

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

ERT Grievance No 150 of 2012

BETWEEN: WAISALE DAVUIQALITA

Grievor

AND: FOSTERS GROUP PACIFIC LIMITED

Employer

Counsel: Mr W. Tokalau, Labour Officer for the Grievor
Ms B. Narayan, Lateef and Lateef Lawyers for the Employer

Date of Hearing: Friday 19 April 2013

Date of Decision: Wednesday 15 May 2013

DECISION

**EMPLOYMENT RELATIONS PROMULGATION 2007 - Section 194(5) – Referral of Grievance to Arbitration;
Constructive Dismissal;**

Background

1. The Grievor in this matter had worked in a permanent capacity with the Employer, a brewing company, since 28 January 1998. By letter dated 23 May 2012, the Grievor resigned in his employment.
2. Within the Grievor's Form 1 complaint, he cites that he was forced to resign because that was no solution to the problems of discrimination, victimisation and bullying that he was experiencing in the workplace.

3. The case before the Tribunal is essentially one of whether in fact the Grievor was constructively dismissed from his workplace, or was it simply a case of the Grievor resigning of his own accord.
4. The proceedings took place over one day, with the parties given the further opportunity to provide additional written submissions in support of their case, should they wish to do so. It is noted that the deadline for submissions of the parties was Friday 26 April 2013. Both parties were subsequently contacted by the Registry in relation to this requirement, when no submissions had been received by either party at the required time. Despite extending the timeline to 10 May 2013 at the request of Solicitors for the Employer, no further submissions from the Respondent were forthcoming. The Registry made two further requests of that firm and having received no further response, the Tribunal determined that the matter would be adjudged based on the information that was available.¹

The Case of the Employer

5. The only witness to be called by the Employer was Mr Banuve Yalimaiwai, the Manager Human Resources. Mr Yalimaiwai has been employed with the Employer for five years, having earlier worked as an Employee Relations Advisor within the company.
6. At the outset Mr Yalimaiwai described the general perception of what he believed had transpired. He said:

¹ Given the findings of the Tribunal, it would be highly unlikely if any prejudice arises as a consequence of this approach. The Employer can hardly claim that it was not provided with every opportunity to put its case. The failure to take advantage of that opportunity sits squarely with the lawyers. The lawyers failed to comply with Directions of the Tribunal, failed to make contact with the Tribunal and seek an extension; were subsequently contacted by the Registry, provided with a further extension and then failed to again comply with that requirement. The window is not an open-ended one.

“we had taken it he resigned on own accord...we contacted him to explain avenues still available ..grievance procedures available.. (Mr Davuiqalita said) either he comes in or we take the Production Manager out. ... We were not in a position to persuade him so we accepted his resignation.

7. In support of the work performance and behavioural issues that appeared to be at the centre of the dispute between the parties, Ms Narayan proceeded to take the witness through various personnel records, that chronicled those events.

Work Performance Issues

8. Exhibits E2 to E12 as included within the Preliminary Submissions On Behalf of the Employer², were shown to Mr Yalimaiwai in order to verify the various incidents that were recorded by the company pertaining to the Grievor’s performance.
9. Those records included counselling and written warnings in relation to attendance,³ leaving work premises without permission⁴, excessive use of sick leave⁵, failure to comply with procedures⁶ and causing loss through negligence in duties⁷. The final warnings and interviews that were evidenced with Exhibits E8 to E10, appear more of a general and all encompassing nature.⁸ The witness was also shown a document that was prepared by the Employer for the purposes of mediation and that sought to summarise the response of the company to the specific complaints that were made by the Grievor.⁹ In doing this, he acknowledged that the document

² As filed on 14 February 2013

³ Exhibit E2

⁴ Exhibit E3

⁵ Exhibit E4

⁶ Exhibits E6, 6A and 6B

⁷ Exhibit E7,

⁸ Some of which appear to be seeking to compound the description of the Grievor’s conduct reliant on the earlier breaches.

⁹ See Exhibit E17

referenced the formal views of the Employer in response to the specific allegations levelled at it by the Grievor.

10. According to the witness, on the day in which the Grievor resigned, he met with him to discuss the allegations contained within the resignation letter, given their serious nature and asked him for particulars. Mr Yalimaiwai stated that the Grievor could not really identify any specifics though appeared to have some difficulty working with his Indo-Fijian supervisors. In this regard the witness advised the Tribunal that the majority of the employees in production were Itaukei and that the Grievor did also have difficulty working with a Production Manager, Ms Baldeo who was both female and Indo-Fijian.
11. On cross-examination by Mr Tokalau, it was put to the witness that the main source of complaint from the Grievor focussed on the Production Manager Ms Sangeeta Baldeo. It was put to the witness that the complaints against the worker came about following the appointment of Ms Baldeo. This was rejected by Mr Yalimaiwai.
12. It was conceded by the witness that Ms Baldeo had been the subject of an earlier discrimination complaint made by a company employee and that her style was “my way or the highway”. It was also accepted that Ms Baldeo had been the subject of a petition signed by workers at the production factory to have her removed as she was too oppressive and bullied employees. Mr Yalimaiwai agreed that this was the case.
13. When questioned by the Tribunal, Mr Yalimaiwai advised that there was a complaint made against the Management of the company and Ms Baldeo in 2009, that was brought by a group of employees and taken to the Prime Minister’s Office. The witness clarified the scope of this complaint, by saying:

Mainly complaints about Geeta..about her management style...when she wants to get things done (she) presses the supervisors...Sangeeta was at the wrong place..blue collar jobs mainly belong to men..to make it worse she was

an Indian.. every time she gives an order it was (alleged) racist or gender (issue)...therefore hard to accept reasonable management authority.

14. According to Mr Yalimaiwai a meeting was held with Ms Baldeo at the time, in which he had attended in his earlier capacity as Employee Relations Adviser and also in attendance was Mr Namani Maritino. He said that these allegations were put to Ms Baldeo and that she had responded words to the effect

I have been given objectives to achieve.. how else can I make it happen

15. Mr Yalimaiwai recalled that in response to these complaints that Ms Baldeo was asked, “to try and understand each individual more”. He said that Ms Baldeo was sent to Australian to a management workshop. When asked by the Tribunal had the company ever sought to explore cultural diversity training with its employees, the answer was no. He advised that there was also no harassment training available, other than an online program referred to as ‘SALT’.
16. In relation to the issue of gender and race based distribution of employees, the witness said within the groupings, there were “too many of one particular race” and “would love better balance”.
17. My Yalimaiwai advised the following breakdown of employees:

Classification	Indo-Fijian	Itaukei	Number of Females
Manager			1
Leading Hand/Supervisor	80%	20%	0
Operator	20%	80%	0

18. According to the witness, he had shared concerns with the Management of the company that only 10% of applicants for supervisory positions were Itaukei. He also indicated that he did not offer the Grievor any specific employee assistance program.

The Case of the Grievor – Waisale Davuiqalita

19. Mr Davuiqalita commenced his evidence by indicating that he had worked firstly as a casual employee with the Employer for 15 years and then for a further 14 years as a permanent employee.
20. In response by Counsel to the general question as to why his employment came to an end, he said:

I was writing letters to management (in) 2010, 2011,, they were not responding... cases they accused me of ..Sangeeta Baldeo causing problems against me all the time..

21. The Grievor then proceeded to give several examples of what he says reflected this unfair treatment. On one occasion, he recalled being “taken up Mr Namani, because some of the machine was faulty”... According to the witness, it was suggested by Ms Baldeo that he had engaged in some form of industrial sabotage.
22. When asked by Mr Tokalau whether he had ever raised these issues with anyone, the witness, indicated, that he had both with his Union and at counselling. He said that he told them, “Sometimes I don’t feel like working..(I would) get to gate and feel like going home” .
23. In response to questioning from Counsel as to the impact that his work had on his personal life, the witness indicated that he felt psychologically affected and that he had gone to counselling. He had said that he had asked for leave from work and that this was refused. When questioned in relation to his former Manager Ms

Baldeo, the witness indicated, that he did not like the way that she spoke to workers. That she would use her power in front of workers. He felt degraded. He claims to have written letters to management informing them of his unfair treatment and that they had failed to act.

24. Upon cross examination by Ms Narayan, the Grievor was taken to specific disciplinary complaints that had been earlier canvassed by Mr Yalimaiwai. In response to the failure to fill up the Daily Beer Runner's Sheets,¹⁰ the witness appeared somewhat critical of the capacity of the complaining supervisor at the time and indicated that he had only 2 months brewery experience when he made the complaint against him.
25. In relation to the memorandum of 6 March 2007 relating to Work Performance & Attendance¹¹, the witness accused the Packaging Supervisor who had prepared the report, of attempting to ingratiate himself to Ms Baldeo.
26. According to the witness, he saw the Production Manager as being incompetent, as not knowing her job. He complained of the fact that procedures would change and be implemented, without his knowledge.
27. Mr Davuiqalita sought to demonstrate this by recalling the events that gave rise to the Counselling Interview dated 3 September 2007.¹² That Counselling Interview form stated:

On 27th August, 2007 Waisale did not show for his duty. His sister called and informed the packaging supervisor that Waisale will not be coming to work because he is taking the pallets from the grounds where the Methosist (sic) convention took place to the church. When asked on his return about taking

¹⁰ See Exhibit E5

¹¹ Exhibit E2

¹² See Exhibit E4

time off to do personal things Waisale mentioned that he felt that as long as someone called in, whatever the reason he could stay away from work at any time.

28. According to Mr Davuiqalita, in relation to this specific incident, it was the case that Ms Baldeo had given him permission to take the pallets that he borrowed from the brewery and to return them. They were to be used for church purposes. This incident that was raised in the Counselling record was therefore inconsistent with that approval. In relation to the claim that he had failed to 'punch in' his time sheet, that was part of the reason for counselling on 23 February 2012¹³, the witness said that "I did forget the time card, but still filled in the attendance form." He claimed that this was simply an oversight on the day in question and that he thought it "better to show my face to her (Ms Baldeo)".

29. When asked by Ms Narayan, "Do you have a problem with Ms Sangeeta being a woman", the witness replied:

Because would be soft, Everything has to be girlish..womanish. I respect her in terms of making decisions (but) attitude..No.

30. Ms Narayan then asked the Grievor could he explain the significant number of sick days (20) that were taken in 2007. On this occasion, he failed to elaborate on the issue, though did concede that he did not tell his medical practitioner that the cause of illness was work related.

31. In relation to the failure to fill in the Beer Running Sheets¹⁴, the Grievor explained that there was a packer counter that would cross check any manual entries. In relation to the allegation that he had failed to ensure the right Crown Seals were in

¹³ See Exhibit E10

¹⁴ Exhibit E5

place prior to the commencement of a production run¹⁵, the Grievor claimed that the Quality Keeper or the person who was undertaking that same role on the previous shift, could have also been responsible for that action.

32. In relation to the allegation that the Grievor had failed to connect the correct tank for the commencement of one particular run in February 2010¹⁶, his response was that he had followed a procedure initially taught to him by his supervisor Mr Konrote. This was also the occasion that the witness had referred to an eye injury arising out of a glass explosion at work, as causing some ongoing problems that he had with vision due to a damaged cornea.¹⁷
33. The Tribunal then asked the witness whether he had raised his concerns with Mr Yalimawai. He indicated that he had written to Mr Yalimawai in 2010, in a bid to ask him to compare the treatment of similar management sanctions imposed against workers who committing comparable breaches at work. He said that in 2011, he also wrote to the Production Manager and Mr Yalimawai complaining of the same.
34. Through his Counsel, the witness was then provided with a document dated 26 August 2010 (marked as Exhibit G1). That letter is reproduced as follows:

26th August, 2010

From: Waisale Davuiqalita

To Whom It May Concern:

I was writing for a reply of the Unions Appeal letter regarding my suspension, there is no reply.

¹⁵ Exhibit E6A

¹⁶ See Exhibit E7

¹⁷ Though it is noted that no such vision impairment was identified in a Medical Report from Suva Private Hospital taken on 13 February 2009. (See Exhibit E16)

I wrote this letter asking where my case end up to because its been 6 months or so now since I've been disciplined (suspended) there's no word from the Company and all I know that this is a last warning for me.

Mentally: looking back over the years I've spent with Carlton Brewery and what I've been through no, I couldn't swallow it. Sometimes I couldn't sleep well waking up in the middle of the night seeing my family quiet asleep asking myself, what will happen if I lose my job? Tears flow in my eyes because I know I've been the subject of discrimination for the last 3 or so years.

There comes a time when I was thinking of outside help for my case because I want to clear my family name from Fosters Brewery's black list.

VISION

I Believe in Fosters vision. "Where Fosters play Fosters wins."

I don't know what kind of game are we playing here a same as the list:

1) 11th of May, 2010: 5 pellets (8 rows) of pints back to reclaim tank due to crown seals.

"No one disciplined"

2) 19th of July, 2010: Premium Beer

a. Particles were found.

b. Change back to Fiji Gold

c. Filler starts 12.30

We lost time on this run (downtime 5 hours).

"No one disciplined"

3) 19th of July, 2010: Fiji Gold Pints

17 pellets, 22 cartons loose on hold due to high oxygen.

12 pellets were sent to Lautoka on the 21st of June. Why?

Because the longer it stays the flat it is.

"No one disciplined"

For This list no one was disciplined or suspended.

Compare with my case. I hope justice will prevail before I go any further.

Yours Sincerely,

Waisale Davuiqalita

(Beer Runner)

35. Mr Davuiqalita claims to have hand delivered this letter to Mr Yalimaiwai.¹⁸
36. Counsel for the Grievor also provided the witness a further letter that was identified by the witness as having been written some time in or around June or July 2011. (Marked as Exhibit G2). Again, the witness claimed to have hand delivered that letter to Mr Yalimaiwai and again claimed that he had received no response to that correspondence, other than the Human Resource Manager indicated to him that the “company stand (is) still the same”.
37. For the sake of completeness, the relevant contents of that letter are reproduced as follows:

Re: Appeal Letter for Suspension to Demotion

I would like to formally appeal my case where I was suspended and later on demoted.

My name is Waisale Davuiqalita and I have been with the brewery for thirteen years now.

In the letter that was given to me I had been informed that through my actions I had incurred the company a huge loss whereby 23 hector liters of Fiji Gold were packed in bottles using Fiji Bitter Crown Seals.

I strongly disagree with the view expressed above as all the 23 hector litres of Fiji Gold that were wrongly packed under Fiji Bitter Crown Seals were transferred back to reclaim tank and there were no labels nor any cartons involved in this instance. The injustice done to me has caused me my leading hand position, which has affected me and family financially and also had painted a negative image of myself at work and in the community despite the years of my excellent service to the company. I would like to highlight some serious cases where the company incurred huge losses from negligence and yet in my view no appropriate action was taken to address them.

There was a case whereby forty hectares of beer was drained out from the tanker and the company ended up paying a huge amount of money for that. On Monday the 1st of August the machine was stopped for three hours for no apparent reason from 15.26-17.37pm and straight after the line operated again like everything was alright. Another perfect example is those quality control on hold finished product sitting in the Dispatch bond which accumulates close to ten thousand cartons. All these cases and many more have incurred the

¹⁸ It should be noted that Mr Yalimaiwai claimed not to have seen this correspondence until May 2012, when the Grievor resigned.

company more losses than what actually transpired in my case yet in my view my case was severely dealt with and not on par with what actually happened on the ground. This is the main point that I am trying to Address on the grounds why my case, which I see as a minor case, was dealt with in a severe manner and why not the other cases mentioned above and many others were not dealt with in accordance to the rightful disciplinary actions. I still cannot see what huge loss management has highlighted in my case in comparison to the huge losses incurred by the company directly related to the management in my view to protect various individuals who were involved directly. I sincerely hope my case would be viewed and treated in a professional manner so that I would be able to receive justice, as I rightfully deserved.

Yours Faithfully

Waisale Davuiqalita

38. In response to the questions asked of the Tribunal, Ms Narayan was given a further right of re-examination. She put to the witness, that he had not submitted the letter (Exhibit G2) to the Employer until he had resigned. The witness rejected that proposition and indicated that he had simply forgotten to date the correspondence. The witness accepted that his letter dated 26 August 2010, did not include anything further allegations of bullying against the Production Manager.
39. The witness was asked whether or not he was now working and he advised that in January of this year, he commenced duties with the Ministry of Social Welfare, where he is earning \$60 per week.
40. Finally, Mr Tokalau called the Grievor's wife to give evidence. The purpose of that was simply to demonstrate the upset caused to the Grievor in their domestic relationship. To the extent that evidence is relevant to the proceedings, a brief entertainment of those issues was allowed.

Additional Evidence Called from Mr Yalimaiwai

41. In light of the fact that the Human Resource Manager had not been able to speak to issues that had been flagged within Exhibits G1 and G2, leave was granted to Counsel to recall the witness.

42. In relation to the letter that was dated 26 August 2010¹⁹, it was claimed by the Human Resource Manager, that this letter formed part of (a group) of letters that “we received when (the Grievor) gave letter of resignation”. In relation to the letter marked G2, Mr Yalimawai claimed that he had not seen that correspondence prior to the resignation of the worker.
43. Counsel for the Employer then produced for the witness a further letter, not earlier introduced as evidence, that had been sent by the Branch Union Secretary to the General Manager of the Employer on 12 April 2010.²⁰ The letter was written on behalf of the Union and sought to make representations on his behalf in relation to various incidents that had been relied on by the company as the basis for disciplinary warnings.
44. For the sake of the record and in order to provide a reasonably clear understanding of the issues in dispute, I have decided to publish the relevant contents of that letter as follows:

Dear Sir,

RE: DISCIPLINARY ACTION – WAISALE DAVUIQALITA

We refer to the Manager Productions letter of 4 March 2010 in relation to the above issue and make the following comments with regards to the reasons to suspend the above named employee and issue him with a final warning.

- 1. We are of the contention that Waisale’s failure to connect the correct tank could not have caused a huge loss to the company since all the beer were reclaimed and the only loss would have been the crown seals and the time lost which was 70 minutes.*
- 2. Waisale has admitted the fact that he mis-read the instructions on the board and even wrote this on his log book as such he was honest and upfront with his mistake. However you will appreciate the way Tank No. LO6 was written on the board was misleading and unclear as seemed to look like LO5 from where the Beer Runner*

¹⁹ Exhibit G1

²⁰ Exhibit E18

(Waisale) normally reads the board. As such any person who has been reading the same board on many occasions could easily have made the same mistake Waisale made. Up to now Management has not bothered to give the necessary instructions for the board to be properly labeled so that similar mistakes would not be made in future.

3. *Waisale is fully aware of the importance of his duties as a Beer Runner and has always tried his best to have the filler start up on time. We ask you to note that this is the first time in his 7-8 years as a Beer Runner that he has mistakenly connected the wrong tank.*

We would further like to highlight certain incidences where we feel that Waisale has been selectively and unfairly disciplined by Management.

- **25 January 2010**

Waisale was disciplined for supposedly delaying the line for 5 minutes. This was after it was found that the left over Fiji Gold crown seals were still on the top bin (above Crouner) from the previous production date. Hence Fiji Bitter bottles were crowned with Fiji Gold crown seals.

*Left over crown seals, as a matter of procedure, should have been removed from the top basin and counted as left-over stock at the end of every production day, which is not Waisale's responsibility, but that of the Quality controller. **Why was Waisale disciplined?***

- **29 January 2010**

*Due to a fault with the conveyor line programming the filler had been operating for the past four days since 25/01/10 and still contained beer in the bowl. Because of this and the fact the filler had not been flushed and beer had been inside for four days Waisale asked Amitesh if he could "CIP" the filler before running it. He was instructed by Amitesh just to flush with water, chill and put beer inside for bottling. It is procedure for the filler to be flushed with water after every production day. Since beer has been settling inside the filler bowl for four days and our brewery is a **food factory** it is a must to perform "CIP" on the filler before running. And to make it worse, there was no sighter at the labeller. This incident was not picked up by Management.*

- **4 March 2010**

*Waisale noted at 2:00pm that there had been a 15 minute delay in production as Beer runner (Ugendra) was not at his station to change over the tanks. Part of the reason why Waisale had been disciplined on the 25th of January 2010 was for causing a 5 minute delay in production. **Is this fair?***

- **4 April 2008**

We would like to bring back this issue to you recollection since this was a serious issue. According to reports given to us by Waisale (Leading hand) and Rigamoto (Final Sighter), caustic was detected in bottles going into the labeller and Rigamoto requester the labeller operator to stop the machine. He called the QC office (Sushil) who took the two bottles for testing and instructed that the labelling machine continue running. Rigamoto suspected

that more bottles had caustic and gain asked the labelling to stop. The Supervisor (Konrote) after Rigamoto explained the problem to him still gave the instruction to continue running.

We know that as a result of this incident 12 pallets of beer (960 cartons) were dumped as they contained caustic. No one was held accountable for this major incident. What of the cost/losses to the company, i.e. in terms of time lost, crown seals, labels, labor, and product loss.

*How does Management compare the supposedly “**huge loss to the company**” caused by Waisale to a loss of this magnitude? It is incomparable. Further, how can Management quantify the risk/ exposure of the company if the product had been made available to the public?*

Above are some of the incidences where we feel that Waisale had been selectively and unfairly disciplined or reprimanded for minor lapses in carrying out his duties.

We accordingly request that you reconsider your decision and withdraw Waisale’s final warning and reinstate his one week’s pay.

We attach copies of reports to substantiate the above incidents.

We are willing to discuss this matter further if you so wish.

Thanking you.

Yours faithfully

Pita Banuve – Branch Secretary

CC: Mr John Mudaliar, NUFCW General Secretary

Manager, Human Resources & Employment Relations – Fosters Group Pacific

Encls;

45. According to Mr Yalimaiwai, the General Manager had asked Sangeeta Baldeo to investigate the issues. He advised that because the General Manager was coming in and out of the country, that he had asked him if I could take the lead in looking at the issue. Mr Yalimaiwai advised that he could in all the supervisors to discuss the issues that had been flagged within the correspondence as being of a like nature to that in which the Grievor had previously been disciplined. He advised that after discussions with the supervisors and Plant Engineer, that it was agreed that these faults arose out of plant and mechanical failure, not the negligence of operators.

46. According to Mr Yalimaiwai, “in January I advised Waisale, because he was calling me up regarding the letter from the Union. I said we have investigated the matter now.” I said, “Oh I need to tell you. What I confirm that I have confirmed. He wanted to know whether these people had first warnings.” According to the witness, he assumed that the Grievor was satisfied with the situation.
47. In response to questioning from Mr Tokalau the witness remained firm that he had not received the letters (Exhibits G1 and G2) from Mr Davuiqalita prior to his resignation.
48. In clarification from the Tribunal, the witness was further asked, did he accept that he knew all of the harassment and bullying allegations at the time of this letter, given the reference made to that within the 3rd paragraph of the Union’s letter dated 12 April 2010. Mr Yalimaiwai accepted that proposition. According to Mr Yalimaiwai, in relation to the allegations that had been levelled at Ms Baldeo, she was contacted and asked to respond. He said that Mr Stoneman, the General Manager sent an email including the allegations, but did not make any further enquiry.
49. The Tribunal asked the witness then who responded to the allegations within that third paragraph:

That Waisale had been selectively and unfairly disciplined by Management

50. His response was that there was no investigation of those complaints. Mr Yalimaiwai accepted that some incidences in the document that were not investigated and should have been investigated. Finally, the Tribunal was advised that Ms Baldeo resigned her employment from the Employer on 15 March 2013.

Allegations Levelled by the Worker

51. The allegations levelled by the worker against his former Manager, deal with issues of unfair treatment and bullying and harassment. While it is noted that within the Grievor's Closing Submissions filed on 23 April 2013, that allegations of racial discrimination are also raised, I am not satisfied that the evidence before the Tribunal is supportive of that fact.²¹

52. In *Fiji Banks and Finance Sector Employees Union v Westpac Banking Corporation*²², the Arbitration Tribunal of Fiji stated:

In Auckland Shop Employees Union – v - Woolworths (NZ) Ltd [1985] 2 NZLR 372 the New Zealand Court of Appeal identified at least three separate situations where a constructive dismissal can occur.

First, where a worker is given a choice of resignation or dismissal.

Secondly, where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

Thirdly, where a breach of duty by the employer leads a worker to resign.

53. In *Mohazab v Dick Smith Electronics Pty Ltd (No2)*²³ a Full Bench of the Industrial Relations Court of Australia was of the view that:

Industrial tribunals and courts have long accepted that an employee who resigns from his or her employment can and should be treated as having been dismissed by the employer if the dismissal is one where the employee did not

²¹ The issue here being that if some form of indirect or direct discrimination was at work, the case of the Grievor was not really argued along those lines.

²² [2004] FJAT 40

²³ (1995) 62 IR 200

resign willingly and, in effect, was forced to do so by the conduct of the employer.

54. The facts before the Tribunal provide some concerning aspects to them. Clearly the allegations of unfair treatment and the singling out by Ms Baldeo by the admission of Mr Yalimaiwai were never investigated appropriately. By the same token. Mr Davuiqalita also had some fairly strongly held views and biases in relation to gender and the manner in which he took instructions from those around him at work.

55. As I intimated during the course of these proceedings, a worker who is taking such large amount of sick leave, should be counselled not so much because of the quantum taken, but more importantly in order to determine the underlying cause. That is particularly important if that identifying cause is work related. The Grievor was clearly not coping at work. In his mind, he had been singled out and disciplined, in circumstances where in the case of other workers, he believed the consequences were far less impacting.

56. I am not satisfied that the Employer did all that it could to investigate the complaints made by the Grievor. At the time of the escalation of the disciplinary matters levelled against the Grievor, he had by that time provided the Employer with approximately 25 years of seemingly good service.²⁴

57. Perhaps had the Grievor sought the assistance of the Labour Ministry earlier when the grievance first emerged, the matter could have been resolved more appropriately for all parties. As it transpired, it seems that it has taken several petitions by workers to the Office of the Prime Minister to really cause any great interest in Mr Dovuiqalita's complaint. He felt singled out and from a

²⁴ That is a combination of casual and permanent service. It does not appear that much complaint could be found against the Grievor prior to 2007.

comparative justice point of view, treated unfairly having regard to similar fact scenarios. This appears to be why he was so upset with his lot.

58. Despite the failure of the Employer to respond in writing to the Grievor's written complaints (Exhibit G1 and G2), I am not convinced that there had otherwise been significant attempts by Mr Dovuiqalita to have the matter resolved.

59. Perhaps he was not that well advised at the time, but the matter could have and should have been brought to a conclusion much earlier. It would have been open to either side to have done this.

60. It is the case that there is no corroborative evidence that has been put by the Labour Office supporting these claims of direct bullying and discrimination. That also would have been a relatively easy task, particularly if it was the case that a group of workers had taken a petition along those lines to the Prime Minister's Office.²⁵

61. To that end, I am less inclined to find that this is a case of constructive dismissal and more a prima facie case of unfair treatment. I appreciate that there may be a fine line separating those concepts, but I am satisfied that the worker did not exhaust all of his possible lawful remedies during the course of his employment. The Employer should not be unduly penalised for that fact.

62. On the other hand, it is clear that the Employer could have done more to improve the employee relations within the workplace. The need for some form of education and training of workers in relation to issues of workplace diversity seems a most obvious one. The disproportionate representation of various racial groups within the various stratum of occupational activities is also of concern.

²⁵ There is no evidence of any ongoing discussions with Unions or anyone else in relation to the agitation of these matters.

63. As the Employer appeared to concede, it would take a very skilled Manager to successfully guide the workers, particularly it would appear a female of Indo Fijian origin. Equally workers need to upskill and be alert to the fact that the chain of command does not provide an opportunity for employees to pick and choose the circumstances, in which they will take instructions at work. That is, that you pick and choose who you take instructions from based on whether they are male or female, Indo-Fijian, Itaukei or persons of any other ethnic background.

Conclusions

64. It appears that the Grievor had run out of stamina in being able to address the issues that he was facing. It is understandable that he felt that he was losing face in the workplace and was increasingly becoming the centre of Management's disciplinary efforts.

65. He was apprehensive about his future and his conduct can perhaps be in some respects, explained from that basis. In an ideal setting, having regard to the fact that the person the Grievor had most difficulties related to in the workplace had now gone, it would be nice to think that the parties could reconcile their differences and the Grievor be re-employed at the workplace. The issues seem somewhat more complicated than that though. There were legitimate complaints levelled by the Employer against the Grievor and these should not be trivialised, even if some of them may have been motivated possibly by less than objective interests.²⁶

66. In all, I think the Grievor's exasperation with his circumstances got the better of him and he took the only way out that he could see. I nonetheless accept the evidence of Mr Yalimawai, that the Employer genuinely wanted to provide the worker with all remaining options to explore as a real alternative to termination.

I note within some of the Counselling Interview records, there seems to be a tendency to make reference and occasionally rely on earlier misdemeanours and issues, almost giving the impression of 'dressing up' a complaint.

In response to that offer, the Grievor appeared to give the Employer an ultimatum; in effect which amounted to either Ms Baldeo being terminated or the employee leaving.

67. There are many unsatisfactory aspects to the Employer's conduct that have been identified, but it is not the role of the Tribunal to intervene in poor human resource management practice, unless there be some statutory basis for doing so. Nevertheless, on this occasion I do believe that there is some scope for providing some remedy to the Grievor.

68. Section 230 of the *Employment Relations Promulgation 2007* provides as follows:

Employment grievance remedies

230. —(1) If the Tribunal or the Court determines that a worker has an employment grievance, it may, in settling the grievance, order one or more of the following remedies—

(a) reinstatement of the worker in the worker's former position or a position no less advantageous to the worker;

(b) the reimbursement to the worker of a sum equal to the whole or any part of the wages or other money lost by the worker as a result of the grievance;

(c) the payment to the worker of compensation by the worker's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the worker;

(ii) loss of any benefit, whether or not of a monetary kind, which the worker might reasonably expect to obtain if the employment grievance had not occurred; or

(iii) loss of any personal property.

(2) If the Tribunal or Court determines that a worker has an employment grievance by reason of being unjustifiably or unfairly dismissed, the Tribunal or Court may—

(a) in deciding the nature and extent of the remedies to be provided in respect of the employment grievance, consider the extent to which the actions of the worker contributed towards the situation that gave rise to the employment grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been decided accordingly.

(3) If the remedy of reinstatement is provided by the Tribunal or the Court, the worker must be reinstated immediately or on such a date as is specified by the Tribunal or the Court and, notwithstanding an appeal against the determination of the Tribunal or the Court, the provisions for reinstatement must, unless the Tribunal or the Court otherwise orders, remain in force pending the determination of the appeal.

69. On its face, the provision assumes that two forms of broad remedy exist. Section 230(2) deals with remedies available where it has been determined that a grievance arises through unjustifiable or unfair dismissal. Section 230(1) provides a broader opportunity to recognise some form of relief in other circumstances.

70. On this occasion, I feel that equity warrants some consideration for whether compensation should be made to the Grievor in accordance with Section 230(1)(c)(i), which is for humiliation, loss of dignity and injury to the feelings of the worker.

71. The Grievor left his employment with unresolved grievances. He needed support at the workplace, because he was clearly not coping with the pressure and difficulty he had in his role and with his perceptions that he held, that he was now being targeted and being treated unfairly at work.

72. Admittedly of his own choosing, the Grievor has now denied his family the benefit of a good household income²⁷, but it needs to be kept in mind that he was offered a further opportunity to reconsider his position. Further, the Grievor has indicated to the Tribunal that he is not interested in returning to work with the Employer. That is unfortunate, because I sense that the Employer would have

²⁷ My record indicates that the worker was in receipt of an amount \$16,093.13 per annum that is \$309.50 per week.

been receptive to have the Grievor re-apply and compete on merit for a vacant position should one become available.²⁸

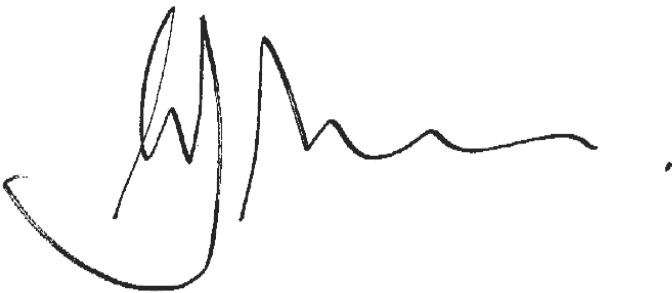
73. I order that arising out of the humiliation, loss of dignity and hurt to feeling suffered by the Grievor, that the Employer pay to the Grievor, compensation in the amount of \$4332.72, being an amount equivalent to 14 week' compensation.²⁹

Decision

It is the decision of this Tribunal:

- (i) The Employer pays to the Grievor the sum of \$4,332.72 within 14 days.
- (ii) That the Grievor be free to make application for cost by no later than within 28 days.

I order accordingly.

A handwritten signature in black ink, appearing to read 'A. J. See', with a large, sweeping flourish at the end.

Mr Andrew J See
Resident Magistrate

²⁸ The Employer needs to be commended for such a stance.

²⁹ This amount equates to what would be available to a worker in accordance with Section 108 of the Promulgation in the case of redundancy.