



Employment Relations Tribunal

Decision

Title of Matter: Joshua Prasad
v
Habibi (Fiji) Limited

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

Subject: Adjudication of Employment Grievance (Unjustifiable Dismissal)

Matter Number: ERT Grievance 140 of 2017

Appearances: Mr S Nacolawa and Mr N Kumar, for the Grievor
Mr R Charan for the Employer

Date of Hearing: Thursday 8 March 2018

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 29 November 2018

KEYWORDS: Unjustifiable and Unfair dismissal; Section 33 Summary Dismissal; Facebook Messaging, Out of hours conduct of employee.

CASES CONSIDERED

Blyth Chemicals Ltd v Bushnell [1933] HCA 8; (1933) 49 CLR 66 (3 April 1933)
Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2; ERT Grievance No 122 of 2016 (10 February 2017)
Josifini Lagi v Nadi Town Council ERT Grievance 173 of 2016; [2017] FJET 7; ERT Grievance 173.2016 (27 March 2017)
Rose v Telstra Corporation Limited 1444/98 N Print Q9292 [1998] AIRC 1592; (4 December 1998)
[1998] AIRC 1592
Shepherd v Felt & Textiles of Australia Ltd [1931] HCA 21; (1931) 45 CLR 359 (4 June 1931)
Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuinaruku [2017] FJHC92; ERCA 9 of 2014 (8 February 2017)

Background

[1] This is a referral made to the Tribunal in accordance with Section 194(5) of the *Employment Relations Act*. The referred matter relates to a grievance lodged by Mr Joshua Prasad on 23 May 2017, claiming that he was terminated in his employment as a waiter at the Employer's restaurant, for alleged misconduct.

[2] The Employer's reasons for dismissal are set out within the dismissal letter to the Grievor dated 22 May 2017¹, that read inter alia:

¹ See Exhibit E1.

On May 22 2017, you have deliberately threatened Mrs Charlene SARROUY one of the Directors of Habibi (Fiji) LTD by messages through Facebook. Indeed, after harassing Mrs Charlene SARROUY who asked you to stop the disrespectful behaviour, and told you that she was not interested in having any kind of relationship with you, you have threatened her to hurt her.

[3] The Grievor's case is that he sent no such message to his employer, but rather that his former partner Ms K, had done so out of spite in order to bring about his termination in employment.

[4] The matter was first listed for Directions in this Tribunal on 27 July 2017, when the parties were required to file and serve material that they intended to rely upon. On that occasion, the Tribunal also put the Grievor on notice, that he may be liable to costs associated with this application, in the event that it fails, on the basis that there was prima facie evidence of him being the owner and controller of the Facebook Account from which the offensive message to Ms Sarrouy had been sent². Following a case review of the matter on 17 November 2017 and the engagement of lawyers by the Employer, the matter was set down for hearing on 8 March 2018.

[5] It is unfortunate that this matter took so long to ultimately conclude. One reason for this was the failure of the parties to provide Closing Submissions in a timely fashion³. The second reason, was due to the failure of Registry Staff to bring this file to the attention of the Tribunal in a timely manner. As it transpires, the following documents have been filed by the parties:-

- Affidavit of the Applicant filed on 14 September 2017.
- Affidavit of the Employer, filed on 26 October 2017.
- Submissions of the Employer filed on 26 October 2017.
- Grievor's Affidavit in Reply to Employers Affidavit, filed on 3 November 2017.
- Grievor's Submissions filed on 16 March 2018.

Case of the Employer

Evidence of Ms Charlene Sarrouy

[6] The first witness to be called by the Employer, was Ms Charlene Sarrouy, who together with her husband Mr Yassine Ouled Dlala, were the joint owners of a Nadi restaurant at which the Grievor was employed. Ms Sarrouy told the Tribunal, that she had been working at the restaurant and seen the Grievor with one of the customers, a Ms K, who subsequently in response to a job advertisement on the Facebook business page of the Employer, approached her indicating that the Grievor was looking for employment. The witness said that she decided to employ the Grievor and shortly after his commencement, found that he would be late for work, made mistakes and blamed another staff member for them. According to Ms Sarrouy, the Grievor was found "staring at (her) sometimes". Ms Sarrouy told the Tribunal, that she felt that the Grievor was looking at female customers and herself in a "perverted" way. That is, as if they were

² The Facebook Username Joshua Prince, was that which was used to send the messages to Ms Sarrouy that gave rise to the dismissal.

³ It is a matter of record that parties were required to file submissions by 15 March 2018. As a result of the non-compliance (and after five months) the Tribunal called the matter back on for 13 August 2018 and further directed that Closing Submissions be filed within seven days.

“sexual objects.” The restaurant owner told the Tribunal that the Grievor had been ‘following her’ on Facebook⁴. Ms Sarrouy, said in her evidence, that after the Grievor had been engaged for about one week, she learnt of the demise of her father and was required to return to his home country of France. According to the witness, whilst in France, she received a message from the Grievor through her Facebook account, asking if they could “go for coffee.” Ms Sarrouy stated that the messaging that she understood was from the Grievor, included a threat to her, after which she alerted her husband and took a ‘screen shot’ of the messages that had been sent. The Tribunal was told, that the witness asked her husband to “stand the Grievor down⁵.” The witness stated that the following week, ostensibly in response to the ‘stand down’, the Grievor had tried to sabotage the business, by making a complaint to the Nadi Town Council in relation to the cleanliness of the restaurant’s kitchen.

Mr Yassine Ouled Dlala

[7] Mr Ouled Dlala is a former ship captain and now Fijian Citizen who is the co-owner of the restaurant with his wife, Ms Sarrouy. The witness was asked about the circumstances that gave rise to the dismissal of the Grievor. In short, he indicated that he found the Grievor’s conduct “pathetic”, had trusted the version of events given to him by his wife and saw no need to investigate the issue with the Grievor. Mr Ouled Dlala told the Tribunal, that prior to this time, his wife had indicated to him that she “felt uncomfortable with (the Grievor) around.” Mr Dlala stated that at the time of the Grievor’s dismissal, there were no customers around, only one waitress, by the name of Makarima.

The Case of the Grievor

[8] At the time of these proceedings, Joshua Zacchaeus Prasad was 23 years of age. Mr Prasad said that he was introduced to the owners of the restaurant by his former partner, Ms K, who in turn he claims to have met on Facebook. The Grievor gave evidence that he was earning approximately \$120 per week in his role as a waiter with the Employer. Mr Prasad stated that his parents did not approve of the age difference between himself and Ms K, who he says was 31 years old and the mother of a young child. The Grievor claimed that after separating from Ms K, that he became the victim of her ongoing harassing conduct.

[9] During his evidence, Mr Prasad told the Tribunal that his Facebook account that was first created in 2009, was ‘hacked’⁶ by Ms K on 14 May 2017, after they were no longer in a relationship. Mr Prasad claimed that during their de facto relationship, that his former partner “would not let (him) use (his) device” and that she had changed the access details of his account. The witness claimed that after he separated from Ms K, that she had returned his electronic devices. Mr Prasad said that upon discovering that his Facebook Account had been ‘hacked’ that he lodged a report with the Lautoka Police Station. The Tribunal was told, that when he was approached by Mr Ouled Dlala in relation to the messages purportedly sent to his wife, that he was threatened with violence and sent home.

⁴ This expression refers to a process whereby you can be provided with updates in relation to the posts made by an individual or business page.,

⁵ The Tribunal understand this expression used by the witness to mean, terminate the Grievor’s employment.

⁶ This term refers to the unauthorised access into the account of the Facebook registered user.

[10] Mr Kumar of Counsel took the witness to Annexure "JZP5" to his Affidavit filed on 14 September 2017, which the Grievor claimed demonstrated a communication between himself and the Facebook Security Team. For the sake of the record the words of that communication are reproduced as follows:

Hi Prince,

Your Facebook password was reset using the email address pjoshuaz@yahoo.com on Sunday, May 14, 2017 at 5.34pm (UTC+12).

Device	F1s
IP address:	27.123.171.71
Carrier:	Vodafone Fiji

If you did this, you can safely disregard this email. If you didn't do this, please secure your account.

Thanks.

The Facebook Security Team

[11] In cross examination, the Grievor was questioned in relation to his claim that his Facebook account had been 'hacked' on two occasions. The Tribunal's attention was drawn to Exhibit G2 to the Grievor's Affidavit, that was a letter dated 30 November 2017 from the Chief Executive Officer of Vodafone Fiji, confirming that the Grievor had been engaged in a telephone call with a customer services representative on 14 July 2017. The Grievor also was taken to Annexure "JZP4" and asked to explain what was meant by the apparent communications between himself and Vodafone Fiji relating to the use of a mobile telephone number, that the witness claimed to be registered in his former partner's name. Mr Prasad, stated that the exhibit demonstrated an attempt by him to gain evidence that his mobile devices, had been both accessed and security settings interfered with, by his former partner, Ms K.

[12] The Grievor claimed that when he was dismissed by Mr Yassine Ouled Dlala, that this took place in front of customers and in a situation, where the owner's voice was raised. In cross examination, the Grievor was asked of the ages of his two former partners and told the Tribunal that they were 37 years and 31 years respectively.

The Evidence

[13] At the outset of these proceedings, this Tribunal made it abundantly clear to the Grievor, that he had a significant task to establish what was being alleged. That is, that someone other than himself had been communicating with Ms Sarrouy and made advances and then threats to her, whilst sending messages over the Facebook social media platform. Several reasons for issuing a warning of this type should be noted. Firstly, at the time of his dismissal, the Grievor had only been working for the Employer for approximately three weeks. A case of this type⁷, without more, would ordinarily not yield a significant compensatory remedy in any event and would be one that would be far better to be resolved through a mediated outcome. Secondly, establishing evidence of a sufficient quality to support the defense of 'not my act' in the case of social media,

⁷ That is, where the Employer prior to the incident, already had major concerns regarding the employees suitability.

is a difficult and expensive task. That is, it would require quite specific evidence, in relation to the technologies used, the access source or sources, the interrogation and clarification of security and account verification protocols, to name but a few illustrations. Further, given the controversial nature of the allegations, the Applicant himself needed to understand that some level of interrogation into his own personal life would be involved. That being said, as Mr Nacowala who was representing the Grievor at the prehearing stages correctly pointed out, despite any of those apparent obstacles, the Grievor is entitled to pursue his statutory rights and defend his reputation. Be that as it may, all litigants in employment cases, need to assess the merits and pitfalls of their claims and conduct, prior to proceeding to arbitration. On occasions, arbitration may still not produce the satisfaction that a party is seeking to secure through the process⁸.

The Acrimonious Separation with Former Partner

[14] Within the Affidavit material, the Grievor says that on 11 May 2017, he had decided to amicably separate from his then partner, Ms K. The Grievor claimed that three days later that Ms K had 'hacked' into his Facebook account and posted various things about himself and another former partner on his Facebook message wall. Mr Prasad said that twice on the 14 May 2017, Ms K had without authorisation, accessed his Facebook account, after which time he attended the Lautoka Police Station to register a complaint. The Grievor states, that the Lautoka police station had advised him to make any 'cyber' crime complaint, to a special office in Suva⁹.

[15] Also within the material, the Grievor claims that on 16 May 2017, he had an Interim Domestic Violence Order taken out against Ms K, although says that it was not served on her, until 22 May 2017, at around 6.00am. The Tribunal has perused the application for Domestic Violence Restraining Order, that was made by the Grievor against his former partner Ms K and notes that the basis for making the complaint as set out within the application, is as follows¹⁰:

ON 6/05/2017. SHE HAS BEEN CALLING AND THREATENING THAT SHE WILL SEND HER GANG TO HARM MY PARENTS IF I DON'T GO TO HER OR MARRY HER.
- SHE HAS HACKED MY SOCIAL MEDIA SITES AND MESSAGED MY FRIENDS AND DEPRIVING ME. 14/05/2017
- SHE HAS ALSO TOLD HER FRIENDS LIES ABOUT ME AND THEY ARE CHARGING MY FB STATUS AND POSTING RUDE COMMENTS. 15/05/2017
- ALSO STALKING MY MOVEMENTS.
Details of history of domestic violence (include dates if possible):

- 29/04/2017 SHE HACKED INTO MY SOCIAL MEDIA SITES.
- 6/04/2017 SHE STALKED ME AT WORK AND ASKED ABOUT MY WHEREABOUTS.

⁸ Often in this regard, litigants speak of 'the principle of the matter' or the need to clear one's name.

⁹ There is no evidence that the Grievor made such a complaint in Suva.

¹⁰ The first line of this section within the application form has been removed, to obscure the full name of Ms K.

What Was the Offensive Communication to Ms Sarrouy?

[16] The details of the messages that have been attributed to Mr Prasad by the Employer¹¹, are set out within Annexure CS1 to the Affidavit of Charlene Sarrouy, sworn on 13 October 2017. The message chain reads as follows:

MON AT 01.13

How are you?

Just want to say to you that I like you

You accepted Joshua's request

MON AT 07.57

Will you have coffee with me some of the time soon? But not to tell Yassine

Joshua, this is inappropriate. I want you to do your job properly and I don't wanna have that kind of discussion again. Plus I'm dad passed away one week ago and I have some other things to deal with. Thanks

MON AT 08.19

But I thought you like me like that? You always smiling at me.

Is this because you are friend with that bitch (Ms K)? Did she say something about me because it aint true. I'm going to kill her

I don't want problems

And I don't want you believe everything you hear. Just give me a chance.

Joshua, First she didn't say anything about you and I'm not interested to hear anything anyway. Second I smile at everyone, it's a part of my job. Third I'm married and I love my husband. So you misunderstood what's happening here. I don't wanna talk about this anymore please.

No I think you just don't know how you feel about me but I can see it clearly

Anyway

Will you tell any one about our discussion?

Because I will deny it and just say that someone did hack into my account.

I don't want problems.

I know (Ms K) has told you some things. I don't want to do to you what I did to her. At least her bruises were hidden. Be a good girl for me ok. We make a good team.

Are you fucking crazy Joshua?
Don't even try to threaten me ok?

¹¹ There was no challenge made by the Employer that these messages were sent by the Grievor's Facebook account to Ms Sarrouy's Facebook account.

[17] According to Ms Sarrouy, after she received this message, she 'blocked' the Grievor from being able to further communicate with her and advised her husband.

What is the Evidence in Relation to Account Hacking and Communications?

The Claim of Phone Hacking on 14 May 2017

[18] In relation to this first claim, the Grievor relies on the Annexure to his Affidavit marked "JZP2", claiming that it was evidence that his former partner who had the Vodaphone Number 8*****3 had accessed his email account pjoshuaz@yahoo.com at 5.34pm on 14 May 2017. The Grievor specifically stated at Paragraph 13 to his Affidavit filed on 14 September 2017, that

*...my former girlfriend (.....) hacked into my facebook account from her mobile phone using her Vodafone No 8*****3*

[19] Annexure JZP2 is a photocopy of a screenshot, that suggests someone is wishing to verify their access to a Yahoo email Account. The Grievor claims within his material, that the Interim Domestic Violence Order that he had secured from the Lautoka Magistrates Court on 16 May 2017, was not served on the former partner, until 22 May 2017. The Tribunal understands from inquiries made on the court file, that this was the case. During proceedings the Grievor stated that he and his father, went to the Lautoka Police Station at 3.00am to make a complaint about the breach of the restraining order.¹² It is further noted that within Exhibit G3, a letter from Inspector Dass of the Lautoka Police Station dated 8 March 2018, that the police officer states that a complaint had been received by the Grievor regarding his ex-partner breaching a restraining order. Within that report, the Inspector cites two specific reports 801/05/15 dated 22 May 2017 at 9.26 am and 846/05/17 dated 22 May 2017 at 1840 hrs¹³. During proceedings, it was established between the parties, that the messages that were received by Ms Sarrouy, took place at the following times.

Sunday 21 May 2017 @ 12.13pm (Paris Time) = Monday 22 May 2017 @ 1.13am (Fiji Time);
and

Sunday 21st May 2017 @ 8.57pm, (Paris Time) = Monday 22 May 2017 @ 7.57 am (Fiji Time).

[20] Inspector Dass was not called by the Grievor to give evidence, nor to clarify what was the basis and exact details of any such reports that were made.

The Claim of Accessing a Facebook Account Without Authorisation

[21] The Grievor has claimed within his Affidavit at Paragraph 14, that Annexure "JZP3" is evidence of the fact that his former partner accessed his Facebook account, through her email address. At best, the document appears to be evidence of someone who is trying to access the email account, pjoshuaz20@yahoo.com. Finally, the Grievor claimed that the Annexure to his Affidavit marked "JZP5", was evidence of the confirmation from the Facebook company, that Ms K had changed his password, utilising her F1(telephone) device. The Tribunal is not particularly persuaded by this

¹² It should be noted here, that the father was not called to give evidence in proceedings, even though the Tribunal understood that he was in attendance at least on some occasions during the scheduling of this matter.

¹³ If the Restraining Order had not been served on Ms K until around 6.00am on 22 May 2017, one wonders how there could have been a breach of that order prior to that time.

Exhibit. Like the others, it is not in its original electronic form, could easily have been manipulated and at best is only evidence that a password to a Facebook account was changed.

Conduct outside of Working Hours

[22] When this matter first came on before the Tribunal, Counsel for the Grievor, Mr Nacolawa, suggested that even if the Grievor had been guilty of the text messages sent to Ms Sarrouy, which was denied, that this would be conduct that was not necessarily captured as being of a type regulated by the employment relationship. The Tribunal is of the view that in this day and age, there is often a fine line drawn between when a worker is acting outside or inside of the employment relationship. But issues such as the allegations described in these proceedings, could easily be characterised as sexual harassment. The overtures were unwelcomed and repeated. Mr Nacolawa's point may have some substance to it, in the case of consenting adults, but this was clearly not one of those cases. To make clear, it seems well accepted that behaviour outside working hours may have an impact on employment to the extent that it can be said to breach an express term of an employee's contract of employment. In *Rose v Telsta Corporation Limited*¹⁴, a Full Bench of the then Australian Industrial Relations Commission stated,

"It is clear that in certain circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited:

the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or

the conduct damages the employer's interests; or

the conduct is incompatible with the employee's duty as an employee.

In essence the conduct complained must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee

Absent such considerations an employer has no right to control or regulate an employee's out of hours conduct".

[23] Aside from any statutory infringements, the question that should be asked in relation to the unwelcomed advances by an employee to the owner of a business whose partner also works in that business, would be, is that conduct of a type characterized within *Blyth Chemicals Ltd v Bushnell*¹⁵ being conduct that,

is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, (and therefore) is a ground of dismissal.

[24] Insofar as the conduct of this type is concerned, the Tribunal is of the view that it is both of a type that is incompatible with the ongoing relationship of employment and that there is a sufficient nexus with the employment to find this to be so. The language of the exchange, was inappropriate and threatening. Ms Sarrouy was sufficiently upset by the conduct, that not only did

¹⁴ [1998] AIRC 1592

¹⁵ [1933] HCA 8

she immediately cease contact with the person responsible but alerted her husband and ultimately made a complaint to the police.

Findings of the Evidence: Does the Tribunal Consider that the Grievor Was Responsible for the Messaging?

[25] The test for drawing any conclusions of fact, is a civil one. That is, on the balance of probabilities was it more likely than not, that the Grievor was responsible for the conduct. Despite the warning that this Tribunal gave the Grievor as to the need to provide concrete evidence of a high quality to support any other case theory, no such evidence to that requisite standard was forthcoming. The photocopied documents that make up the Annexures to the Affidavit of Mr Prasad, are certainly not the best evidence. In each case, there is no account for how the document were created, what was the original source and was there an electronic version in order to compare it to the 'hardcopy' exhibit.

[26] Another issue that was raised during cross examination, was the fact that the 23 year old Grievor had conceded to having been previously in a relationship with a woman who was 37 years old and most recently, Ms K who was 31 years old. The inference being here, that Ms Sarrouy was 36 years of age and was therefore of an age bracket within the range that Mr Prasad was inclined to befriend. That to some minor extent, reduces the suggestion that it would be farfetched for the Grievor to have made the approach to Ms Sarrouy, because of their obvious age difference. What it does not do though, is lead to any further support of the claim that Mr Prasad had sent the offensive message. The Grievor is entitled to enter into lawful relationships with whomever he pleases regardless of the age of the other person and it is not the role of this Tribunal to draw any inference out of any evidence in this regard.

[27] The Tribunal is further of the view, that the Grievor had some control of at least the phone number he claimed had also been compromised. In this regard, the Tribunal notes Annexure "JZP4" that gives the impression, that even though the Grievor claimed this phone number was not registered to him, he was nonetheless capable of gaining information from the service provider in relation to its status. The capacity to do so, seems quite at odds with what would ordinarily be anticipated in such circumstances. That is, that the service provider would provide such information to a third party. Perhaps it was common place that both the Grievor and Ms K had common access to passwords and social media accounts¹⁶? There is also some question as to whether the entire communication relating to that Exhibit, had been provided.

Conduct Prior to Ms Sarrouy Departing for France

[28] It is perhaps instructive to read some of the Statement that Ms Sarrouy provided to the Fiji Police Station at Nadi on 7 June 2017, where she states:

¹⁶ If that were the case, there is also a possibility that both Mr Prasad and Ms K could have been involved in the messaging to Ms Sarrouy. That is, Mr Prasad could have commenced the messaging and Ms K may have been responsible for the more offensive aspects of it.

He was also making a lot of mistakes at work and even blaming the other staffs about it, he also lied about everything and his behaviour was not good to me and the other female guests that was making the Guests uncomfortable (he usually stares)

...when I flew out I also received a text message from Sabrina that she has broken up with Mr Prasad and that I should be careful with him. I also informed my husband to keep an eye on him as I did not trust him because of his unusual behaviour.

[29] It is a matter of record that Counsel for the Grievor, Mr Kumar did not take the opportunity to challenge the veracity of this aspect of Ms Sarrouy's statement. As such, it therefore provides an uncontested description of the Grievor's behaviour during his relevant employment period, at least insofar as it was perceived by Ms Sarrouy. It would seem that in the case of an employee who had only been engaged for three weeks, that these reasons in themselves would have been sufficient to have brought the employment contract to an end, albeit more probably with notice, rather than without. Ordinarily a probationary period would serve both parties for that purpose. Clearly, Ms Sarrouy did not find the Grievor to be an honest employee. That would, *ceteris paribus*, be a justifiable reason for dismissal. Whilst the Tribunal accepts that the Grievor had on its face secured an Interim Domestic Violence Restraining Order, there is just insufficient evidence to conclude beyond reasonable doubt, that he was or was not the person who sent the messages to Ms Sarrouy through his Facebook Account. Not that the criminal test applies¹⁷, but to be fair there is insufficient proof to categorically state that it was the Grievor's act.

[30] The most troubling part of the message sent to Ms Sarrouy, was the following:

I don't want problems.

I know (Ms K) has told you some things. I don't want to do to you what I did to her. At least her bruises were hidden. Be a good girl for me ok. We make a good team.

[31] At one level, it is hard to comprehend how or why an employee would believe such comments made to his employer would go unchallenged. And that in some ways lends itself to a conclusion, that perhaps the text was written by a person or persons who were wanting to destroy the employment relationship. A threat of that type by an employee to his employer, would be tantamount to a repudiation of the employment contract. It would make no sense whatsoever. Yet this is where the evidence of the Grievor is wanting. For example, it was claimed that he first was made aware of the 'hacking' of his Facebook account on 14 May 2017 and that he had seen the posts purportedly made by Ms K on two occasions that same day, at 5.34pm and again at around 6.30pm. What is hard to understand here, is that if the Grievor was able to access his account on those occasions, why was it that he did not change his password and email account at that stage? It is a matter of record also, that the Grievor provided no evidence whatsoever, of any of the posts that he claimed were made by Ms K on those two separate occasions¹⁸.

[32] Further, in relation to the later claim that a Facebook Account was hacked around 3.00am on 22 May 2017 and that the Grievor managed to retrieve this account, there is simply no concrete evidence of when any retrieval took place. On this occasion, the Grievor claimed that he attended the police station with his father at around 3.00am, however there is no record of any attendance at the police station at that time. At best, there is evidence that a police report was taken at or

¹⁷ The relevant standard of proof is that set out within *Brigginshaw v Brigginshaw* [1938] HCA 34; (1938) 60 CLR 336

¹⁸ One would have assumed that this would have been evidence, that would have formed a complaint to police.

around 0926 hrs on that day.¹⁹ One thing that there is absolutely no evidence of and this is a point that should not be lost on anyone, is that from the time that it was claimed by the Grievor that he was aware that his account had been hacked at or around 3 o'clock on the Monday morning 22 May 2017, until he attended work that afternoon, he made no effort at all to contact his employer and plead that this was not his act. To illustrate the point further, let us look at the timing of the issues.

Time	Event
0.13 am Monday 22 May 2017	Message sent to Ms Sarrouy from Mr Prasad's account that read, How are you? Just want to say to you that I like you
3.50am Monday 22 May 2017	Mr Prasad claims to have made a complaint to Lautoka Police about posting of rude messages by ex-girlfriend ²⁰
07.57hrs Monday 22 May 2017	Further messaging from Mr Prasad's account to Ms Sarrouy, asking if she wanted to have coffee
08.19hrs Monday 22 May 2018	Further message from Mr Prasad's account to Ms Sarrouy.
09.26hrs Monday 22 May 2018	Lautoka Police Station Report 801/05/17
18.00hrs Monday 22 May 2018	Mr Prasad attended work and said shown messages that had been sent to Ms Sarrouy. ²¹

[33] The Tribunal does not accept the evidence of the Grievor in relation to what transpired at 3.00am Monday 22 May 2017. That is, that he returned to the police station to make a complaint about lewd and bawdy messages²². It would have been easy for Mr Prasad to have called his father to give corroborating evidence, but no such attempt by the Grievor was made²³. And what were the "rude messages" that the Grievor claims to have detected at this time on Monday morning? The Grievor provided no evidence of these at all²⁴. They can't have related to those that were ultimately produced by the Employer in proceedings,²⁵ because at that time, no rude messages had been received by Ms Sarrouy. They were received at a later time. All that Ms Sarrouy had received from Mr Prasad's account by that time, was the following:

How are you?

Just want to say to you that I like you

[34] Whilst obviously even this messaging was unwelcomed and inappropriate, the truly offensive language was received by Ms Sarrouy, on and after 08.19hrs that day. If the Grievor was aware of the fact that his account had been 'hacked' at this juncture, he provides no insight as to what control measures he immediately took in order to prevent a continuation of the same. More importantly, it would seem that his case is attempting to suggest that he was unaware of the

¹⁹ See Exhibit G3.

²⁰ The Grievor has provided absolutely no evidence at all, what he claims these messages were.

²¹ See Paragraph 20 of the Affidavit of the Applicant dated 14 September 2017.

²² Note Paragraph 17 of the Grievor's Affidavit in Reply.

²³ It is understood that during some of the proceedings, the father himself had been sitting in the Tribunal Room.

²⁴ Again the language at Paragraph 17 of the Grievor's Affidavit in Reply, claims that "lewd and/or bawdy messages" were sent to Ms Sarrouy between 1am-3am.

²⁵ See Affidavit of the Employer filed on 26 October 2017 at Annexure "CS1".

messaging that had transpired until 6.00pm, when he went to work and was confronted by Ms Sarrouy's husband.

[35] The Tribunal does not accept such a scenario and considers it is far more likely that Mr Prasad was aware of at least some of the messaging that had taken place by that time. A simple interrogation of his Facebook account would have shown the recent activity and messaging that took place. In ordinary circumstances, one would have expected that an innocent party to such conduct, once alive to the fact that the unauthorized access had taken place, would have endeavoured to quickly contact those people to whom the messages had been sent, or to which the posts referred, in order to clarify that it was not his act. There is no evidence at all that Mr Prasad sought to make contact with his Employer and explain the situation.

[36] It seemed accepted by all of the parties that Ms Sarrouy knew Ms K and was aware of the fact that the couple had separated. Surely if that was the case and those women were in direct contact with each other, there would have been a far easier way for Ms K to have convinced the Employer that the Grievor was unsuitable in his role.²⁶ Although, again from a brief understanding of what is contained within the Lautoka Magistrate Court file, the relationship between the Grievor and Ms K around this time was volatile and marred by allegations and counter allegations. As Ms K was not subpoenaed to give evidence, it is just too difficult to reach any fair conclusions about her possible involvement in any of this.

[37] This in one sense requires a returning to the evidence of Ms Sarrouy, where she made clear that she was already of the view that the Grievor was unsuitable in his role and indicated the same to her husband, before she left for overseas. The owner of a small business is entitled to feel comfortable and safe in the workplace. In this case, Ms Sarrouy did not. A dismissal is justifiable on that basis. Even before the Facebook messaging incident, Ms Sarrouy had told her husband, that she did not trust the Grievor because of his unusual behaviour. Ms Sarrouy said that he was untruthful and that he was making guests feel uncomfortable. In the hospitality industry, that would be a sufficient reason to question the ongoing employment of a waiter.

Relevant Case Law

[38]The Tribunal has been referred to various cases by the Grievor, that whilst instructive shed no additional light on what needs to take place when evaluating the evidence. In *Kumar v Nanuku Auberge Resort Fiji*²⁷, it has been said:

As a starting point, at least in the context of 'unjustifiable dismissal', the question needs to be asked, having regard to the Statement of Reasons provided, whether a termination based on those reasons was justified. The question post Central Manufacturing v Kant, where a new regulatory regime is installed, must be, Can the dismissal be justified? The initial question to ask is not how the dismissal takes place, or what is relied on as part of that process, but whether the reasons for giving rise to the decision to terminate are justifiable. The concept of whether or not a termination or dismissal at work is justified or not, has been enshrined in international labour law for many years.

²⁶ Even if that would possibly have given rise to a claim by Mr Prasad for interference with contractual relations.

²⁷ [2017] FJET 2

The Termination of Employment Convention, 1982 (No. 158) adopted at the 68th International Labour Convention session in Geneva, sets out within Part II, Division A, a framework for assessing whether or not a dismissal is justified. Article 4 for example, provides that "The employment of a worker shall not be terminated unless there is a valid reason for such termination concerned with the capacity of conduct of the worker or based on the operational requirements of the undertaking, establishment or service. Articles 5 and 6 thereafter provides additional illustrations of circumstances that would not constitute a valid reason for termination. These include union membership, filing a complaint or participating in proceedings against an employer, discriminatory grounds based on attribute, absence due to maternity leave or temporary absence from work because of illness or injury.

Northrop J in Selvachandran v Peteron Plastics,²⁸ provided the following clarification when a comparable question was being asked as to whether a termination decision was a valid one. In that case, his Honour stated:

Subsection 170DE(1) refers to "a valid reason, or valid reasons", but the Act does not give a meaning to those phrases or the adjective "valid". A reference to dictionaries shows that the word "valid" has a number of different meanings depending on the context in which it is used. In the Shorter Oxford Dictionary, the relevant meaning given is "Of an argument, assertion, objection, etc; well founded and applicable, sound, defensible: Effective, having some force, pertinency, or value." In the Macquarie Dictionary the relevant meaning is "sound, just, or well founded; a valid reason."

In its context in subsection 170DE(1), the adjective "valid" should be given the meaning of sound, defensible or well founded. A reason which is capricious, fanciful, spiteful or prejudiced could never be a valid reason for the purposes of subsection 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must "be applied in a practical, commonsense way to ensure that" the employer and employee are each treated fairly, see what was said by Wilcox CJ in Gibson v Bosmac Pty Ltd, 5 May 1995, unreported, when Considering the construction and application of section 170DC.

...the concept of what constitutes a justifiable decision within the meaning of Section 230(2) of the Promulgation, could well canvas such concepts as to whether the dismissal decision was sound, defensible or well founded; not capricious, fanciful, spiteful or prejudiced.

[39]The decision to dismiss in the circumstances appears defensible and sound. Even if it is the case that the Grievor did not send the offensive messages to Ms Sarrouy in the morning of 22 May 2017, the other concerns raised by Ms Sarrouy would have been sufficient in the circumstances to bring about Mr Prasad's termination in employment. This incident, the subject of these proceedings, only appears to have consolidated the views of the Employer. At best in these circumstances, the Grievor could claim for the one weeks' notice of dismissal, that is

²⁸ See [1995] IRCA 333;62 IR 371 at 373

provided for within Section 29 of the *Employment Relations Act 2007*. That is, that he was entitled to the notice of his termination.

[40]It is also noted by the Tribunal, that the Employer did not issue the Grievor with a dismissal letter at the time of termination, as required by Section 33(2) of the Act. The Tribunal appreciates that one reason for this was due to the very emotional state of upset that would have been brought about, by Mr Ouled Dlala learning of the messages that his wife had received. In such circumstances and because of the size of the undertaking, the Tribunal also understands that the Employer did not see the need to undertake an investigation into the conduct of Mr Prasad, prior to reaching its decision to dismiss him in his employment. In the unique circumstances of this case, the Tribunal is satisfied that the Employer had sufficient information at that time, to justify at least in a prima facie sense, the dismissal of the Grievor. That would have included, the views that Ms Sarrouy held and later reported to the police, that the Grievor made female guests feel uneasy and was looking at female customers and herself, in a “perverted” way. Even if some of these reasons were not set out within the dismissal letter, they are still capable of being relied upon by the Employer in justification of its conduct.²⁹

[41]The Tribunal recognises that there are compelling arguments that are capable of being advanced by both parties, as to whether the Grievor should have been entitled to notice, as opposed to having been terminated summarily. This is particularly so, given that when confronted with the allegation by Mr Ouled Dlala, the Grievor claimed that it was not his act and there is no absolute certainty that based on the alleged earlier conduct of Ms K, that she or someone else did not send the offensive messages to Ms Sarrouy. The danger for all concerned, including the Tribunal, is that if it was not his act, then of course it would be unfair to deprive the Grievor his one week’s notice of dismissal, or payment in lieu thereof. To err on the side of caution, one week’s notice as compensation should be given. An order to that effect will be issued to the Employer.

[42]Insofar as any question of unfairness is concerned, the case law in this regard has been consistently applied over recent years. In *Josifini Lagi v Nadi Town Council*³⁰ this Tribunal stated:

*The question of whether the dismissal was fair in my mind is quite clear.The issue is whether in carrying out the dismissal, the Employer acted in a manner that was harsh, aggressive, humiliating, degrading, embarrassing, or in a manner that otherwise causes humiliation, bad repute and injury to the feelings of the worker.*³¹

[43]While the Grievor claims he was terminated in front of customers, he provided no corroborating evidence in this regard. The Employer indicated that the confrontation with the Grievor took place in front of a waitress only and the Tribunal accepts that this is the more likely version of events. There is no case to be made out for unfair dismissal; that is that the dismissal was executed unfairly.

²⁹ *Shepherd v Felt & Textiles of Australia Ltd* [1931] HCA 21; (1931) 45 CLR 359 (4 June 1931)
³⁰ ERT Grievance 173 of 2016; [2017] FJET 7; ERT Grievance 173.2016 (27 March 2017)
³¹ See *Yanuca Island Limited trading as Shangri La Fiji Resort and Spa v Vani Vatuaruku* [2017] FJHC92 at [61].

Conclusion

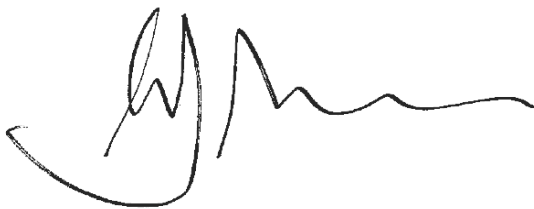
[44] In conclusion, the point needs to be made, that the very reason why this Tribunal sought to discourage the Grievor from pursuing this application, was because of the likelihood he would ultimately achieve the result that he has now achieved.

[45] The Grievor has not been able to establish beyond reasonable doubt that it was either Ms K or himself, or indeed someone else who was responsible for sending the messages to Ms Sarrouy's Facebook account, on 22 May 2017. Reinstatement in the circumstances of this case, was never likely to be an option, given the nature of the issues that had transpired and the small size of the employer. The unfortunate thing for Mr Prasad was that the Employer in this case, had strong misgivings about the way he conducted himself in the workplace. As such, the nature of this case has meant that neither party will ever feel fully satisfied that their conduct has been vindicated by proceeding to trial³².

Decision

[46] It is the decision of this Tribunal that:

- (i) The Grievance lodged against the Employer be dismissed.
- (ii) That the Employer pay to the Grievor within 21 days, the amount of \$120.00, as payment in lieu of notice.



Mr Andrew J See
Resident Magistrate

³² Perhaps if an expert in ascertaining the activities on Ms K's F1 telephone device had been relied upon, it may have been possible to ascertain whether or not she had accessed the Grievor's accounts, but of course, the costs of pursuing that sort of inquiry, are well outside of the means of the ordinary litigant in such cases. More importantly, there was never any attempt by the Grievor to make Ms K submit to such a production of her device in order that it could be interrogated for such purposes.