



Decision

Title of Matter: Ifereimi Jeke (Grievor)
v
Barefoot Investments Ltd trading as
Kuata Barefoot Island Resort (Employer)

Section: Section 211(1)(a) Employment Relations Promulgation

Subject: Adjudication of Employment Grievance (Unjustifiable or Unfair Dismissal)

Matter Number(s): ERT Grievance No 27 of 2017

Appearances: Mr S Yalayala, National Union of Hotel & Catering Employees, for the Grievor
Mr S Prajeel, Human Resource Officer, for the Employer

Date of Hearing: Thursday 25 May 2017

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 26 May 2017.

KEYWORDS: Unjustifiably or unfairly dismissed; Misconduct of Employee; Responsibilities of Employer; Disciplinary Procedures.

CASES CITED:

Parvinesh Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2
Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuinaruku [2017] FJHC92; ERCA 9 of 2014

Background

1. This is a referral made to the Tribunal in accordance with Section 194(5) of the *Employment Relations Promulgation 2007*. The referred matter relates to a grievance lodged by Mr Ifereimi Jeke on 30 September 2016, in which it is claimed that he was unjustifiably and/or unfairly dismissed in his employment. The primary thrust of the grievance that has been referred, is that the former employee, was not provided with the reasons for termination as required under Section 114 of the *Employment Relations Act 2007*; that he was not provided with any right of

appeal or redress against the decision to dismiss, nor was a proper investigation carried out in relation to the allegation that had been made.

The Case of the Employer

2. The case of the Employer was argued by Mr Sanjay Prajeel, a newly appointed Human Resource Officer on behalf of the Employer resort. Mr Prajeel provided the Tribunal with a brief background to the two resorts that were part of the 'Barefoot Collection' brand and proceeded to provide the background to the rationale behind the Grievor's termination.
3. The Human Resource Officer was unable to tender to the Tribunal a copy of the termination letter that was purportedly provided to the worker coinciding with his dismissal. Mr Prajeel drew the attention of the Tribunal to documents that it had submitted as part of the *Company Submission* dated 22 May 2017, that in particular referred to the fact that the Grievor had been issued with two earlier warning letters for misbehaviour and poor performance. According to the submission, the termination of the Grievor was due to his "action of gross misconduct", insofar as it was alleged that he had "br(oken) into (a) room to take out his phone that was left in for charging".
4. Mr Prajeel was not involved in any of the issues that gave rise to the earlier performance warning, nor could he give any direct evidence as to what had transpired on or around the date of dismissal.

Evidence of Mohammed Shameem Akthar

5. The first witness to give evidence was Mohammed Shameem Akthar, who is employed as a carpenter at the resort and was the person who had made the initial complaint regarding the Grievor, that he had entered into his room, so as to retrieve a mobile telephone that had been charging. According to Mr Akthar he had been engaged at the resort for the past four years. He said that he had not authorised the Grievor to enter his room in order to retrieve a mobile phone that had been left charging and indicated that when approached to retrieve the Grievor's phone, he had told Mr Jeke that he would open the room for him, if he could wait for ten minutes.
6. According to the witness, on the relevant day in question, he had returned to his room and the lock and door were broken.¹ He said that the door was open and the phone missing. Mr Akhtar said that this incident was reported to the Company Security. The witness told the Tribunal that,

Jeke asked me to charge his phone in my room, because he had no power at home.

7. The witness said that he agreed to do so and locked the door and went to the job site. Mr Akhtar said that around 4.45pm that day, Mr Jeke approached him and asked could he have his phone. In his evidence, Mr Akhtar said that he had told the Grievor that he would need to wait ten minutes, until he was free to return to the room. Mr Akhtar said that when he returned, the

¹ The Tribunal is not convinced that any lock was broken. Mr Akhtar's evidence was that the door lock was intact and that the padlock was missing.

padlock to a barrel bolt was no longer there and that the fly screen from a screen door had been pulled out in order to access the door lock. The witness conceded that the Grievor would regularly come to his room, during various work breaks and while on smoko.

8. On questioning from the Tribunal, Mr Akhtar told the Tribunal that the Grievor was a good worker and that he had never stolen or been suspected of ever taking anything from his room. The witness told the Tribunal that the fly screen was re-affixed to the 'screen door' within about 30 seconds, but that he could not understand what had happened to the padlock that had been attached to the barrel bolt lock.

Evidence of Mr Sanjay

9. The Employer was also requested to make contact with another employee Mr Sanjay, who according to Mr Akhtar was also staying in the staff quarters at the relevant time. Mr Sanjay denied having authorised the Grievor to access the room that Mr Sanjay shared with Mr Akhtar and two other employees of the resort. A further employee of the resort, a Mr Shazil was also contacted by Mr Prajeel at the request of the Tribunal, however he was not able to be audibly understood, because he was outside of an effective mobile phone signal.

Evidence of Mr Livai Tuimereke

10. Mr Tuimereke was a Security Officer working at the resort, who told the Tribunal that he is also a Director of the owner company. Mr Tuimereke told the Tribunal that he was a Crime Committee Member who had been involved in the termination decision. The witness, who gave evidence to the Tribunal, again at its request, over the telephone. Mr Tuimereke indicated that he had been involved in discussing the misconduct with the Grievor and consistent with a document provided to the Tribunal by Mr Prajeel, had "decided to terminate (the worker) because what (he had) done was against the company rules and regulations".
11. When questioned by the Tribunal, Mr Tuimereke conceded that he had not conducted an inspection of the door or lock, so as to ascertain whether in fact that there had been a forced entry to the room and that the lock to the door, was broken, nor had he satisfied himself that no other worker who had resided in that room had provided the Grievor with access to retrieve his phone.²

The Case of the Grievor

12. The case of the Grievor is a relatively simple one. The Grievor was not provided with a fair process in terms of the manner in which any investigation of the issues took place, nor was there any justification for the dismissal based on the facts of the case.
13. Mr Yalayala told the Tribunal that the Grievor was 21 years of age and had been educated up to Class 8 level. The Tribunal was told that the Grievor had never been made aware of any company policies and that in any event they were in English. Mr Yalayala also submitted that any disciplinary infringements that had been issued to the Grievor had been done in circumstances

² It is for that reason, that the Tribunal insisted that the other room occupants be contacted, as it appeared quite strange that a door supposedly locked, was not broken and that the padlock was missing,

where he had been asked to sign a document and was not full understanding the contents of what he had signed.

Evidence of Mr Ifereimi Jeke

14. The Grievor gave his evidence through the use of a court interpreter. Mr Jeke told the Tribunal that he had lent his telephone to a co-worker by the name of Timoci, who had asked Mr Akhtar whether he could charge the phone. The worker admitted to having entered the room to retrieve his phone, but stated that he had done so after getting permission from one of the room's occupants.³ The witness illustrated to the court how he opened the door and indicated that when he left the room, that the padlock remained intact. The worker refuted the suggestion that he had caused any damage to the door.
15. In all, the Grievor advised the Tribunal that he had been employed with the Employer for approximately seven months. The witness said that he was now assisting a backpackers resort on the island, with shark feeding demonstrations. Mr Jeke said that he was now earning approximately \$70 per week, in contrast to the previous wage that he received of \$132 per week. The worker advised the Tribunal that he had spent \$30 in return boat fares attending the Tribunal for the proceedings.

Relevant Considerations and Analysis of the Evidence

16. Through his representative, the Grievor claims that his dismissal was both unjustified and unfair. In relation to the question of what constitutes a 'justifiable dismissal', a brief analysis of the history of that concept is found within the decision, *Parvinesh Kumar v Nanuku Auberger Resort Fiji*⁴. In the case of what constitutes an unfair dismissal, this is made clear by her Honour Wati J, in the case of *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuaruku*⁵
17. Because there is no dismissal letter that has been provided to the Tribunal in these proceedings, it is somewhat difficult to fully comprehend the issues at play at the relevant time. The Tribunal notes that a 'First Written Warning' was issued to the Grievor on 21 October 2015, that essentially had as its focus the unacceptable work performance of Mr Jeke. The second written warning was issued to the Grievor on 2 February 2016. That letter reads in part:

Your contract of services will be terminated if you receive three written warnings, as outlined in the Barefoot Collection Staff Handbook.... Your job description states that one of your responsibilities is to act as the 'Warrior' and stand or perform on the rock as the Yasawa Flyer passes Kuata Island.

³ The Tribunal accepts that the Grievor appears to have provided inconsistent statements as to who had provided him with consent to open the door, enter the room and retrieve his phone. However, the Employer did not challenge the witnesses account of events, that it was a Timoci who had asked for the phone to be charged and that a Mr Shival may have been the person who had authorised his entry to the room.

⁴ [2017] FJET 2

⁵ [2017]FJHC92; ERCA 9 of 2014.

18. During proceedings, the Employer's representative did not provide the Tribunal with any job description, so as to understand exactly the nature of that breach. In any event, the Tribunal has made the point to Mr Prajeel the Employer's representative, that it would have strong doubts as to whether the Grievor would be able to comprehend any company policies that were not written in a simple form, other than in his own Itaukei language.

19. The Tribunal is not satisfied that the Grievor deliberately forced entry into the room of Mr Akthar. His explanation of opening the barrel lock door, appeared quite credible and begs the question, whether someone else already had opened that door and left the padlock unlocked. Even if the Grievor had accidentally removed the flyscreen in his efforts, this was an issue according to Mr Akthar that was quickly fixed. The Grievor claims that he had permission to enter the room to retrieve his phone. While there appears some confusion as to who gave him this permission, it is not an issue that can be conclusively determined, when all of the room occupants were not interviewed by the 'Crime Committee Members'. While the Tribunal recognises that there had been a compounding of performance issues, it is unclear through the submissions as to how significant these were and whether or not, there had been any real attempts to guide the worker for these purposes. There are several reasons for forming this view and they go to the adequacy of the Employer's human resource management practices. For example, the Employer could not provide the actual current employment contract, although did provide one, that appears to have been for a three or four month duration. It is noted within that document that it states:

employees, employed under a 30 day contract are not entitled to annual leave, sick leave or bereavement leave payments. No annual or sick leave will be accrued by an employee while on a casual contract of employment.

20. This is concerning, as it would strongly appear that the contract was designed to avoid making any payment for annual leave or sick leave for workers, by containing the contract period to 30 day segments. In the present case, it would seem that the Grievor had worked at the resort for approximately seven months. That service would be regarded as continuous. The worker is entitled to access annual leave after working for in excess of 30 days and sick leave, where he had worked for more than 90 days. Probably more concern is the provision within the contract that reads:

Barefoot Island will not be held responsible for any injuries occurred while working on Barefoot Island. All relevant training pertaining to the duties and equipment used by the employee are the employee's responsibility.

21. That clause within the contract similarly would be in breach of the company's clear responsibilities set out within the *Health and Safety at Work Act 1996*. It would be unenforceable at law and sends a very wrong message to management and staff alike. There is simply no contractual option for the Employer to opt out of its strict statutory OHS duties. The Employer is directed to review its human resource policies and practices, so as to ensure that they comply with Fijian Employment law.

Conclusions

22. In all, the Tribunal finds the personnel practices of the Employer highly questionable and on that basis remains suspicious of exactly the true state of affairs that has given rise to the Grievor's termination. There is no evidence at all of any appropriate induction that may have taken place, no evidence of any supportive counselling or guidance offered to the worker. The tone of the

employment contract submitted by the Company to the Tribunal in proceedings, in fact reflects quite the opposite. Employers must modify their human resource practices and policies to have regard to the cultural and social backgrounds of the workers that they engage. In this case, there is a good justification for ensuring that policies and employment contracts are provided to workers in their first language. In the case of disciplinary warnings, they too need to be provided in a way that it made clear and understood.

23. The Tribunal is of the view that having regard to the total circumstances of this case, that on the finest of balance, the conduct of the Employer was not justified. The evidence presented by both parties was not that strong. The Grievor is now working for another employer on the island and said that he had been out of work for a period of approximately four months following dismissal.
24. In light of the above, the Employer should provide some compensation for the dismissal against a backdrop that appears based on the evidence, lacking in justification. The Tribunal orders that an amount of four weeks wages, calculated at \$528.00 should be paid to the Grievor within 21 days hereof.
25. In addition, the Employer is ordered to pay the travel and expenses for the Grievor in attending the Tribunal hearing; that sum to be assessed at \$60.00 and to be paid within 21 days hereof.

Decision

26. It is the decision of this Tribunal that the grievance of Ifereimi Jeke be upheld and that the Employer, Barefoot Investments Limited is to pay the Grievor the total sum of \$588.00 within 21 days.

The Tribunal orders accordingly.




Mr Andrew J See
Resident Magistrate