

Referral of the Employment Grievance to Mediation that was submitted by the Grievor on 7 August 2013 and the *Certificate of Declaration of Referral of Employment Grievance Form 4* as referred by the Ministry of Labour on the 19th October 2013. The Tribunal has had also regard to the *Preliminary Submission of the Grievor* filed on the 13 March 2014, the *Legal Submissions on behalf of the Employer* filed on 2 April 2014 and the *Submission on behalf of the Grievor*, filed on 10 April 2014.

3. It is also noted that there is an *Agreed Bundle of Documents* filed, including the Employee Record, two warning letters issued by the Employer on 29 January 2013 and 31 May 2013; the termination letter dated 5 August 2013 and other miscellaneous documents.
4. The Tribunal also notes the Exhibits provided during the course of proceedings, including a particular Judgment issued by my Sister Magistrate Waleen M George dated 13 October 2015, in Criminal Case Number 1617 of 2013: *The State vs Abhimanyu Krishna*, where the Managing Director of the Employer, Mr Krishna, was convicted of one count of indecently annoying a person in accordance with Section 213 (1) (a) of the then *Crimes Decree 2009*.

The Reason for Termination

5. The background to this case is that the Grievor had been working for the company Frincos Hire (Fiji) Ltd for approximately 14 months. The events that gave rise to the issuing of a termination letter, are set out and summarized within the judgment of George RM that describes how that Grievor and his Employer Mr Krishna were involved in a verbal altercation that ultimately gave rise to the termination of the Grievor's employment. There does not appear to be any great account of and detail of the nature of the discussions that took place at the time, except to say that it was a result of words used by Mr Krishna that he was ultimately convicted in accordance with Section 213 (1)(a) *Crimes Decree 2009*.

Was the Grievor Unjustifiably Dismissed?

6. The starting point for assessing whether a dismissal has been either justified or executed in a fair manner is of course the *Employment Relations Act 2007* and the requirement to issue a dismissal letter to the Grievor in accordance with Section 114 of the Act, to enable an evaluation of whether or not the termination of the contract was in fact justified. The reasons set out within the Exhibit 1, the termination letter dated 5 August 2013 presents as follows:

"As from today 05/08/13, the management has decided to terminate your service from the Company

With these reasons:

1. *Annoying the Managing Director Mr Krishna by swearing at him in front of the workers at Albert Park.*
 2. *Not listening to instructions given by Mr. Krishna and showing no respect to him.*
 3. *As the Company policy, any workers committed any offence or having any pending cases with the police, will not be employed by the company.....”*
7. As the Tribunal has alluded to and as noted by the Magistrate’s Court on 13 October 2015, George RM, did not accept the version of events of the Employer and as a matter of fact, found that Mr Krishna was the agitator and had commenced the verbal assault against the Grievor.
8. There is no other information before the Tribunal that justifies dismissal of the Grievor. On that basis then, regard should be paid to the principles that have been developed by this Tribunal for the purposes of evaluating whether or not an employment decision in the case of dismissal is justified or not. In this regard the Tribunal refers to the decision of *Kumar vs Nanuku Auberge Resort Fiji 2017 FJ ET 2 ERT Grievance 112 of 2016 10 February 2017*. The Tribunal cannot find any justification of the dismissal of the Grievor against that authority.¹
9. The Employer has acted in a manner that was not justified and where the Employer Mr Krishna himself appeared to conduct himself in a volatile fashion, albeit that in other circumstances, such conduct may not have taken place. In any event, it did and the subsequent conduct of the Employer is now said to have also given rise to a claim for unfair dismissal in so far as the dismissal was executed in a manner that was unfair.

Was the Dismissal Unfair?

10. In relation to whether the dismissal was unfair, the parties are referred to the decision of her Honour Wati J. in the case of *Yanuca Island trading as Shanri-La Fijian Resort and Spa ERC A 9 of 2014 (8 January 2017)*. In such an event, where persons are terminated at work in what is said to be an unfair fashion, regard is had to such issues as the manner in which the dismissal took place; whether or not there were any employees present at the time; and whether or not the Grievor suffered any humiliation as a consequence of the manner in which the dismissal was effected. During the proceedings today under this Determinative Conference, the Grievor had indicated that he did feel quite embarrassed by the allegations of the Employer, particularly when various tools and equipment were taken from him when the Employer searched the Grievor’s bag. The Grievor has indicated to the Tribunal today, that the Employer was made to subsequently return items taken off him at the time of the dismissal, because of the fact that they were the Grievor’s property.

¹ The whole basis for the Employer’s justification comes out of conduct, in which the Managing Director and not the Grievor, was ultimately charged by way of a criminal conviction.

11. Having regard to all of the issues, the Tribunal is satisfied that the Grievor was dismissed in a manner that was both unjustified and unfair.

Compensation

12. There is some debate in relation to the amount of monies that the Worker had been receiving during the course of his employment with the Employer. It seems common ground that the Worker was in receipt of \$2.08 per hour. The Employer alleges that the Worker was working 40 hours a week, the Grievor alleges to be working 48 hours a week. It is noted that at Attachment "SH 1" of the Employer's documents that the Employee's record for some of the pay periods are set out, that includes the days of absenteeism and days of on a Saturday or Sunday. It is hard for the Tribunal to determine the number of hours worked.²
13. There have also been some contentions made by the Employer, that the Grievor had taken excessive sick leave during the employment period, however, Counsel for the Grievor Mr Young and the Grievor himself, had indicated to the Tribunal that the Grievor had undergone surgery for abdominal cancer. On that basis, the Tribunal accepts the fact that the Worker would have been likely to have been ill during some of that employment period. In any event, it does not improve the situation. It is more likely than not that the Worker had been scheduled on a 48 hour week roster.
14. On that basis and for the purposes of identifying compensation, the Tribunal will work on the amount of \$99.84 per week. Further and having regard to the fact that the Grievor had only been working for 14 months, there is some argument to suggest that a compensation amount of within the range of 3-4 months would ordinarily be appropriately awarded for an unjustifiable dismissal of this type. Further, the Employer needs to understand that if the Worker had a reasonable expectation of continuing in his employment, then such an arbitrary figure may not necessarily reflect the true state of play.³ Taking into account all facts and factors, the Tribunal feels an award of 3.5 months for the unjustifiable dismissal is appropriate in the circumstances.⁴

² The Tribunal is of the view that the ordinary hours within the building and construction industry would be 48 hours a week and even if that was not the case in this instance, is nonetheless of the view that the final determination is within the scope of what is reasonable regardless of those additional hours that may have been built into the calculation. Of course the Employer's Time and Wages Records could have been produced to have clarified this issue. There does not appear to have been any attempt by the Employer to do so.


³ This is not a claim in contract, even though the principles of mitigation still need to apply. There are also other issues at play, including the cost of finding new work and the ancillary costs associated with loss of income during the relevant period, that may have regard to the costs of defaulting and refinancing of financial arrangements, the uncertainty of the future work opportunities, the level of new wage achieved etc. The contributory conduct of an employee also on occasions may need to be factored into this assessment. In this regard, there was a claim of some retaliatory conduct on behalf of the Grievor and whilst the Tribunal makes no findings, it does nonetheless consider that


15. In relation to the issue of unfairness, the Tribunal accepts there was a degree of humiliation that would have arisen, not only in the way in which Employer spoke to the Grievor that itself gave rise to the Managing Director's criminal conviction, but also the fact this took place in front of colleagues and that the Worker was then ultimately humiliated further by having his bag searched. The Tribunal believes an additional amount of compensation of 2.5 months wages equivalence is appropriate for that component of the claim. On that basis, the ultimate award equates to 6 months' worth of wages, calculated as a compensation amount of \$2,595.84.

Decision

It is the decision of this Tribunal that:-

- (i) The Employer pay the Grievor the sum of \$2,595.84 in full and final settlement of this grievance.
- (ii) That amount is to be paid within 21 days.


Mr Andrew J See
Resident Magistrate



there may have been some aspect of Mr Tuirabe's conduct that may have been contributory to some of the tension that occurred that day.

⁴ The termination took place on 5 August 2013 and it is noted that the original hearing notes showed that the Grievor claimed to have been not working for five months, until 27/1/2014.