



Employment Relations Tribunal

Decision

Title of Matter: Rusiate Turuva Cebaivalu
v
Itaukei Land Trust Board (TLTB)

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

Subject: Adjudication of Employment Grievance (Unjustifiable Dismissal)

Matter Number: ERT Grievance 181 of 2017

Appearances: Mr K Tunidau, Kevueli Tunidau Lawyers, for the Grievor
Ms E Raitamata and Mr J Cati, for the Employer

Dates of Hearing: Thursday 28 June 2018; Friday 29 June 2018;
Wednesday 26 September 2018; Wednesday 3 October 2018;
Tuesday 2 July 2019; Wednesday 3 July 2019; 9 October 2019.

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 23rd October 2019

KEYWORDS: Section 211(k) *Employment Relations Act 2007*; Adjudication of dismissal grievance.

CASES CONSIDERED

Kumar v Nanuku Auberge Resort Fiji [2017] FJET 2; ERT Grievance No 122 of 2016 (10 February 2017)
Peni Koro Lagi v Calm Fire Professionals, [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)

- [1] This is a grievance commenced by Mr Rusiate Cebaivalu against the I-Taukei Land Trust Board (TLTB), claiming that he was unjustifiably dismissed in his employment on 22 August 2017. The matter has been referred to the Tribunal in accordance with Section 194(5) of the *Employment Relations Act 2007*. There are three principal reasons that the Employer has relied upon in justification of the dismissal decision¹. The first, relates to the Grievor's witnessing of an *Agreement for Lease* document on land at Korokoro Nadi, that his Manager had asked him to sign and that it is claimed he failed to verify the specific details contained within, prior to signing the document. The second, concerns the claim that the Grievor had lacked integrity by somehow allowing the lease agreement to be entered into, when there were discrepancies in relation to the area under lease and the undervaluing of the commercial terms in which the lease was secured; and the third concerned itself with the Grievor making available his computer password to another employee, in breach of the TLTB's Information Technology policy.
- [2] It may as well be pointed out at this juncture, that the Employer has not asserted either within its oral or written submissions, that the Grievor himself took advantage of, or secured any benefit out of either of these breaches, however it needs to be said that the Manager of the South West Region and a fellow

¹ See Exhibit E10 at Document No15.

Estate Officer, were subsequently terminated as a consequence of facilitating that transaction. The following documents, together with oral evidence, submissions and other exhibits, formed the basis for this Tribunal reaching its findings in this matter:-

- Employer's Supplementary Bundle Documents, dated 4 December 2018;
- Employer's Further Supplementary Bundle of Documents, filed 26 June 2019;
- Affidavit of Evidence in Chief of Qaranivalu Lutubula, filed 14 March 2018;
- Affidavit of Evidence in Chief of Miriama Delai, filed 14 March 2018;
- Affidavit of Evidence in Chief of Mere Wong, dated 13 March 2018;
- Affidavit of Evidence in Chief of Rusiate Turuva Cebaivalu, filed 19 January 2018; and

The Case of the Employer

Miriama Delai

[3] The first witness to give evidence on behalf of the Employer, was Ms Miriama Delai, an Internal Auditor engaged at the TLTB. Ms Delai told the Tribunal that she was asked to undertake an investigation into a number of serious allegations of non-compliance and fraudulent dealings that had been identified following an internal investigation undertaken as a result of a complaint received from Adi Ceva Sova Lutumailagai, regarding a lease being issued over land beneficially occupied by her family at Korkoro, Nadi. The Witness was referred to the initial Investigation Report dated 8 February 2017 (Exhibit 1(a)) that was prepared for the General Manager by the Acting Internal Audit Assistant, that included ascertaining whether proper procedures were followed by South Western Region staff in the processing of the said lease and whether those staff involved in the transaction, had breached any terms and conditions of employment.

[4] That initial investigation, sought to investigate the complaint and then as a consequence the Grievor's and others involvement in the transactions, in relation to the following key issues²:-

- (i) The processing of the lease application received from the applicant;
- (ii) The preparation of the offer letter that was made to propose the lease terms;
- (iii) The variation between the land area the subject of the lease and the TLTB records;
- (iv) The de-reservation of the reserve land portion;
- (v) Transfer of lease from the applicant's name (Ulaiyasi Samo) to Inspired Properties Pte Ltd;
- (vi) Failure to follow survey instruction process; and
- (vii) Extra processing fees invoiced into the subject lease after the first offer paid.

[5] Specifically, according to the Witness, the Grievor was interviewed in relation to the following matters:

- (i) The processing fee that was charged to the applicant;
- (ii) The reconciling of the prepared lease documents, with information contained on the case file;
- (iii) Failure to insert the appropriate case number; and
- (iv) A failure to demonstrate integrity in the conduct of his duties.

[6] The Investigating Officer told the Tribunal that as a result of the lease offer document being prepared manually, that a variance to the actual lease area was able to be made, where it was increased from the 2.8686 hectares as contained within the Board's records, to 10.5881 hectares. During cross examination,

² See first report compiled by Investigating Officer at Exhibit E1 (a).

the Witness agreed that she had looked into the lease formation process, and explained the way in which the steps in the process took place, from the Estate Officer Service receiving an application to lease, to having a file created with Tenant ID, the geographical area being examined by the Operations Team and the liaison with the Mataqali or Tokatoka. The Witness also spoke of the site inspection taking place in conjunction with the Estate Officer-Operations, before the file was forwarded to the Senior Estate Officer and then Regional Manager South West for approval. The Witness accepted that the first step of the process did not come through the Grievor and that the lease application process had by-passed him and that it was handled by an Estate Officer, Ms Unise Drauvesi. When asked by Counsel, why the first step was not handled by the Grievor, the Witness responded, that Ms Drauvesi “was assisting when required”. When pressed further on this point as to whether Ms Drauvesi was authorised to undertake this first step of receiving applications, the Witness, stated, “I asked is this documentation part of your role (and was advised that it is) in case services team not there”. The Witness further stated that she subsequently found out that the Estate Officer Drauvesi was acting fraudulently. According to the Witness, her investigation revealed that Ms Drauvesi had accepted the application and created the file electronically, within the Board’s ‘Landsoft’ information system. The Witness stated that Ms Drauvesi created that file on the system and entered it in the name of Inspired Properties Pte Ltd on behalf of its Director, Mr Babu Ganesh. Ms Delai told the Tribunal that in response to the complaint, that the Technical Team visited the landowning unit and discovered that the landowners were still living on the land and that neither the Operations Team nor Technical Team had liaised with the local landowners. The Witness stated that there was no manual file located and no record of any consultation.

[7] Ms Delai agreed with Counsel Tunidau, that the only part of the transaction that the Grievor had a ‘hand in’, was when he was asked to witness the signatures as requested by the former Regional Manager South West, Mr Ela Manuku³. The Internal Auditor, explained the process for how consent of landowners was achieved on lease applications and stated that it required 60 per cent of the persons over 18 years to give their approval. The Witness stated that the Board would not proceed further, if that threshold was not reached and said that the application was provided without the required authorisation from land owners (See Exhibit G1). The Witness was shown the *Application to Lease* document and agreed that it had been processed and stamped by Ms Druavesi, who had witnessed the declaration of the applicant. When asked by Counsel, who had entered the application into the Landsoft System, the Witness initially stated that she could not recall, but said it would have been someone from the services team; however when prompted with her notes, agreed that it was Ms Drauvesi. The Witness was then asked by Counsel, whose password had been used for this purpose and again Ms Delai responded by saying that she didn’t know and that this issue was not covered in her investigation⁴. Again, Mr Tunidau referred the Witness to her own Affidavit at Annexure ‘MD1’ in which the investigation findings make clear that the IT password of the Grievor was used by Ms Druavesi for this purpose.

[8] When pressed as to the circumstances as to why Ms Druavesi had access to the password of the Grievor, the Witness stated that based on her inquiry, that during a supervisors meeting, the Grievor had been instructed by his Manager to provide the password to her. The Witness said that she had tried to contact a supervisor who was in attendance at the Supervisors meeting when the instruction was alleged to have been given, but when she contacted one of them, was advised that this person could not recall. Ms Delai said that she had not sought to find out from the Manager Mr Manuku, whether or not he had actually issued that instruction. The Investigating Officer said that she did find out who else was present at the meeting, however did not follow the issue up with Finau Tabuakuro who also attended at that time. Ms Delai told the Tribunal that she did not see the need to interview other people as it was clear that the

³ At this juncture, the hearing was adjourned to 28 June 2018, in order to enable the various lease documents, inspection précis, lease officer, payment receipts for costs, and agreement for lease and lease surrender documents to be disclosed.

⁴ The Tribunal regards this lack of candour as casting some shadow on the case of the Employer and the manner in which the evidence may have been assessed.

Grievor had breached the IT policy. The Witness did say that arising out of her inquiry, Ms Druavesi was told to use the Grievor's password and that another employee, Manasa Vakabua, was to gain access to another user's password for the same purpose. When asked by Counsel, why as an investigator, that Ms Delai had not clarified this issue with the Manager Mr Manuku or Mr Vakabua for that matter, she responded that there was no reason, and then stated that she did not have Mr Manuku's contact available, nor understood his whereabouts. Ms Delai confirmed that she also did not ask Ms Drauvesi, how was it that she had accessed the Grievor's password to make entries to the Landsoft system.

[9] The Witness was shown the *Inspection, Precis & Recommendation Report* (Exhibit G3), a report prepared as a precursor step to entering into a lease agreement and told the Tribunal that this was prepared by Ms Drauvesi who had entered the information into the Landsoft system. Ms Delai said that she did not ask Ms Drauvesi why it was that she did not utilise her own password for making the entries onto the system. The Witness identified the Lease Offer letter that had been prepared (Exhibit G4) and the list of payments that had been made arising out of the offer letter (Exhibit G5). It was acknowledged that Ms Babu Ganesh had made the payments on behalf of the applicant Ms Ulaiyasi Samo and that this was also an unusual feature. The Witness was shown the Agreement for Lease document (Exhibit G6) and stated that this was issued in the name of Inspired Properties Pte Ltd, rather than the applicant Mr Samo. Ms Delai explained to the Tribunal that normally the *Agreement to Lease* document is drawn up by the Estate Officer-Services, Mr Cebaivalu, however stated that on this occasion it was drawn up by Ms Drauvesi. Mr Tunidau put to the Witness that the lease agreement had been drawn up by Mr Manuku and Ms Drauvesi and that the Grievor's password had been used for that purpose and other than that his only involvement was when he was asked to witness the signatures of that document. In response, Ms Delai did not accept that the Grievor should have relinquished his responsibility so as to not ensure that the correct procedures were followed. Ms Delai was asked as to what was the usual practice when a lease agreement was to be signed by the Manager and she told the Tribunal, that the document would be accompanied by the other supporting documents, but indicated that she had not clarified as part of her investigation whether or not that was the case on this occasion. In response to the questions of the Tribunal, the Witness stated that the Grievor was terminated for two reasons. Firstly, that he shared his password in breach of policy and secondly for witnessing the signatures of the lease agreement. The Tribunal was informed that Mr Manuku had been terminated for his involvement in this process for receiving monies and that Ms Drauvesi was also terminated.

[10] In re-examination the Witness explained that Mr Manuku was not investigated as part of the process, because he was no longer at that time working at the TLTB and that stated that she had no relevant authority to go out and search for someone outside of the Board. Ms Delai told the Tribunal that the Grievor was given the opportunity to explain himself⁵. The Witness clarified that normally in lease offers, there was only one invoice raised, but that on this occasion, there were two lease offers issued⁶, with two separate invoices generated. The Witness reiterated that both offers were issued utilising the computer of Ms Drauvesi, whilst accessing the password of the Grievor. Ms Delai stated that when asked by Mr Manuku to provide the password to Ms Drauvesi, that the Grievor should have told him that he needed another password. The Witness was directed to the interview responses provided by the Grievor on 7 March 2017⁷, where the Grievor made clear that he was unaware that Ms Drauvesi still had access to his password and confronted her in relation to this issue. The Witness was asked did she clarify what was meant by a "supervisor password" and admitted that she did not ask the Grievor what was meant by this expression⁸.

⁵ Note Annexure 24 to Exhibit E1(a) and Annexure 2 to Exhibit E1(b).

⁶ Offers dated 3 March 2017 and 28 April 2017.

⁷ See Annexure 2 to Exhibit E1(b).

⁸ The Tribunal understood that there were 3 supervisor passwords in use at Namaka at that time, allocated to the Grievor, the Assistant Manager and Manager.

Mr Qaranivalu Lutubula

[11] Mr Lutubula is the IT Co-ordinator of the Employer and is responsible for systems architecture, compliance and services. The Witness told the Tribunal that he had received a request from the Senior Internal Auditor to access the audit log of the Grievor’s password as being used on the computer of Ms Drauvesi. Mr Lutubula stated that this was undertaken by structured query language (SQL) inquiries taken off the daily log of transactions archive. The Witness explained the different access levels for the different users of the Landsoft system and said that in response to the request that had been made to undertake an audit, he discovered that there had been a breach of IT policy. Mr Lutubula produced the Audit Log that he had prepared (Exhibit E2) and explained the various items that identified the daily transactions. The Witness explained that he had detected the sharing of the Grievor’s password during the period 11 February 2016 to 13 September 2016 and said that the system requires the password be changed by the user every 30 days. This according to the Witness, would have meant that the password would have been changed by the user on eight occasions. The Grievor was shown a copy of the IT policy circular dated 9 June 2016 (Exhibit E3) that reinforces the need to safeguard password security and said that this was issued in a memorandum each year.

[12] In cross examination, Counsel asked the Witness to clarify the way in which the policy that was referenced within Exhibit E3 was to apply and asked whether a password could be shared for official purposes. Mr Lutubula replied, that the “password is not normally to be shared”⁹ and that another password should have been used should there have been a need for this to be done. It was at this point that the Tribunal sought further information to be extracted from the IT archives. The Witness was asked to produce a report of all computers at the Namaka office that utilised the Grievor’s password during the relevant period. A brief adjournment was allowed for this to take place and for that information to be provided to the Grievor (See Exhibits E5, E6 and E7). The summary report prepared by the Employer reveals that the Grievor’s password had been accessed on 14 of the computers, other than Mr Cebaivalu’s during the 12 month period. It was at this juncture and on the basis that it was clear that the parties needed to examine the documents and their implications to their respective cases, that a short adjournment in proceedings was called. The parties were also encouraged to discuss the possibility of settling the grievance outside of the Tribunal.

Ms Mere Wong

[13] Ms Mere Wong is the Learning and Development Officer, with the TLTB and had prepared an Affidavit that was admitted into proceedings as her Evidence in Chief. The essential thrust of the Witness’s evidence was to chronicle the employment history of the Grievor that included the following disciplinary infractions:-

Date	Event
12 February 2014	Caution letter - wrongful entry of lease rental for lease reference.
30 May 2016	Caution letter – releasing documents to tenant in breach of policy.
18 August 2016	Caution letter – Not carrying out due diligence while supervising the work of his team
29 November 2016	Please explain letter – attendance; failing to take action on cases; non-closure of cases; non-response to client emails and complaints from other staff in relation to management of case files.
23 January 2017	Final warning letter issued.

⁹ The use of the word “normally” is an interesting one and seems to have been preferred to the word “never”

[14] The Witness thereafter identified the relevant procedural steps undertaken by the Employer in issuing the Grievor with a suspension letter, including entertaining his request for a reconsideration of the suspension and the ultimate dismissal decision (Annexure to Affidavit of Mere Work “MW7”). Ms Wong explained the tiered appeal mechanism that was available to employees who had been dismissed in such circumstances and identified within the annexures to her Affidavit, the further correspondence between the parties in this regard. During cross examination, what became apparent was that two of the three persons who had issued disciplinary letters against the Grievor, Messrs Mudunasoko and Manuku, had been dismissed in their employment. Specifically in relation to the lease offer (Exhibit G2), the witness was unable to state, whose responsibility it was to prepare the lease offer form, nor the *Inspection, Precise and Recommendation Report*, or the *Lease Agreement*. Ms Wong was adamant nonetheless, that the Grievor was negligent in his duties and that he should have verified the transaction before agreeing to act as witness to the signatories.

Ms Taravini Waci Murimurivalu

[15] Ms Murimurivalu commenced with the Board as an Estate Assistant in January 2016. The Witness gave evidence that her first role within the Board’s office, was in the Services Team, where she was involved in assisting with the preparation of lease documentation, stamping, creation of leases and tenant ID’s. The Witness told the Tribunal when she first commenced at the Namaka office, that she worked closely with the Grievor and that he had taught her how to create and move cases utilising his laptop. The Witness said that she would need to have ‘super user access’ on the Grievor’s computer, in order that she could undertake these tasks. The Witness gave two occasions when she did seek and gain access to the Grievor’s password for the purposes of creating and moving files. The first occasion, she said was in response to the request made by the former Senior Estate Officer, who was wanting to create a file number to facilitate a payment and the Grievor was not at work. On that occasion, the Witness recalls telephoning the Grievor at the request of ‘Koli’ to access this password. On the second occasion that the Witness recalled, she was required to access the Grievor’s password to move a file, however his password had expired. The Witness claimed that Mr Cebaivalu provided her with a new password to complete the task. Ms Murimurivalu indicated that whilst it was not her job to create new file numbers on the Landsoft system, that she would do so under the Grievor’s leadership up and until the date of his termination. During cross examination, the Witness agreed with the proposition that she had been told as part of her induction training, that IT passwords were not to be shared, but nonetheless still borrowed the password of the Grievor. Mr Tunidau took the Witness to the summary of users that had utilised the Grievor’s password (Exhibit E5) and Ms Murimurivalu sought to deny the fact that she had herself accessed the Grievor’s password from her own computer. In response to specific dates identified by the Grievor’s Counsel, the Witness claimed not to know what those occasions related to, however claimed that for a period of time in June 2016, the Grievor had accessed her computer, as his was under repair in Suva. The Witness refuted the suggestion by Mr Tunidau that the Grievor had not provided her, with his password.

[16] In re-examination, Ms Murimurivalu suggested that the Grievor never gave her advice as to how to do her work¹⁰, although appeared to later admit that he did teach her how to do some of his work. The Witness told the Tribunal that she would invariably rely on the Estate Operations Manual (EOM) and said that she would be required to create up to five files a day, on the Grievor’s computer.

The Case of the Grievor

[17] The Grievor, Mr Rusiate Cebaivalu, jointed the TLTB on 5 September 2011 and holds a Bachelor’s Degree in Land Planning and Real Estate. According to the Witness upon his commencement with the Board he received no induction training and clarified that there was not an induction process for an Estate Officer.

¹⁰ That seems quite contradictory to the available evidence.

The Grievor provided an account of the steps involved in the leasing process and explained at what stage of the process, the Landsoft system generated a case file for the actioning by the various departments. The Witness explained the processing of 'type 1' (department) applications, that included ascertaining from the geographical information system (GIS) whether the land is available and thereafter approaching the landowners to consider whether they were amenable to entering into a leasing arrangement. Mr Cebaivalu stated that the de-reservation process (that is an application under the relevant legislation that allows a request to put land "outside the reserved area" into the reserve so that it can be leased out) required 50.2 per cent approval in order for it to proceed. The Witness said that in the case of an expired lease that this would go to the landowners for approval, after which time a physical inspection and demarcation of the land would be undertaken using a GPS system. Mr Cebaivalu explained the way in which the co-ordinates were overlaid on the land map to determine whether the lease area was available or not. He stated, that otherwise, there would be a need to produce a locality plan and give to the Type 1 team for further investigation. The Witness stated that the preparation of the *Inspection, Precis and Recommendation Report* was undertaken by the Estate Officer of the Type 1 team and that his former department had nothing to do with the preparation of that document. Mr Cebaivalu said that once the précis was approved, it would go to the services team for the creation of a lease offer that was signed by the Regional Manager. According to the Grievor, the lease offer was created through the Landsoft system, though previously had been created manually.

[18] Mr Cebaivalu explained that an *Agreement for Lease* document was subject to survey, in which a locality plan was produced and this was prepared in 2016 by Peni Raiwailui. The evidence was that the final lease document was signed by the Regional Manager on behalf of the Board, and the tenants, then stamped and sent to the Registrar of Titles. In relation to the application for lease in question (Exhibit G2), the Grievor made clear that the document was vetted by former Estate Officer Drauvesi and that his department had nothing to do with the lease application. The Witness was shown page 2 of that document that indicated the application had been received by Ms Drauvesi on 13 January 2016 and reaffirmed that normally that function would be undertaken by his office¹¹. Mr Cebaivalu was quite clear that he did not process this application. The Witness confirmed that the 'precis' form (Exhibit G3) should have been prepared by the Type 1 team, in which Ms Drauvesi was a member. The Witness confirmed that he would not know on the face of that document, whether any consultation with the landowners had in fact occurred. The Witness was shown Exhibit G4, the lease offer and again indicated that this document was not prepared by his department. The Witness was shown documents Exhibits G5 and G6 and indicated that he was unaware of the payments made and also had no involvement in the preparation of the lease document.

[19] In relation to the witnessing of the signatures to the lease document, the Grievor stated:

I was not familiar with the case. I was called into Regional Manager's room –summoned to his room. In the room with Regional Manager and Mr Babu Ganesh.... When I walked in to take seat, the Regional Manager explained cost of lease and discussed lease.... Regional Manager signed, Mr Babu Ganesh stamped and signed. I then took it and signed and stamped it as well.

¹¹The witness was withdrawn at this point, because the Tribunal wanted to make sure with Counsel that the evidence was going to deal with the specifics of the case and not the general manner in which applications are processed.

[20] The Witness told the Tribunal that any Estate Officer could be called to witness the signing of a lease document. The Witness was referred to the Estate Operating Manual (EOM) (See extract at Exhibit G8) – in which the process for the approval of ‘type 1’ lease applications was contained. Mr Cebaivalu stated that this procedure was to apply before the lease document is forwarded to the Executive, although was of the view that the paragraph would not apply if the lease document had not been prepared by his department and considered that the Estate Officer –Operations (Ms Drauvesi) if undertaking the task in conjunction with the Regional Manager, should have abided by the relevant procedural steps contained within the EOM. The Grievor reiterated that he was of the view that the lease document was in order, when he was contacted by his then Regional Manager to witness the signature.

[21] In relation to the issuing and accessing of the supervisor passwords, the Witness recalled a meeting of the senior estate officers and other heads of departments and supervisors (the supervisors meeting), at which time he was issued with a password for the sake of urgency, so that staff could resolve the task of dealing with a large number of lease applications. According to the Witness, they were given a pass code, from which they created their own passwords. Mr Cebaivalu stated that he never gave his password to Ms Murimurivalu. When shown Exhibit E5, the Witness could not explain the reason that he had not accessed his computer utilising his password over the period 3 March to 31 March 2016 and 27 June to 13 July 2016. The Witness agreed to the fact that he “shared password in the presence of others only to do so for that task alone”.

[22] In cross examination, the Witness was taken to the flow chart diagram in Exhibit G8 (extract from EOM), and accepted that the paragraphs 3 and 14 within the EOM were referring to the Estate Officer –Services’ role. The Grievor accepted that ordinarily that his office would be responsible for the lease offer. The Witness conceded that there was nothing on the initial application made by Mr Samo (Exhibit G2) to show that the document had been vetted or checked. Discussions ensued and the Witness was withdrawn, to canvas the apparent contradictory nature of the oral evidence given in relation to the signing of the lease agreement, when contrasted to that earlier made by the Grievor in his appeal applications, wherein he stated that at the time of being summoned to attend the meeting with the Regional Manager and Mr Ganesh, that they had already signed the document¹². In response to questions from Ms Raitamata of Counsel, the Witness indicated that it was only one occasion that he had shared his password with Ms Drauvesi and he also accepted that the password would be changed in response to a notification that was automatically generated.

[23] Counsel Raitamata and then Cati, took the Witness to specific dates within the audit log entries contained at Exhibit 5 and correlated certain dates to those in which he had been recorded as being absent from leave. For example, 18 March 2016, when it was recorded that a computer user named Maka had accessed the password on 4 occasions on that date. Other dates identified were 31 August 2016 and 5 September 2016, in which whilst on leave, the Grievor’s computer had been accessed for 22 and 12 transactions respectively. Against that evidence, the Witness maintained that he didn’t give any staff his password. The Tribunal then asked of the Grievor whether he could identify the various sections that the staff named within Exhibit E5 were employed and he responded, by stating that there was a range of employees in the Type 1 Team based at either Nadi or Nadroga; and in the Arrears or Payments sections.

Closing Submissions of the Parties

¹² Refer to Affidavit of Evidence in Chief of Rusiate Cebaivalu (Exhibit E11) at Para 2; See also submissions within Employer’s Supplementary Bundle at Documents 14, 16 and 21.

[24] In his closing address, Mr Tunidau reinforced that there were three grounds that the Employer was relying upon in justification of the dismissal decision. The first, dealing with the failure to check and verify documents; the second in the wrong area size the subject of the lease document and the final matter, being the sharing of a super-user password in breach of IT policy. Counsel submitted in the first investigation report prepared by the Acting Internal Audit Assistant, a Mr Waisea Delai that the recommendation was that the Grievor should be issued with a final warning. The two primary themes running through the oral closing submissions, dealt with the fact that the Grievor only ever admitted to providing his password to another employee on one occasion and that the rest of the time, his computer access would have been given under supervision for training and support purposes. And secondly, that the Grievor was not involved in the transactions that gave rise to the lease agreement being executed between the TLTB and Inspired Properties Pte Ltd and that he only witnessed the signature on the assumption that he was doing no more than that.

[25] The Employer on the other hand, makes the point that the issue of trust and the importance of the integrity of its officers is fundamental to its role and the confidence that must be had in the institution. The Employer through its Counsel, submit that it is just not credible to accept that the Grievor had only provided his password to another employee on one occasion and instead signals this conduct, together with his previous disciplinary infractions as evidence of gross negligence as an employee. Mr Cati made clear that at the time of the dismissal, the Grievor had already been on his last warning and had his salary reduced as part of the penalty by the Employer. The Employer reinforced the lack of explanation that the Grievor could give in the case where his password was used by others to access computers, even on days when Mr Cebaivalu was not at work.

[26] In reply, Mr Tunidau affirmed to the Tribunal that some of those involved in issuing the recent disciplinary actions against the Grievor, were themselves dismissed in their employment. The case of the Grievor being that there were many questions that remained unanswered or unexplored as a result of the fact that several of these key personnel had themselves been dismissed.

Is the Dismissal Decision Justified?

[27] The test for justification of dismissal is well known and the jurisprudence within Fiji has some quite distinctive characteristics that sets it apart from countries such as New Zealand, Australia and England, for example. What needs to be ascertained is whether there is a valid and reasoned decision that formed the basis for the dismissal. The Employer relies on three grounds within its dismissal letter dated 28 March 2017:

1. That (he) failed in (his) responsibility as Estate Officer Services at the time to check and verify all the necessary documents in the land file for lease reference 4/10/41014 against the records in the Landsoft system when (he) witnessed the Agreement for Lease to Inspired Properties Pte Ltd;
2. That (he) did not demonstrate integrity when (he) received instructions from former Regional Manager South West (Ela Manuku) without highlighting to him that the Lease Offer was manually prepared; area in Landsoft is only 2.8686 ha when the AFL has 10.5881 ha and that the Board did not charge a Premium for the commercial lease.
3. That (he) seriously breached the TLTB IT Policy when (he) shared (his) Landsoft password to Estate Officer Drauvesi. (He) was well aware of several instructions via circulars on the Board's zero tolerance policy on the sharing of IT access passwords for the very reason that dishonest employees use this to their advantage.

Failure to Review Documents Before Witnessing Signature

[28] The Grievor has freely admitted that he had not reviewed the documents relating to the entering into of the lease agreement. That simply was not the context in which the Grievor found himself in. The entire process had been undertaken by others and at the point in time when he was called into the office of his manager, the Grievor saw his role, whether rightly or wrongly, to do no more than complete a request to witness the signing of a document¹³. One only needs to read the language of the findings of the *Internal Investigation Report* dated 20 March 2017 (Exhibit E1 (b)), to understand that the investigator had no issue whatsoever with Ms Drauvesi undertaking the task of processing a lease application. The objection was only in the manner in which she went about that task. The extract of the EOM (Exhibit G8) at Paragraph 24, imposes no specific requirement on the Estate Officer - Services to witness any document. In this case, the Grievor's involvement in the process had been bypassed. Whilst Paragraph 23 of the EOM provides that the "EO should ensure that the lease document is proper and correctly compiled before the document is forwarded to SEO or Regional Manager for signing", in this case that step had already been concluded. The Investigation Report seems to overlook this procedural step.

[29] If the lease document was already either signed or about to be physically signed by the parties, how could it be the case that the Estate Officer – Services could be held accountable up to that point in time¹⁴. The Investigation Report appears to raise Step I within Paragraph 23 of the EOM with Ms Drauvesi, but thereafter seems to not focus on that issue. The generic use of the term Estate Officer within Paragraph 23, cannot be overlooked. How did that prepared lease agreement make its way to Mr Manuku and Mr Ganesh for signature? If the Grievor was not involved in that step, is the Employer saying that there are no other Estate Officers who could have processed the lease documents to that stage? That was an unclear position based on the evidence. None of the witnesses for the Employer were technical experts. Neither Ms Delai or Mr Delai in their investigation reports appeared to take issue with the fact that Ms Drauvesi was processing the lease application, only that she was doing so with an apparent bad intent. Ms Wong, the human resource expert, simply did not know the detail of the workings of the activities and the IT expert Mr Lutubula was also not a content expert. This really only left the Estate Assistant Ms Murimurivalu, who simply was not asked the questions in relation to procedure. Whilst Counsel Cati did, to his credit, attempt to piece together the jigsaw that he had, that is simply not the way that an employer should mount its justification arguments, where a worker has been terminated at work. The Tribunal cannot rely on guess work in such serious matters. The Tribunal does not accept based on the specific circumstances of this case, that there was an obligation on the Estate Officer-Services to "*check and verify all the necessary documents in the land file for lease reference 4/10/41014 against the records in the Landsoft system*" prior to witnessing the lease document, given that the document had already been submitted (presumably by another Estate Officer) to the Manager for signature. Of course, one may have thought how did the case reach this stage, when I have had no involvement in it, however there is no evidence whatsoever that this was the first case of its kind where the file and lease agreement was

¹³ It really does not take the matter much further whether the document was signed in the presence of the Grievor or whether the parties had just signed the document, although one would hope a witness to a signature would at least be doing that.

¹⁴ The issue of password sharing aside for one moment.

processed by a person other than Mr Cebaivalu.¹⁵ And the other point is, that the evidence of the Grievor that “any Estate Officer can witness the lease agreement” has not been refuted by the Employer, albeit that Counsel for the Employer has argued that the EOM should not be interpreted along those lines. The EOM seems to deliberately draw the distinction between the role of the Estate Officer (where the term is generically expressed) and that of the Estate Officer –Services. That distinction cannot be assumed away. The Tribunal does not believe that this ground has been fairly established in the circumstances.

Failure to Demonstrate Integrity

[30] This second ground, alleges that there had been a failure of integrity of the Grievor when he received instructions from the area Manager to witness the signature of the lease document, having regard to the land size; the fact that the lease offer was manually prepared and that a commercial premium for lease had not been secured. The Grievor admits at the outset, that he was presented with nothing other than the request to witness a signature. There was no file that he was asked to vet, as the process had already passed that point. The Grievor’s conduct may have been foolish and unwise, but there is simply no demonstration of a lack of integrity. That language is suggestive of some ethical or moral shortfall and the Grievor has certainly demonstrated none of those qualities. The Tribunal made clear several times in its questioning of Counsel for the Employer, as to whether or not it was being alleged that in some way that the Grievor had secured some financial benefit or secret commission arising out of this transaction. The Employer’s Counsel was quite clear that no such claim was being levelled against the Grievor. Against that backdrop, the ground of there being a failure to demonstrate integrity, simply cannot be substantiated.

Sharing of IT password in breach of policy

[31] This is the most significant breach arising out of the factual evidence, albeit that when the Tribunal requested that a special IT report be prepared showing how many of the Employer’s computer users had accessed the Grievor’s password, it revealed a widespread disregard by staff in relation to the policy. Again here, it is a little like the war-time military defence, where people may say that they are doing nothing more than following the instructions of their superior officers. In this case, the Employer had an IT policy that was clear and unambiguous and the reasons for having protected and hierarchical access rights, is simple enough to understand. But what should a worker do, where she or he is being instructed to give a co-worker access to his account to undertake a particular project, in this case the closing out of old files. The Grievor should not have given the password and the IT department should have instead been required to entertain the business case for why a temporary super-user access for the relevant works, could not have been issued. As an aside, an interesting further investigation into the usages of the other super-user passwords at that time, may also produce similar results. In any event, in his evidence, the Grievor claimed that he had only given his password out to Ms Drauvesi on one occasion, although the evidence suggests that he did confront that person when he apprehended her having accessed his account in the South West Boardroom in the presence of another officer¹⁶. Whilst neither party sought to adduce evidence in relation to that incident, insofar as they failed to call the relevant officer Mr Vakabua,

¹⁵ In this regard, the procedure itself seems to indicate that the flowchart had been modified on 19 January 2015 to accommodate some variation to past practice.

¹⁶ See for example, submissions on summary appeal dated 18 March 2017 (Annexure “MW 9”).

again it is nonetheless evidence that is unrefuted by the Employer. Of course, the evidence of Ms Murimurivalu, is that whilst acting on instructions from senior officers, that she had cause to gain access to the Grievor's IT password in order to complete certain tasks. The Tribunal is inclined to think that this may have occurred on at least one of those occasions, in an emergent situation and of course, one would have thought that any ongoing exposure to risk, would have been easily closed down, in the case where the Grievor simply requested a change of password immediately thereafter.

[32] The evidence that the Tribunal requested from the Board has revealed that up to 14 persons potentially had breached the IT policy in the period January to December 2016. That is not to diminish the allegation, but only to place it in context. This ground has been made out, although it would seem to have been made out against a large number of employees working at the Board.

Other Considerations

[33] There are some other general observations that need to be made. Firstly, the complainant who brought this wrongdoing to the attention of the TLTB, is said to be the aunt of the Grievor. Without placing too fine a point on such matters, it would seem, that in most cases, a family member would not be deliberately wishing to bring harm to the economic and property rights of another family member, particularly if there was no gain to be made by doing so. In addition, it is noted within the materials, that the Grievor claims to have a long family association with the Board, insofar as his grand uncles were former chairpersons of the Board, that his uncle is a current board member, that another uncle was a former General Manager, Legal and that his own mother was the former Board Secretary and Manager, Research and Development.

[34] It would be unusual, in such circumstances, if the Grievor was to have such disregard for his family's involvement in the activities and history of the Board, that he would have deliberately conducted himself in a manner that was inconsistent with the objects of the organisation. Mr Cati characterised the Grievor's conduct as gross negligence, however in light of the above, the Tribunal cannot see how that can be said. At worst, the Grievor could be said to have been naive, unthinking and not very astute when he unwittingly agreed to witness the signing of the Lease Agreement. At the other end of the continuum, it may be said that as one of a number of Estate Officers who were capable of witnessing a signature, he was at that time, being required to do no more than that. Whichever end of that continuum his behaviour may be placed, he was not attesting to the integrity of the agreement, that task was presumed to have been undertaken by those charged with that task at Paragraph 23 of the EOM. The Grievor was doing nothing more on this occasion, than witnessing a signature. Whether alarm bells should have rung, is otherwise hard to say. If the EOM wanted Estate Officers to refrain from witnessing signature at Paragraph 24 step IV, until such time as they had verified the documents on a file, that extra step could easily be written into the EOM. The fact remains that no such step is set out. That obligation is to take place by the Estate Officer referred to in Paragraph 23 step IV. As has been said throughout this decision, the Grievor was not involved in that process. He was called into the office of his manager, to facilitate an activity in accordance with Paragraph 24 step ii of the EOM.

[35] Further, there is no evidence before the Tribunal as to whether the conduct of Messrs Manuku, Mudunasoko and Ms Drauvesi, was of such a nature, that the Grievor should have been suspicious of their behaviour, so as to have refused to witness the document in these circumstances, although a

perusal of the investigation reports, gives the impression that there was a range of irregular dealings taking place in the Nadi office around that time.

[36] The Tribunal does not believe that the dismissal was justified on the basis of the grounds set out within the dismissal letter. In *Kumar v Nanuku Auberger Resort Fiji*¹⁷, 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. 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,¹⁸ 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

¹⁷ [2017] FJET 2

¹⁸ See [1995] IRCA 333;62 IR 371 at 373

decision was sound, defensible or well founded; not capricious, fanciful, spiteful or prejudiced.

[37] The Grievor was on his final warning from the Employer, although it is really hard to appreciate how valid some of those complaints that formed the dossier of Ms Wong's Affidavit really were, given that some of the protagonists are now themselves dismissed employees and their motivations for agitating such issues, now under some cloud. Whether the Grievor was aware of wrongdoings by others remains to be seen, however at best the justification for dismissal based on performance grounds, if that was to be the course to follow, would have been the fairer and more defensible position for the Employer to adopt.

[38] The Grievor has had a series of performance related complaints levelled against him and the Employer is quite entitled to raise these issues with him. In the instant case, the Grievor seems to have lacked the assertiveness to say "no" to people. That may be a consequence of his character and it also may be because of the other non-work related issues that he is preoccupied with, particularly caring for his mother. That issue and the drain of caring for a family member who is seriously ill, should not be overlooked by anyone. Certainly nowhere within the Employer's materials is there any recognition of that issue and whether or not, this may have in some way distracted the Grievor in the performance of his duties.

Conclusions

[39] The termination of the Grievor should not have taken place in a summary fashion, based on the available evidence. It is likely though, that the Grievor would have needed to improve his performance if he was to remain with the Employer. Again, it would seem at a personal level, that Mr Cebaivalu had a lot of distractions that simply had impacted on his capacity to perform and likely his energy levels as well. The extracts from the EOM were unclear and Counsel for the Employer could not confidently clarify the roles and responsibilities within it. The expression Estate Officer is used generically within the document and the role of Estate Officer –Services is on occasions used exclusively. It should not go unnoticed that in relation to the witnessing of the lease document, the generic expression is used.

[40] The Employer has not acted justifiably in summarily terminating the Grievor, though the Tribunal will not intervene in the dismissal decision. The relationship is at an end and the Grievor needs to consider where his future skills sets and abilities should be directed. He is clearly an intelligent and hard working person, who has demonstrated many great qualities in caring for his mother. The failure to provide a proper process for bringing the employment relationship to an end has been prejudicial to the Grievor. He has been denied an opportunity to canvas the issues in a measured and objective fashion. The Employer's appeal process also seems wanting. The failure to provide any reasons in justifying the dismissal decision by the manager reviewing the appeal, demonstrates a very hollow mechanism in place. To simply tell someone that "I stand by the Management's decision to summarily dismiss you", lacks any transparency and would hardly provide any confidence that the appeal process is a legitimate one.

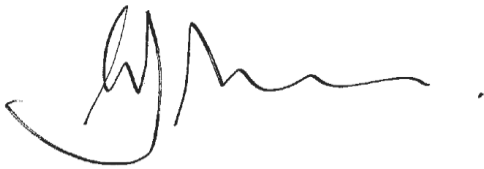
[41] In *Peni Koro Lagi v Calm Fire Professionals*¹⁹, the Tribunal found that there are a variety of considerations that can be relied upon when making a determination as to what would be an appropriate amount of compensation to be awarded to a Grievor, in the case where it has been established that she or he has been unjustifiably dismissed in employment. These would include: the length of service with an employer; the likely remuneration received if the employment had continued; attempts made to mitigate any loss of income; any other income received by the Grievor prior to any decision being reached by the Tribunal; the capacity of the employer to pay; and any other special features of the case. The Grievor had been

¹⁹ [2018] FJET 4; ERT Grievance 183 of 2017 (4 January 2018)

employed with the Employer since 2011. Because of the circumstances as to how the dismissal came about, the Grievor should be provided some benefit to offset the immediacy of the decision and the failure to properly canvas the issues with the Employer. The Grievor was suspended and then left without pay. It is understood that he has not been able to find suitable employment to date, and that there is always some stigma associated with the termination of employment. An amount of six month's salary will be awarded in the circumstances. That figure is to be based on the annual salary of \$29,198.00, providing for an amount of \$14,599.00. In addition, the Employer should issue a Statement of Service to the Grievor. In the circumstances of this case, each party is to bear their own costs. An Order to give effect to this decision will be issued to the parties.

Decision

[42] It is the decision of this Tribunal that the summary dismissal of the Grievor in his employment was not justified and that the Employer should pay Rusiate Cebaivalu compensation in the amount of \$14,599.00 within 28 days hereof.



Mr Andrew J See
Resident Magistrate