, because the Grievor makes the point that he stored boxes containing mobile phones on a pallet after being unloaded from Flight FJ 910. Mr Degei, in his capacity as Cargo Bond Officer, also didn't appear to object to the fact that the Grievor was sealing a damaged box and he supplied tape for him to do same. The available evidence of the Employer is simply insufficient to establish any substantial breach by the Grievor.

[38]That is not to say that there may not have been a breach, only that there is insufficient evidence before the Tribunal and presented during proceedings, to favour the establishment of that fact. And even in relation to the video footage on 12 September, there were several employees shown captured within the 34 minutes, none of whom any ATS witness identified and nor were they interviewed. The Tribunal has played this video footage over and over again and finds it very difficult to understand for example, why the person walking out of the bond warehouse at 22:55:35 and looking in the direction of the Grievor at that time, was not interviewed. Surely that person knew the Grievor was amongst the pallets at that point in time. And what was the Grievor lifting above head height at 22:57:04? That was not the sign of a person wishing to conceal his hand movements.

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29 It is understood that this is a Sydney to Nadi flight, that ordinarily arrives in the early evening.

30 See *Worker's Preliminary Submissions* filed on 24 May 2017 at Paragraph 7.5.

Circumstantial Evidence and the Standard of Proof in Civil Proceedings

[39]In the Employment Tribunal where civil proceedings are commenced, the standard of proof to be established is one that is based on the balance of probabilities.[31] In such cases, the approach taken by Courts and Tribunals is that the graver the allegation[32] and consequence[33], the higher the threshold test should be. And where the case of the Employer is one that relies on circumstantial evidence, then the party charged with the burden of proof must establish that the more probable inference supports the case that is alleged; in this case the justification of the dismissal based on misconduct[34].

[40]In *Holloway v McFeeters,*[35] the Australian High Court stated:

> *In a civil cause "you need only circumstances raising a more probable inference in favour of what is alleged . . . where direct proof is not available it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference; they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture: see per Lord Robson, Richard Evans & Co. Ltd. v. Astley (1911) AC 674, at p 687 . . . All that is necessary is that according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood". These passages are extracted from the unanimous judgment of this Court (Dixon J., as he then was, Williams, Webb, Fullagar and Kitto JJ.), in Bradshaw v. McEwans Pty. Ltd. (Unreported, delivered on 27th April 1951). . We should think that, applying these principles to the present case, inferences sufficiently appear from the circumstances to which we have referred that make it at least more probable than not that the unidentified vehicle was being driven in a negligent manner at the time of the accident and that this was the cause of the accident.*

[41] And as later stated by Gzell J *in Australian Securities and Investments Commission v Macdonald (No 11*)**,**[36]

> *" the more serious the consequences of what is contested in litigation, the more a Court will have regard to the strength and weakness of evidence before it in coming to a conclusion (CEPU v Australian Competition and Consumer Commission [2007] FCAFC 132, (2007) 162 FCR 466at [30]). That means that if inferences are to be drawn, ASIC has to establish that the circumstances appearing in the evidence give rise to a reasonable and definite inference and not merely to conflicting inferences of equal degrees of probability."*

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31 See *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 (30 June 1938)

32 See *Qantas Airways Limited v Gama* (2008) 167 FCR 537; [2008] FCAFC 69 at [137]; *Granada Tavern v Smith* (2008) FCA 646 at [95]

33 See *Morley v Australian Securities & Investments Commission* [2010] NSWCA 331 at [746].

34 See *Jackson v Lithgow City Council* [2008] NSWCA 312 at [9].

35 [1956] HCA 25; 94 CLR 470 at 480-481

36 [2009] NSWSC 287 (23 April 2009).

Conclusions

[42]Whilst at first blush during proceedings on 1 November 2017, this Tribunal believed that a prima facie case of misconduct was established against the Grievor, the further and ongoing interrogation of the evidence and the hearing from the witnesses of both parties, has led the Tribunal to a different conclusion. There is simply insufficient evidence to draw the conclusions that have been done by the Employer in claiming the justification of the dismissal.

[43]For example, consider the three persons identified in the video footage at 22:43:41 and why is their activity regarded as any different to that of the Grievor commencing from 22:52:31. In the first case, Mr Pene claims that the workers were checking a consignment, but how can these activities be differentiated from that being undertaken by the Grievor? There is no evidence of the Grievor opening any of the goods being held. There is insufficient circumstantial evidence to favour an inference of rummaging as suggested by the Employer. The reasons given by the Employer in justifying the dismissal decision cannot be substantiated and on that basis cannot be preferred to those of the Grievor, on the balance of probabilities. After an extensive interrogation of the evidence, the Tribunal cannot support the dismissal decision.

Remedy

[44] In the *Submissions of the Grievor* dated 6 September 2018, it is argued that the Grievor should be reinstated in his employment. That is the primary remedy available under the Act and one that should be considered wherever possible. The Tribunal sees no reason why the Grievor should not be returned to his former position. The Employer is a large organisation and has extensive experience in handling human resource issues and industrial relations disputes. A worker who has been unjustifiably dismissed, should not be deprived of the right to return to work, simply that it may be regarded as unpalatable or inconvenient.

[45]This matter first came on before this Tribunal on 25 October 2017, having earlier been the subject of mediation activities. At that time, the Employer sought to have the grievance struck out, on the basis that it was frivolous and vexatious[37]. It is unfortunate that the timing of this final decision now made, was also stymied by the fact that the submissions of the parties had not earlier been forwarded to the Tribunal by the registry. In any event, the matter has now been determined and the Tribunal is of the view that the worker should be reimbursed for lost wages as calculated in a manner consistent with the terms of employment contained within the Letter of Offer dated 29 October 2015. At that time, the Grievor's salary scale was $8,731.00 to $13,238.00.

[46]The Employer shall be ordered to reimburse the Grievor for 75% of his lost wages and other accrued entitlements for the period from the date following dismissal, Friday 27 January 2017 to 22 February 2019. The rate of calculation should be based on a PPT Loader Cargo at the 2nd Year of Service. The discounting for lost wages, takes into account the fact that some mitigation for the lost income is expected and that there is no reason why after such a lengthy period of time, that the Grievor should not have found temporary employment. All leave entitlements and other contributions that are due, should accrue at the rate of 75% during that period and there should not be a break in service continuity. The Grievor should thereafter be allowed to return to work on 25 February 2019 and must be placed on the 2nd Year salary increment where he should be next entitled to a salary increase, consistent with the anniversary of his commencement date with the Employer.

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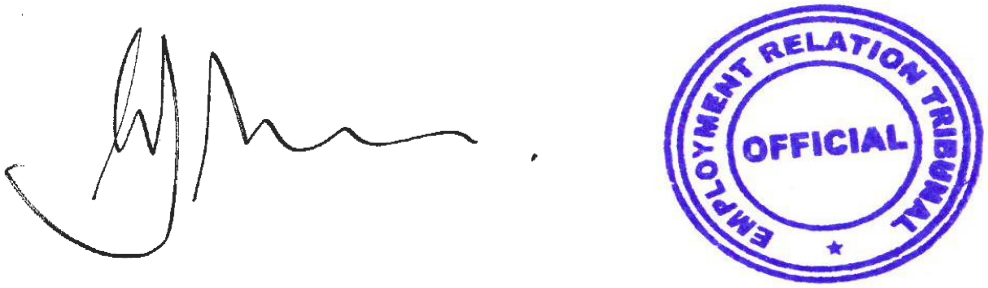
[37] See Notice of Motion dated 12 May 2017.

Decision

[47] It is the decision of this Tribunal, that:

(i) The Grievor must be reinstated in his employment.

(ii) Any application for costs following the event, must be made within 21 days hereof.



Andrew J See
Resident Magistrate