

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

ERT Grievance No 99 of 2012

**BETWEEN:** RATTAN SAMI

**Grievor**

**AND:** CARPENTERS FIJI LIMITED T/A MORRIS HEDSTROM

**Employer**

**Counsel:** Mr D. Nair for the Grievor  
Ms D Prakash for the Employer

**Date of Hearing:** Wednesday 24 April 2013

**Date of Decision:** Wednesday 24 April 2013

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**DECISION**

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**APPLICATION FOR REFERRAL TO EMPLOYMENT RELATIONS COURT – Section 218(1) Employment Relations Promulgation 2007; UNFAIR AND UNJUSTIFIED TERMINATION; Continuity of Employment– Section 61 Employment Relations Promulgation 2007**

**Background**

1. This is an application made by the Employer under Section 218 of the *Employment Relations Promulgation 2007* to have the proceedings in this matter transferred to the Employment Relations Court for the hearing and determination of the matter.
2. The proceedings arise out of the referral of an employment grievance to this Tribunal, in accordance with Section 194(5) of the Promulgation.
3. The outline of the unsettled employment grievance as referred from the Mediation Unit is as follows:

“The decision by management to terminate the services of the griever which he claimed was unjustified and unfair and to be reinstated with loss of pay or any other accrued entitlement.”

### **The Grievor**

4. According to Mr Nair, the Grievor had been working with the Employer under various contractual arrangements. The first was a period of tenured employment that spanned the period from approximately 1977 to 2009. Thereafter, the Grievor was engaged under two further contractual arrangements. The first, a contract entered into on or around 10 November 2009 for a period of 12 months. And the second, a revised contractual period commencing on or around 10 November 2010 and continuing through to the date of termination on 1 February 2012.<sup>1</sup>
5. My understanding from Mr Nair’s brief comments at the commencement of proceedings, was that apart from one week’s broken period of service at the completion of the tenure period in 2009, the Grievor had worked continuously with the Employer for a continuous period of some 35 years.

### **Commencement of Proceedings**

6. At the commencement of proceedings, Ms Prakash was alerted to the fact that the ordinary manner in which proceedings of this type were to be conducted, was for the Employer to present its case first, in defense of the application.<sup>2</sup>
7. Ms Prakash at that juncture, sought that the Grievor should proceed first, primarily on the basis that she claimed that the case before the tribunal was simply a “matter of law”.
8. She claimed that the Tribunal needed to only concern itself with the issue of whether the termination was lawful. When pressed on this issue, she claimed that the Tribunal did not need to concern itself with whether the termination was unfair or unjustified. Beyond that though, Ms Prakash seemed unable to articulate her argument. Further, Ms Prakash advised the Tribunal that the Employer would not be

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<sup>1</sup> Though there appears to be some suggestion within the termination letter that the written contract had expired on 10 May 2011. (See Annexure RS-01 of the Preliminary Submission of the Grievor)

calling any witness evidence and that the 'matter of law' could be resolved by the Tribunal based on the documentary evidence of the parties.

9. In response to that, the Tribunal challenged Counsel to advise whether the Employer need to respond to the allegations of the Grievor, that the termination was unjustified and unfair. The response initially seemed to be, that the answer would be no. Again when pressed, Ms Prakash claims that in any event the Employer did not understand the allegations of the Grievor and that this somehow should still dictate that the Grievor should proceed and present his case first. Again that request was refused, as there was no basis that could be clearly argued that would justify such a departure in approach.
10. The Tribunal then referred Ms Prakash to two paragraphs within the Grievor's Preliminary Submission that made it clear of the themes that were being advanced as part of the grievance. These were identified at Paragraphs 2.2 and 3.6 of those Submissions as:

*There was no adverse reports on his performance that was brought to his attention during the period of his employment.*

*The employer should have followed the due process of terminating the employment of the grievor in accordance with the relevant provisions of the Certified Agreement.*

11. The Tribunal then indicated to Ms Prakash that this was the case that the Employer was required to meet and so much was clear from these submissions. It was further put to Counsel, that the case seemed straight forward and that it was unusual for an Employer not to wish to call evidence to refute the likely evidence from the Grievor.
12. The question was then asked of Ms Prakash, was she aware of the reason for the termination. At this point Counsel indicated that she was not and claimed that she had not been able to ascertain any from her file.
13. I find that position highly unlikely and disingenuous, that Counsel would attend a matter that has its genesis in a mediation activity on 25 April 2012 and claim not to know the reasons for the termination. It is a matter of record that in attendance at the Tribunal today, were no fewer than 3 company representatives, who one would have thought could have easily provided Counsel that information, if it was the case that she genuinely did not know.<sup>3</sup>

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<sup>3</sup>

A situation that I highly doubt and would wonder, why she did not bother to find out.

14. In any event, I indicated to Ms Prakash that I was wanting the Employer to open its case and asked her if she was ready to proceed. It was in response to that direction, that Counsel sought a five minute adjournment in order to consult with her advisers.

**Application Under Section 218 (1) of the Promulgation**

15. Upon resumption of proceedings Ms Prakash made a request that the matter be referred to the Employment Relations Court, on the basis that the relevance of Section 61 of the Promulgation needed to be firstly determined.

16. Section 61 of the Promulgation provides:

*For the purposes of this Part, employment is deemed to continue as long as the worker continues to be employed in the workplace by or on behalf of the owner of it for the time being, and is deemed not to be discontinued by the termination of an employment contract entered into by the worker if, within one month of the termination, the worker is re-engaged in the same workplace.*

17. When exercising its discretion in accordance with Section 218(2) of the Promulgation, as to whether or not to transfer proceedings to the Court, the Tribunal must be of the opinion that:

- (a) an important question of law is likely to arise; or
- (b) the case is of such a nature and of such urgency that it is in the public interest that it be transferred to the Court.

18. As intimated to the parties, the application for transfer is refused.

19. Firstly, Counsel has been unable to provide any clear argument as to what is the important question of law that is likely to arise. The grievance is what it is. The allegation is that the termination on 1 February 2012 was unjustified and unfair.<sup>4</sup>

20. The Grievor is perfectly entitled to take his grievance to the Ministry and have that grievance referred to Mediation. When the grievance remains unresolved, it is not an unreasonable expectation that the grievance would be thereafter referred to the Tribunal in order that it can make a determination, whether or not the allegations of the Grievor are made out.

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<sup>4</sup> It is noted within the termination letter that the Grievor's employment was terminated immediately, though whether that is unfair and justified, remains to be determined.

21. That would appear to be the very simple purpose of enshrining such processes within the Promulgation.
22. Somehow or other in this instance, the Employer seems to think that it can avoid undergoing any such inquiry or having the need to defend its decision to terminate the Grievor's employment, by claiming that some special circumstance exist, that would render this case one that first needs to address an important question of law.
23. I cannot find anything within the submissions of Ms Prakash to convince me that an important question of law exists, or that the application should be granted.
24. In *Nale v Carpenters Fiji Ltd*<sup>5</sup>, this Tribunal set out what it believes are well accepted principles of law and practice that govern the obligation of an employer when terminating an employee, as follows:

*"55. In Central Manufacturing Company v Kant*[\[20\]](#)*, the then Supreme Court held, that*  
*..there is an implied term in the modern contract of employment that requires an employer to deal fairly with an employee, even in the context of dismissal.*

*56. Specifically, the Court held that while the common law implication plainly does not extend to a requirement that reasons be given, or that a hearing be afforded at least where the employee has the right to dismiss without cause and to make a payment in lieu of notice. It does extend, however, to treating the employee fairly, and with appropriate respect and dignity, in carrying out the dismissal.*

#### ***Statutory Obligation***

*57. While the Employment Relations Promulgation 2007 does not set out a statutory framework for how unfair dismissals within employment should be adjudged,*[\[21\]](#) *the Promulgation does nonetheless provide strong signposts that termination in employment (whether with or without notice, or with or without cause) should be undertaken fairly.*

*58. Consider for example the language at Section 230(2) of the Promulgation. The Tribunal and Court both have powers to remedy or resolve grievances that arise out of "unjustifiable or unfair dismissals". Yet these terms are not defined within Section 4 of the Promulgation. So what is an unjustifiable or unfair dismissal?*

59. Section 4 of the Promulgation defines the term "dismissal" to mean: any termination of employment by an employer including those under Section 33"

60. In the case of a written contract, for example, such dismissals would include, any termination of employment that is unilaterally initiated by the Employer, including termination arising under:-

- Section 41 (in the case of a worker's inability to fulfil the contract[22], or due to sickness or accident; and
- Section 33 (that deal with the circumstances in which summary dismissal is justified);[23] and
- Section 29 (in all other cases where termination is provided with notice).[24]

61. In the absence of any statutory or apparent common law definitions of "unjustifiable and unfair dismissals", I would attribute the following ordinary meanings to such words. For a dismissal to be justified, it would need to be capable of demonstration that it was just, right or valid; capable of being defended with good reasoning. A decision would be unfair, if it was harsh, unjust or unreasonable.

62. So it would seem the intention of the Promulgation is to ensure that all terminations of employment are both justified and fair. Unlike the common law, the Promulgation does not just concern itself with the manner in which the dismissal was executed, but whether or not it was justified or fair as a substantive decision. A remedy for reinstatement would not be made available, if the role of a tribunal was only confined to the manner in which an employer treated a worker at dismissal and not whether or not, the decision to termination was actually justified in the first instance.

### ***Bringing an Employment Contract to an End by Termination of the Employer***

63. The critical focus of termination law is that the unilateral action taken by the Employer to bring to an end the employment contract is placed under scrutiny.[25]

64. In the case of a Worker seeking statutory relief, what is being pursued, particularly where reinstatement is sought, is the intervention of the court or tribunal, to declare the termination, unjustifiable or unfair.

65. This requires two considerations. Firstly, an assessment as to whether or not the termination was unjustified or unfair, but secondly, whether such a remedy is a feasible one.[26]

66. *The interrogation of employment grievances alleging unjustifiable or unfair dismissal, therefore have as their focus the cause or reason for termination. It would be hard to envisage an employment contract, other than in the case of a Section 40 Contract, where a cause was not attributable to its termination.*

67. *An Employer may for example determine that a position is genuinely redundant, in which case, the action to terminate may be justifiable and depending upon how the redundancies determined, fair. The termination may be based on the inability of the Worker to meet the key performance objectives of the position, or it may be as a consequence of the employee's behaviour and conduct at work. It may be due to communication or personality disputes. These are all causes. An employer does not bring an employment contract to an end for no reason, for no cause.*

68. *A Worker engaged under a contract for an indefinite period of time, is entitled to understand the reason for termination. To not do so, in my mind, at least in a prima facie sense, renders the termination, unfair or unjustifiable. An Employer may say that it has no obligation to provide such reason, but in my mind such a state of affairs would more likely than not, be unfair.*

### ***The Right to be Heard by An Employee***

69. *In Carpenters Fiji Ltd V Latianara*[\[27\]](#), Wati J stated at [26]:  
*When the termination is without cause, what is there to hear the employee on? And, if there is serious misconduct, then it is the prerogative of the employer to terminate the employment immediately. If all of these procedures of hearing and explanation are accorded to the employee, then the purpose of summary dismissal is lost.*

70. *Circumstances where there are no causes for the termination will be most rare. As illustrated above, an Employer will always have a reason for bringing an employment contract to an end. “*

25. I can see nothing pertaining to the continuity of service provision, that has any bearing on these considerations.

26. The facts of the matter are quite clear. The Grievor was terminated by letter telling him that:

*His services are no longer required effective immediately.*

27. At the time of his termination, he had been working for the Employer in a situation where it would appear that his fixed term contract dated 10 November 2010 had expired on 10 May 2011 and yet he was continuing to work for the Employer.

28. There is nothing particularly novel in these factual circumstances. Ordinarily, the conduct of parties can be assumed to have continued by their actions alone and their preparedness to honour and maintain the ongoing obligations to each other, that were at least until the date of termination, apparently carried out.
29. Whether the issues of justification and fairness need to be considered in the context of a 9 month period (10 May 2011 to 1 February 2012), a 15 month period (10 November 2010 to 1 February 2012), a 27 month period (10 November 2009 to 1 February 2012) or a 35 year period (1977 to 1 February 2013), they still need to be considered.
30. The importance of Section 61 of the Promulgation in the context of that analysis, is not that pivoting.
31. It is for that reason that the Tribunal does not find that there is an **important** (my emphasis) question of law to arise.
32. Secondly, this is certainly a matter that does not fall within Section 218(2)(b) of the Promulgation, being one that is of such a nature and of such urgency that it is in the public interest that it be transferred to the court.

### **Response by the Grievor to the Application**

33. Mr Nair was of the view that it would be quite unjust that the matter not proceed today. He indicated that the Grievor had travelled from Nausori and that he had incurred representative costs that should not be wasted.
34. Mr Nair submitted that the issue remained quite simple; that the Grievor had been unjustifiably and unfairly terminated.
35. Ms Prakash responded to those submissions, by indicating that the Grievor had been given advanced warning of the position to be adopted by the Employer and that any costs, should remain as costs in the cause.

### **Conclusions**

36. Whether or not there is any merit in the grievance referred to this Tribunal remains to be seen. That is a matter for the parties to argue. My impression of what has occurred is simply that the Employer and its Counsel, over relied on the strategy it wanted to adopt when coming before the Tribunal. It should have been ready to proceed. It was not. Instead, Ms Prakash seeks to rely on the argument, that



*At the time the Grievor was terminated he did not have a valid employment contract<sup>6</sup>; and*

*That the non-renewal of the Grievor's contract is a matter of interpretation of law and is the only issue that needs to be determined by the Tribunal.*

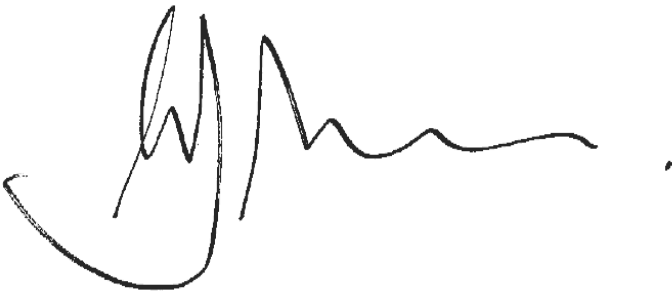
37. I reject entirely the proposition that the only issue that needs to be determined by the Tribunal is the non-renewal of the Grievor's contract. I have explained the powers of the Tribunal and the fact that the referral from the Mediation Unit comes about, with a concomitant expectation that the grievance will be explored. Whether or not there is any merit to it, is a completely different matter. The inquiry will necessarily unearth a range of issues that may be a combination of questions of law and fact. None of which based on the submissions of the parties, are remarkable.

38. The position of the Employer and Counsel is very ill-conceived and has caused unnecessary inconvenience and expense to both the Grievor and this Tribunal.

39. I order that the Employer pay to the Representative, the amount of \$550.00 as sought.

**DECISION:**

- (I) That the Application for referral be dismissed.
- (II) That the Employer pay the Grievor's costs in the amount of \$550.00

A handwritten signature in black ink, consisting of a large, stylized initial 'A' followed by a series of connected loops and a long horizontal tail.

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<sup>6</sup>

That would be an extraordinary concession to be made even if it was true, which I would think from first impressions, would be highly doubtful.

**Mr Andrew J See  
Resident Magistrate  
24 April 2013**