

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



Decision

Title of Matter: Sultan Mohammed Khan (Grievor)
v
South Seas Cruises (Employer)

Section: Section 211(1)(a) *Employment Relations Act 2007*

Subject: Adjudication of Employment Grievance

Matter Number: ERT Grievance No 25 of 2018

Appearances: Mr S Khan, Grievor
Ms S Buksh, HR Manager, for the Employer

Date of Hearing: 9 March 2018

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 11 June 2018

KEYWORDS: Employment Relations Act 2007; Dismissal of Employee During Probationary Period; Provision of notice during probationary period.

Background

[1] The Grievor in this matter lodged a grievance with the Mediation Service on 6 November 2017. At issue is the dismissal in his employment on 6 October 2017, following a brief period of engagement commencing from 24 July 2017. Because of the short nature of the employment period, the parties agreed to have this matter determined by the Tribunal, 'on the papers'.

Issues

[2] There are several aspects to the grievance that have been raised. First and foremost it concerns itself with the decision of the Employer to bring the employment contract to an end, as a result of a probationary review that was undertaken. Secondly, there are a series of complaints that concern the human resource practices of the Employer, that deal with such issues as the failure to provide a transport allowance as a transitional arrangement upon commencement; failure of the Employer to provide at its own cost, well-fitting personal protective equipment; and the withholding of termination pay.

- [3] The Grievor admits to the fact that he was approached by the Maintenance Manager, Mr Bryden in relation to his probationary review, although had refused to sign the review letter provided to him, because of the fact that he did not agree with its contents. The case of the Employer is set out within its Preliminary Submissions filed on 20 April 2018. In essence, it refutes the nature of the allegations levelled at it and relies on its assessment that the Grievor was not a suitable fit for the organisation.

Issues

- [4] The employment contract that came into force between the parties on 24 July 2017, made provision at Clause 3 for a Probationary Period of employment of three months, with the capacity for the Employer to extend that period for an additional one month period, in the case where it is not satisfied with the employee's performance. It is quite clear within the materials provided by the Grievor,¹ that the Employer wrote to him on 6 October 2017, identifying concerns and seeking to extend the probation for an additional one month period. Providing that the issuing of that report was done in good faith, then the Employer was well within its rights to do so.

General Workplace Concerns

- [5] The Grievor raises various workplace concerns regarding the terms and conditions of his employment. For example, he complains about being issued with ill-fitting overalls and the Tribunal acknowledges that the provision of such items should be done at the Employer's cost. The issue in relation to the safety boots of the Grievor is less clear, as the Employer argues that the safety shoes provided were fit for purpose and there is no evidence that has been mounted by the Grievor to discredit that view. Other matters flagged, whilst admittedly annoyances are less critical to the primary issue concerning the termination decision.
- [6] The true focus of this analysis is on the purpose of a probationary period and what it means to the rights of the parties. In the case of a new employee, this presents a window by which her or his skills and suitability to a role can be assessed. It is a period in which an Employer can look at all manner of issues to consider whether or not an ongoing employment relationship should be established. Relevant issues of course focus around the key technical duties associated with a role, but equally important would be the capacity of a worker to engage effectively with clients, co-workers and managers and to be able to demonstrate a willingness to embrace the organisation's mission and behavioural practices.

Probationary Review

- [7] The Grievor makes clear that he did not wish to sign his probationary review and on that basis a stalemate was reached between the parties. What is to happen in such cases? The matter needed to be resolved. The Grievor has every right to challenge his assessment, but the question is, when is the most appropriate time to do so? Perhaps he could have gone to the

¹ See Exhibit F to his Written Submission

Maintenance Manager's reporting officer, in order to raise such concerns. The employment contract nonetheless makes provision for the extension of the probationary period and to that end, it may have been wiser for the Grievor to have held his concerns, until such time as an ultimate decision as to his permanency was to be made. The Employer is nonetheless entitled to bring to an end the employment contract during a probationary period, subject to any relevant contractual or statutory provisions. In this case, the probationary clause of the contract was silent as to what is the manner in which termination could take place during this period. To give practical effect to such matters, Clause 5 of the Employment Contract, the Termination Clause, would need to be considered.

- [8] The letter of termination of the Employer, relies on the powers of summary dismissal for serious misconduct to bring an end to this contract. The Employer seems to characterise the reason as "gross neglect of duties." For that to take place, the Tribunal would have to be satisfied that the situation that gave rise to such a decision, fell into one of the categories of case, as set out within Section 33 of the *Employment Relations Act 2007*.
- [9] Based on the evidence before it, the Tribunal is not satisfied that it did. The Tribunal is not satisfied that this is a case such as in *Carpenters Fiji Ltd v Tawake*², where there was a lack of skill or qualification, expressly or by implication warranted by an employee as having possessed. Nor does it appear to be one of substantial neglect of duties as in the case of *Fiji National University v Ram*.³

Conclusions

- [10] Whilst the Tribunal can sympathise with the Employer and its likely frustration with events, what is more likely that this shows, is the inadequacy of the probationary arrangements to allow for the termination of a worker with notice, perhaps in a lesser time frame in such cases where the ongoing performance and suitability of the worker is being questioned. The present relationship between the Termination and Probationary clauses would otherwise require the giving of one month's notice.
- [11] This has not taken place and that is the remedy that should be provided to the Grievor in these circumstances. The Tribunal is not wishing to involve itself in other issues whilst of importance to the Grievor, are all matters of a relatively trivial nature that cannot be resolved without a good deal of further inquiry. There is no benefit to be had given the nature of those issues and the circumstances of this case, to explore such matters on this occasion.

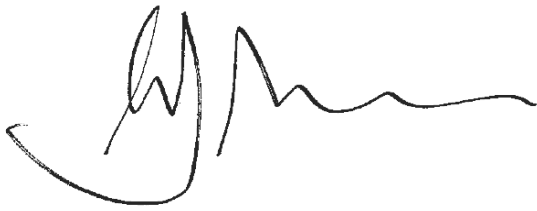
² [2016] FJHC 1081; ERCA14.2013 (28 November 2016)

³ [2015] FJHC 1020; ERCA15.2013 (15 December 2015)

Decision

It is the decision of this Tribunal that: -

- (i) The Grievor was entitled to four week's notice of termination, in the circumstances of this case.
- (ii) There was not sufficient basis for terminating the Grievor's employment for reasons of misconduct.
- (iii) By way of compensation, the Employer must pay to the Worker the salary equivalent of four weeks' wages within 21 days from today's date.



Mr Andrew J See
Resident Magistrate