Decision

Employment Relations Tribunal

Title of Matter:	**LABOUR OFFICER on behalf of Losa Rosaline Buchanan (Applicant)** **v** **GRAND PACIFIC HOTEL LIMITED (Respondent)**
Section:	**Section 8 *Workmen's Compensation Act* 1964**
Subject:	**Compensation in case of permanent and partial incapacity**
Matter Number(s):	**ERT WC 83 of 2018**
Appearances:	**Ms P Chandra, for the Labour Officer** **Mr P Kumar, MIQ Lawyers, for the Employer**
Date of Hearing:	**22 July 2019.**
Before:	**Mr Andrew J See, Resident Magistrate**
Date of Decision:	**10 September 2019**

KEYWORDS: Section 8 *Workmen's Compensation Act* 1964; Claim for Compensation in case of Permanent and Partial Incapacity .

CASES CITED:
Fiji Sugar Corporation Ltd v Labour Officer [1995] FJHC39; Civil Appeal No 0010 of 1994, 17 February 1995.
Raiwaqa Buses Ltd v Labour Officer [2011]FJHC174; HBA23.2008 (18 March 2011)
Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu [1994] FJHC 180; (9 December 1994)

Background

[1] This is an application made for worker's compensation in accordance with Section 8 of the *Workmen's Compensation Act* 1964. The application filed on 24 September 2018, claims compensation in the amount of $24,000.00 arising out of an injury suffered whilst the Worker was engaged in the activities of Executive Housekeeper, at the Grand Pacific Hotel, Suva.

[2] According to a statement provided by the Worker to the Labour Office on 12 May 2015, whilst at work on 10 July 2014, she had experienced an abnormal sensation in her body and informed co-workers that she thought she was having a stroke. The following morning the Worker

attended a medical practitioner and was provided with a medical certificate for two days, following which she then attended the Sigatoka Hospital and was admitted for a week. It is noted that a Medical Report issued by that hospital on 31 July 2014, indicates that the Worker was suffering from uncontrolled hypertension and a transient ischaemic attack (mini-stroke).

The Case of the Labour Officer

Assistant Labour Officer Ramiza

[3] The first witness to give evidence on behalf of the Labour Office was Ms Razia Ramiza, an Assistant Labour Officer. Ms Ramiza told the Tribunal that the injury to the Worker was not reported and despite the request made to the Employer to complete the *Notice of Accident* (Form LDC1) as required under Section 14 of the *Workmen's Compensation Act* 1964, that was not forthcoming. Ultimately, based on the available information that had been gathered by the Ministry, including the medical reports provided from the Sigatoka Hospital, the Nasese Medical Centre and the Independent Medical Assessment undertaken by the Workcare Clinic Medical Assessor, a whole person permanent assessment of 26 percent was determined and a claim for compensation in the amount of $24,000.00 sent to the Employer[1]. During cross examination, the Witness conceded that there had been some correspondence received from the Employer and that she understood that some meeting between the parties had taken place.

Losa Rosaline Buchanan

[4] The Worker Ms Rosaline Buchanan told the Tribunal that she commenced employment as the Executive Housekeeper with the Employer on 6 January 2014, and had previously worked at the Warwick Hotel, where she was responsible for the supervision of 70 staff. The Worker said that whilst the starting time at the hotel was 8.00am, that she was expected to get to work much earlier around 6.30am and would finish anytime between 8.00pm and 11.00pm. According to Ms Buchanan, on the day in which she suffered a mini stroke at work, at around 2.30pm, she had sat down at her desk and felt a sensation in her arm. The Witness stated that the HR Co-ordinator at that time, together with one of the trainees were present. In her evidence, the Witness stated that at around 5.00pm, she travelled by minivan to Sigatoka, and fell asleep in her travels. Ms Buchanan stated that her husband then took her to the Sigatoka Hospital the following day, when after several days on sick leave, she was admitted to that hospital being assessed with uncontrolled hypertension and having suffered a transient ischaemic attack.

[5] According to the Witness, the General Manager of the hotel and his wife visited her at the Sigatoka Hospital and because of the fact that the employer had medical insurance cover for its employees, organised in conjunction with the Nasese Medical Centre for her treatment there as an inpatient for the period 28 July 2014 to 3 August 2014. Ms Buchanan stated that in November 2014, her Employer had organised for her return to reduced working hours, however after only 1 week at the workplace and working 8 hours a day instead of 4 hours under her plan, knew that she was not physically capable of continuing in her role. Counsel for the Labour Office referred the Worker to the Workcare Clinic Report (Exhibit E2) where it indicated that she had been a past hypertensive for the 10 previous years. The Witness stated that she had high blood pressure whilst working at the Warwick Hotel, though it wasn't as high as when working at the Grand Pacific. During cross examination, the Worker's attention was drawn to Clause 6 of the employment contract (Exhibit E1) with Grand Pacific, where there was an expectation that she would "work beyond (48) hours as necessary to ensure that the Hotel's needs are met". It was put to the Worker that she was being negligent about the management

[1] See Exhibit L2.

of her own health and Counsel for the Employer clarified that the Worker had not submitted to a medical examination for the purposes of Clause 12 of that contract[2].

Ms Joyce Latchmi

[6] The only witness called for the Employer was Ms Joyce Latchmi, the Human Resource Manager of the hotel. The Tribunal finds that the Witness is not a credible one. First and foremost, there is the copy of the employment contract that was tendered by the Employer. As the signature blocks show, Ms Buchanan signed the document on 14 January 2014. The General Manager of the Hotel did not date the document that he signed. In the case of Ms Latchmi, despite giving evidence that she not being appointed to the role of Human Resources Manager until 2015, she has signed the employment contract in that capacity dated 1 August 2014. Whilst the consequences of such action will not be further explored for the purposes of this proceeding, it does nonetheless give rise to suspicious conduct of the Employer in relation to its dealings. In short, the Witness claimed that Ms Buchanan's injury was not work related as it was not reported on the day of the event, although it is conceded that the Worker's husband did notify the Human Resource section of her condition by 13 July 2014.

[7] During cross examination, Ms Latchmi claimed that there had been no request made of the employer to provide time and wages records. The Witness could not comment as to whether or not the Employer had requested that Ms Buchanan submit to a medical examination and preferred to respond by saying, that she "wasn't there". Ms Latchmi when challenged that the Worker did advise two colleagues of the fact that she was not well on the day in question, responded, "no I knock off at 12..according to my knowledge she did not". The Witness conceded that Ms Buchanan's daughter also worked at the hotel.

Analysis of the Issues

[8] Despite this matter being scheduled for 18 March 2019, at the request of the Labour Officer, that date was vacated when its medical witness Dr Tikoinayau was said to have been unavailable. The matter was therefore listed for 22 July 2019 and despite that advanced notice, at the commencement of proceedings, Ms Chandra advised that the medical expert was again not available. The Tribunal was not prepared to delay the proceedings any further and was content to rely on the medical information set out within the Applicant's Disclosures as being sufficiently informative to assist the Tribunal in reaching a decision[3].

Is Ms Buchanan a Workman (Worker) for the Purposes of the Act?

[9] Section 2 of the *Workmen's Compensation Act* 1964 defines workman (Worker) to mean:

> *any person who has, either before or after the commencement of this Act, entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, or otherwise, whether the contract is expressed or implied, is oral or in writing, whether the remuneration is calculated by time or by work done, and whether by the day, week, month or any longer period:*
>
> *Provided that the following persons are excepted from the definition of "workman":-*

[2] Note here, that the request for an employee to submit to an examination by a medical practitioner, needs to be initiated by the Employer, not the employee.

[3] See specifically within those disclosures, the Medical Report from the Sigatoka Hospital dated 25 September 2017, the Medical Report from the Nasese Medical Centre dated 4 August 2014 and December 2014 and Medical Report from the Workcare Clinic dated 11 April 2018.

(a) a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club;
(b) an outworker;
(c) a member of the employer's family dwelling in the employer's house or the curtilage thereof; or
(d) any class of persons whom the Minister may, by order, declare not to be workmen for the purposes of this Act.

[10] The Tribunal is satisfied that at the time of the injury, Ms Buchanan was a workman (worker) for the purposes of Section 2.

Was the Respondent the Employer of the Workman?

[11] Section 3 of the Act, reads:

"employer" includes the Government and any body of persons corporate or unincorporate and the personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person; and in relation to a person employed for the purposes of any game or recreation and engaged or paid through a club, the manager, or members of the managing committee of the club shall, for the purposes of this Act, be deemed to be the employer;

[12] The Employer is caught by the definition at Section 3 of the Act.

Did the Worker Suffer a Compensable Injury?

[13] Section 5(1) of the *Workmen's Compensation Act* 1964 provides as follows:

If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workmen, his employer shall, subject as hereinafter provided be liable to pay compensation in accordance with the provisions of this Act ....

[14] There are three requirements to satisfy Section 5(1) of the *Workmen's Compensation Act* 1964.[4] These are:-

(i) Personal injury by accident;
(ii) Arising out of employment;
(iii) In the course of employment.

[4] *Raiwaqa Buses Ltd v Labour Officer* [2011]FJHC174; HBA23.2008 (18 March 2011)

Did the Worker Suffer A Personal Injury by Accident?

[15] Pathik J in *The Fiji Sugar Corporation Limited v Labour Officer*[5] set out in detail what is meant by the expression "injury by accident". The Medical Reports provided by the Labour Officer in the *Applicant's Disclosures* filed on 9 October 2018, reveal the following. That the Worker was:-

- Admitted to the Women's Ward, Sigatoka Hospital from 13/7/14 after presenting with right hand numbness. She was admitted and diagnosed with uncontrolled hypertension and transient ischaemic attack and was discharged on 18 July 2014;
- Presented to the Nasese Medical Centre on 28 July 2014, with slurring of speech and difficulty with balance, where she remained til discharge on 3 August 2014;
- Seen on two further occasions at the Nasese Medical Centre on 8 August 2014 and 7 October 2014 and was observed to have "minimal slurring of speech but hardly noticeable" – with motor functions all normal and sensory functions also intact; with stable neurological status at the time of examination.
- Examined on 11 April 2018 by Workcare Clinic and diagnosed with moderate memory loss, some difficulty in articulation in speech; and mental status rated as class 2 with a WPI of 20%. The medical opinion of Dr Tikoinayau was that the excessive work hours aggravated the Worker's hypertension causing the stroke.

[16] The Employer has not produced its time and wages records for the relevant period, despite the request that was made by the Labour Office that it should do so. Nor did it submit to the request to provide the contact and names of the two workmates who could have been interviewed. The Tribunal is satisfied that the Worker did attend the Sigatoka Hospital's outpatients on 10 July 2014 and thereafter obtained a medical certificate for two day's sick leave. Ms Buchanan then returned to that Hospital and was admitted. The Employer appears to have been well aware of this injury. The Worker was the Executive Housekeeper and held a senior and central role within the hotel. Her absence in such a situation would have been immediately felt. The fact that the General Manager and his wife travelled to Sigatoka to visit Ms Buchanan, evidence that was not contested, makes clear that the Employer was well aware as to what had transpired. Based on the medical records provided, including having regard to the evidence given by Ms Buchanan, the Tribunal finds that the Worker did suffer an injury by accident, in that she suffered a mild stroke whilst at work. As Dr Tikoinayau's medical report makes clear, the event has triggered poor long term memory and a flat mood, that has impacted on daily life activities.

Was the Worker's Accident Arising Out of Employment?

[17] The next consideration is whether what the Worker was doing at the time of the accident, arises out of her employment. The Worker had been working with the Employer for only 6 months at the time of the event, but the work hours were unreasonable and unsustainable. Counsel for the Employer sought to suggest that this was the contractual position that the Worker had signed up for, however such a situation ignores the health and safety implications of working 15 or more hours a day. It is simply not sustainable. The fact that the Worker suffered from hypertension previously is really not that relevant. The Employer must take the Worker as it finds her. The Employer did not seek to have Ms Buchanan submit to a medical examination in accordance with the terms of the employment contract and the language of that clause in any event, places the responsibility for pursuing that requirement on the Employer not the Worker.

5 [1995] FJHC 39; Hba0010j.94b (17 February 1995)

[18] Ms Buchanan spoke of the extra work associated with a start-up hotel, including the need to put in place standard operating procedures (SOP's) for staff. All of the extra stress and workload exacerbated her condition. That is the medical evidence and it must be accepted. The Employer made no effort to call any medical experts to refute that claim.

[19] Pathik J in *Travelodge Fiji Limited Suva v The Labour Officer for Karalaini Diratu*[6], sets out the relevant considerations when determining whether or not a worker suffered an accident arising out of employment. His Honour relied on Lord Sumner's characterisation in *L & YR v Highley*[7] to apply the following test:

> *".... Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was whereby in the course of that employment he sustained injury.*

[20] As his Honour further stated:

> *The expression is not confined to the mere "nature of the employment" as formerly held in several cases, but it "applies to the employment as such - to its nature, its conditions, its obligations, and its incidents.*

[21] The Worker felt pains in her arm while at work at her desk. This situation was reported to co-workers and to medical staff at the Sigatoka Hospital. There was no evidence of the Worker undertaking any activities that she was not required to perform or directed to perform. The Tribunal is satisfied that this limb is established.

<u>In the Course of Employment</u>

[22] In *Travelodge,* Pathik J stated:

> *The two conditions which must be fulfilled before an accident can be said to have occurred "in the course of employment" are:*
>
> *(a) the accident must have occurred during the employment of the workman and*
>
> *(b) it must have occurred while he was doing something which "his employer could and did, expressly or by implication, employ him to do or order him to do"*

[23] The Tribunal is satisfied that these two elements have been met. The Worker was at work at the time of the event and she had been attending to her duties that were in the ordinary course of the working day and that the Employer had required her to perform. The injury occurred in the course of the Worker's employment.

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6 [1994] FJHC 180

7 (1917) AC 352 at 372

Conclusions

[24] The Tribunal accepts that the Worker had a 10 year history of hypertension, although this situation was exacerbated by the excessive hours she was required to work in her new role. The work load was unreasonable and unsafe. The Tribunal is satisfied that the claim against the Employer meets the requirements of the Act and the calculation based on a permanent impairment assessment of 26 percent whole person impairment (WPI), has been made out. In relation to costs, the Tribunal is not satisfied that costs should follow the event, given that it was the Labour Office on the first occasion that sought an abandonment of the trial date when it was originally fixed.

Decision

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

(i) The Respondent pay compensation to the Labour Officer on behalf of the injured Worker, in the amount of $24,000.00, within 28 days hereof.

(ii) Each party bear their own costs.

Mr Andrew J See
Resident Magistrate