Decision

Employment Relations Tribunal

Title of Matter:	**LABOUR OFFICER on behalf of Josua Naiteitei (Applicant)** **v** **FIJI PALMS BEACH CLUB & RESORT LIMITED (Respondent)**
Section:	**Section 8 *Workmen's Compensation Act* 1964**
Subject:	**Compensation in case of permanent partial incapacity**
Matter Number(s):	**ERT WC 99 of 2014**
Appearances:	**Ms R Kadavu, for the Labour Office** **Mr G O' Driscoll, O'Driscoll Law, for the Respondent Employer**
Date of Hearing:	**3 September 2019**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**26 November 2019**

KEYWORDS: Section 8 *Workmen's Compensation Act* 1964; Occupational Disease; *Workmen's Compensation (Occupational Diseases) Regulations*.

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).
Raiwaqa Buses Ltd v Labour Officer [2011]FJHC174; HBA23.2008 (18 March 2011).
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 Section 8 of the *Workmen's Compensation Act* 1964. The application filed on 25 September 2014, claims that the Worker, a former barperson employed by the Respondent, had suffered from "finger irritation due to detergents he used while washing glasses (and) utensils in the bar". The Labour Officer claims the amount of $2,020.32, on the basis of a five per cent whole body permanent impairment assessment.

[2] The delay in this matter appears to have come about, in part, as a result of an application made by the Respondent Employer, that the matter be struck out on the grounds that it discloses no reasonable cause

of action or defence. That interlocutory application was disposed of by the then Chief Tribunal on 13 July 2018.

The Case of the Labour Officer

[3] The Worker reported his dermatological condition to the Labour Office in February 2011. In communications sent to the Employer on 22 February 2011, the Labour Office had asked that the Respondent formally report that condition[1], together with its knowledge that the Worker had suffered from "chronic left knee aches," claimed to have arisen during and in the course of his employment with the Respondent over the preceding 13 years. Within the Labour Officer's opening submissions, it was claimed that the Employer had been aware of the Worker's condition since 2010[2].

Dr Meciusela Tuicakau

[4] The first witness called to give evidence on behalf of the Labour Officer, was Dr Meciusela Tuicakau, a specialist dermatologist, who explained the condition paronychia, that was said to be a nail infection around the cuticles of the fingers. Dr Tuicakau explained that the condition arises out of continuous or recurrent immersion of the nails in water and is very common amongst bar attendants and waiters. The doctor explained how the 5 per cent whole body impairment was calculated and was shown a medical report that he had prepared on 3 March 2013.[3]

[5] In cross examination, the medical expert said that he had been made aware that the condition had come about some 7 years prior to his consultation with the Worker. In response to questioning from the Tribunal, Dr Tuicakau indicated that you could minimise the risk of the condition, by using other methods to clean dishes and glasses and accepted that the use of gloves would have some benefit in this regard also.

Josua Tuluga Naiteitei

[6] Josua Naiteitei is the former employee, the subject of this application. The Worker explained to the Tribunal the nature of his employment with the Respondent and indicated that he had been employed for 15 years with his former employer. In his evidence, the Witness told the Tribunal that he had reported his condition to his Manager and said that he had brought this to her attention "every time I came to work". Mr Naiteitei claimed not to have been provided with any personal protective equipment (PPE) including gloves. According to the Witness, he was told by his Manager to go to the doctor and "after that the Employer told me not to do washing." The Worker stated that he "kept doing (this) even though (the) employer told me not (to)".

[7] In cross examination, the Worker gave a detailed history of his work in the hospitality industry, that commenced in 1960. Mr Naiteitei claimed that he had noticed problems with his hands, when he started working at the resort and re-affirmed that his Employer had advised him not to immerse his hands in water and directed him to attend a doctor to have the condition treated. In re-examination, the Witness indicated that he was not provided with gloves to wear at work until either 2009 or 2010, a time after which he had already acquired the condition.

Mr Willie Toga

[8] The final witness to be called to give evidence on behalf of the Labour Officer, was Mr Willie Toga, who is presently employed as a barperson at the Fiji Palms Beach Club Resort. Mr Toga explained the duties that he performed at the resort and told the Tribunal that he had known the Worker, since 2005. The

[1] The request specifically asked that the Employer complete a form LD C1, in accordance with the requirement at Section 14(1) of the *Workmen's Compensation Act* 1964.

[2] As it transpires, that date was at least no later than 18 November 2009.

[3] See Exhibit L1.

Witness attested to the fact that the Worker had been suffering from nail infection during his employment at the resort and indicated that in his case, whilst gloves were ultimately provided, that they nonetheless burst and were not completely water resistant.

Marica Naikelekelevesi

[9] Ms Naikelekelevesi was at the relevant time, a Technical Officer employed with the National Occupational Health and Safety Service. The Witness was charged with the inspection of the workplace in response to the initial complaint of the Worker and completed a *Chemical Exposure Investigation Report* dated 29 August 2011. It was noted within that report, that the toxicological information relating to the dishwashing liquid being used by the Employer, "may cause redness, itching and irritation" to the skin[4]. It is also noted within that report, that the then Manager of the resort, Ms Wendy Montgomery had written to a local medical practitioner seeking clarification of the Worker's condition following him being referred to the local surgery and was advised that "he should recover well if he takes the tablets daily – even if his hands get wet[5]."

Mr Kelemete Qiodravu

[10] The final witness to give evidence was Mr Qiodravu who is an Assistant Labour Officer at the Ministry of Labour. The Witness spoke of the procedural steps associated with the Ministry's investigation, including the initial request made to the Employer to complete the form LDC1[6] and the response that was provided. Mr Qiodravu was taken through the various documents that give rise to the making of a claim against an employer, including the co-ordination of the medical assessment by Dr Tuicakau and the final calculation based on the statutory formula. It was noted by the Witness that in response to the claim served on the Employer, that a letter was received from its insurer, denying liability under the Act[7]. In cross examination, the Witness was challenged for not having provided any other statements from co-workers at the resort.

[11] At the conclusion of the Applicant's case, the Employer elected not to call any witness evidence in its defense.

Analysis of Issues

[12] Central to the Submissions of the Employer filed on 11 October 2019, is the contention that paronychia is not a personal injury by accident for the purposes of Section 5(1) of the *Workmen's Compensation Act* 1964, nor has the claim been made consistent with those for prescribed occupational diseases for the purposes of Section 35 of the Act. Dealing with these matters in reverse order, it is accepted that paronychia is not a prescribed disease for the purposes of the *Workmen's Compensation (Occupational Diseases) Regulations* 1964. Paronychia is nonetheless a form of skin disease that affects nails and on that basis, is located within the study of dermatology, which has been defined as the "medical science of diagnosing and treating skin diseases affecting the skin, hair, and nails"[8]. It is a specialty with both medical and surgical aspects. In this regard, it should be noted that dermatitis, is an identified "injury" for the purposes of the prescribed Form LDC1 located at the Second Schedule to the Act[9]. On that basis, there would appear to be a statutory regime established, that recognises that dermatitis is to be treated as an injury. No other logical conclusion can be drawn.

[4] See Applicant's Disclosures

[5] See email communications dated 18 and 19 November 2009.

[6] See Exhibit L5.

[7] See Exhibit L11.

[8] See Australasian College of Dermatologists https://www.dermcoll.edu.au/for-community/understanding-dermatology/

[9] Note here the revision that was made to this form on 6 August 1976.

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

[13] 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 accepted from the definition of "workman":-*
>
> *(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.*

[14] There is no dispute that Mr Naiteitei is a workman (worker) for the purposes of Section 2.

Was the Respondent the Employer of the Workman?

[15] 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;*

[16] This is not an issue in dispute. The Worker was employed by the Respondent, who is the Employer captured by the definition at Section 3 of the Act.

Did the Worker Suffer a Compensable Injury?

[17] 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....*

[18] It appears well accepted that there are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act* 1964.[10] These are:-

(i) Personal injury by accident;
(ii) Arising out of employment;

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

(iii) In the course of employment.

Did the Worker Suffer A Personal Injury by Accident?

[19] Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*[11] set out in detail what was to be meant by the expression "injury by accident". For the reasons identified above, the Tribunal is satisfied that a dermatological condition, is a personal injury by accident for the purposes of this first limb.

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

[20] Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*[12], 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*[13] 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.*

[21] 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.*

[22] The Employer has stated within the *Notice by Employer of Accident Causing Injury* (LDC1) that there had been an "on going problem since 2009". The Tribunal accepts the evidence of Dr Tuicakau and Ms Naikelekelevesi, that the ongoing immersion of the hands in water cleaning glasses gave rise to the condition.

In the Course of Employment

[23] 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"*

[24] Whilst the Tribunal is satisfied that the 'accident' occurred during the employment of the Worker, there is some evidence to suggest that the Employer had specifically requested the Worker not to wash

[11] [1995] FJHC 39; Hba0010j.94b (17 February 1995)
[12] [1994] FJHC 180
[13] (1917) AC 352 at 372

the glasses, or at least wear gloves to minimise the risk of further irritation. This possible breach of instruction is unlikely to render the Worker's conduct of a type that would be regarded as serious and wilful misconduct for the purposes of Section 5(1) (b) of the Act. The Employer has not bothered to provide any direct evidence as to what were the instructions that it had issued and the Tribunal cannot without more, regard the ongoing washing of glasses by the Worker, as "serious" and "wilful". An Employer in such circumstances, should have enforced its instruction, if it regarded the issue as serious. The Tribunal finds that the Employer's conduct was somewhat inconsistent in this regard. For example, in the email communication of Ms Montgomery to the Mitchell Clinic on 18 November 2009,[14] the Manager writes:

> *(Josua) seems convinced that his problem has been caused by using detergent when washing glasses by hand. Our Bar size and the amount of business in a small Resort Club Bar that is not open to the public, does not really justify a dishwasher. I have advised Josua to wear gloves by he seems reluctant to do so.*

[25] Fourteen months later, in response to the request by the Labour Office that the Employer complete the LDC Form 1, the Resident Director, Jim Sherlock wrote in what can only be described as an unhelpful manner:

> *The Club never reported Mr Josua Naiteitei's absence from work to the Ministry of Labour due to the fact there was never any accident to report……. We will retain the four LD Form/C/1 sent as they will be useful should a work related accident should (sic) occur at The Club in the future*

[26] Unsurprisingly, the Club ultimately did complete the Form LD C1 and faxed that through to the Labour Office on 21 November 2011[15], some nine months after the initial request. Clearly from November 2009, the Employer was aware that the Worker had been suffering from a condition, whether it believed it to be work related or not. The evidence of the Worker was that the condition deteriorated and he first attended the Pacific Health Centre on 27 September 2010. It would seem that by February 2011, that the Worker had taken his concerns to the Labour Office who ultimately wrote to the Employer on 22 February 2011. There is nothing unusual with these timelines. The Employer was put on notice of the concerns back in November 2009, so much is clear from the correspondence between Ms Montgomery and Dr Mitchell. The Employer should have either altered the Worker's duties or enforced its directions that Mr Naiteitei was not to 'wash up'. It did neither of these, although it seems, to the Worker at least, that he was ultimately terminated in his services, was paid an amount of $1500.00 and told to "leave the premises".

[27] The Tribunal is satisfied that the dermatological condition, came about during the employment and there is no contrary evidence to suggest that the task of washing the dishes and glasses, was not something that the Worker should not have been doing. The Employer has elected not to provide any evidence whatsoever of the arrangements it intended to put in place, if the Worker was not to undertake that task. That is, who was it proposing to undertake this glass washing, if it wasn't the Worker? The Tribunal accepts that the Worker continued with the task out of necessity.

Conclusions

[28] Based on the evidence of Dr Tuicakau, the Tribunal accepts that at the time of the assessment, that the Worker was suffering from 5 per cent whole body impairment. Reliant on the statutory formula at Section 8 of the Act, the following calculation of 5% x $154.64 x 260 weeks, renders the amount owing as $2010.32. As the Labour Office has not included interest within its claim, no award will be made. This matter should have been resolved far earlier than what it did. The progressing of the matter was stymied

[14] See at p23 of the NOHS Investigation Report.

[15] This type of conduct by the Employer, does nothing to assist in the effective administration of the Act.

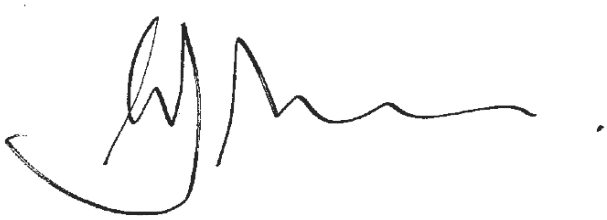
by the Employer and its failure to co-operate with the Labour Office. The fact that the Employer then sought to have the matter struck out, was another step in proceedings, that did nothing other than to deny the Worker a more timely access to his statutory entitlements. Costs shall be summarily assessed in the amount of $1,500.00.

Decision

[29] It is the decision of this Tribunal that:

(i) The Respondent Employer pay compensation to the Labour Officer on behalf of Josua Naiteitei in the amount of $2,010.32 within 28 days; and

(ii) The Respondent Employer pay costs to the Labour Officer in the amount of $1,500.00 within 28 days.



Mr Andrew J See
Resident Magistrate