AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO. 4 OF 2006

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In the Dispute Between

FIJI PUBLIC SERVICE ASSOCIATION

and

AIRPORTS FIJI LIMITED

FPSA	:	Mr R Singh
AFL	:	Mr V Qoro

<u>DECISION</u>

This is a dispute between the Fiji Public Service Association (the "Association") and Airports Fiji Limited (the "Employer") concerning the refusal by the Employer to re-instate the salary of Mr N G Singh (the "Grievor").

A trade dispute was reported by the Association on 29 May 2002. The report was accepted on 29 July 2002 by the Permanent Secretary who referred the

Dispute to a Disputes Committee. As the Employer failed to nominate a representative to the Committee, the Minister authorized the Permanent Secretary to refer the Dispute to an Arbitration Tribunal for settlement pursuant to section 5A(5) (a) of the Trade Disputes Act Cap 97.

The Dispute was referred to the Permanent Arbitrator on 29 August 2002 with the following terms of reference:

> ***"...... For settlement over the alleged refusal on the part of Airports Fiji Limited to re-instate Mr N G Singh's salary effective from 13 September, 2001".***

The Dispute was listed for preliminary hearing on 3 October 2002. On that day the parties were directed to file their preliminary submissions by 14 January 2003 and the Dispute was listed for hearing on 31 January 2003.

The Association filed its preliminary submissions on 8 January 2003 and the Employer filed its submissions on about 21 January 2003.

When the Dispute was called on for hearing the parties requested that the hearing date be vacated to allow further time for settlement discussions. The Tribunal vacated the hearing date and directed that the Dispute be relisted for mention on a date to be fixed.

The Dispute was listed for mention on 3 April 2003 and again the parties requested further time to continue settlement discussions. It would appear that over a prolonged period of time protracted discussions were not able to bring

about a resolution of the Dispute. As a result the Dispute was listed for mention on 27 May, 24 June and 30 September 2005.

The Dispute was listed for hearing on 3 November 2005. The Employer was not in a position to proceed on that day and as a result the hearing commenced on 7 November 2005 in Suva. Each party called one witness. At the conclusion of the evidence the parties sought and were granted leave to file written final submissions.

The Association filed its final submissions on 21 November 2005. The Employer filed answering submissions on 7 December 2005 and the Association filed a reply submission on 26 January 2006.

The Grievor commenced employment in the civil service in 1962 as a trainee cadet in the civil aviation sector. He was employed continuously in the civil service until May 1999. Following the re-organization of the Civil Aviation Authority of Fiji (CAAF) the Grievor was one of 283 former CAFF employees who were re-employed by the Employer as a result of a Direction by the then Minister for Public Enterprises dated 9 June 1999 and set out in Legal Notice No.75 of 1999.

The Employer is a Government Commercial Company under the Public Enterprises Act 1996. It is by definition a company in which the Government owns 100% of the equity. It took over the operational business of CAAF whilst the Civil Aviation Authority of Fiji Islands (CAAFI) took over CAAF's regulatory functions.

The Grievor's terms and conditions of employment whilst he was employed by CAAF up until May 1999 were those set out in a Collective Agreement dated 7 August 1998 between CAAF and the Association.

In Fiji Public Service Association – v – Arbitration Tribunal and Airports Fiji Limited (Civil Appeal No.10 of 2003 delivered 19 March 2004) the Fiji Court of Appeal observed at page 6 in paragraphs 17-18:

> ***"Counsel for Airports accepted, in our view correctly, that this correspondence, and particularly the directors' minute, established that Airports had agreed that the Agreement applied to it.***
>
> ***If follows that the Arbitrator and the Judge erred in law in their conclusion that the issue was governed by the earlier judgement and by their failure to have regard to the events that occurred between the Union and Airports subsequent to the judgment".***

As a result this Tribunal has had no hesitation in concluding in a number of disputes that the terms and conditions of employment of those 283 former CAAF employees who were re-employed by the Employer with effect from 26 May 1999 were those set out in the 1998 Collective Agreement between CAAF and the Association.

The Employer has submitted that it is not bound by the Agreement and has, through an appeal in a subsequent matter, placed the issue before the Court of Appeal for further consideration. However, the Tribunal sees no reason why it should not accept the Court of Appeal's conclusion as correctly stating the legal position. After all the concession which lead to the Court of Appeal's conclusion was made by Counsel for the Employer.

Furthermore, it is noted that the Employer did not seek to challenge the Court of Appeal's conclusion by way of an application for leave or special leave to appeal to the Supreme Court.

In September 2001 the Employer ceased paying the Grievor. His last fortnightly pay was paid on 10 September and he was paid up to 13 September 2001.

At the time of this occurrence the Grievor was on in patient sick leave which had commenced on 1 March 2001 pursuant to clause 4.21.4 of the Collective Agreement which states:

> ***"An employee undergoing treatment as an in-patient in a hospital, or required by a registered medical practitioner to convalesce at home shall be granted paid sick leave of up to forty two (42) days in a leave year".***

This entitlement covered the Grievor up to 12 April 2001. By letter dated 7 May 2001 the Employer wrote to the Grievor concerning his sick leave entitlements. Omitting formal and irrelevant parts, this letter stated:

> ***"It is noted that you are currently certified as medically unfit until 11/5/01.***
>
> ***You are required to undergo Medical Board examination in accordance with Clause 4.21.5 of your Terms and Conditions of Service as you have already exceeded your 42 days in-patient sick leave entitlement on 12/4/01".***

The letter directed the Grievor to attend a medical board examination on 10 May 2001 at 10.00am.

Clause 4.21.5 of the Collective Agreement states:

> ***"Furthermore, on the recommendation of a Medical Board, nominated by the Authority in consultation with the Association, the employee shall be granted in-patient sick leave up to a maximum of one hundred and eighty(180) days on full salary".***

At this stage it should be noted that it appeared, at least for the purposes of this Dispute, that the 42 days referred to in clause 4.21.4 were included in the 180 days referred to in clause 4.21.5. In other words the entitlement to in-patient sick leave was a maximum of 180 days.

By letter dated 11 May 2001 the Medical Board reported back to the Employer in the following terms:

> ***"Thank you for asking us to see Mr N G Singh for in-patient sick leave. The Board is of the opinion that Mr Singh should be granted in-patient leave until the operative procedures is carried out. We believe this is being facilitated at a hospital in New Zealand soon".***

In accordance with clause 4.21.5 the entitlement to in-patient sick leave expired on 1 September 2001.

Although the Employer gave no reasons at the time for stopping the payment of wages with effect from 14 September 2001, the reason is clearly stated on page 4 of its preliminary submissions:

> ***"Mr Singh's salary was ceased on 10 September 2001 after AFL found out that he had exceeded his in-patient sick leave of 180 days".***

In fact the operative procedure referred to the Medical Board's report was not performed until 29 October 2001. The Tribunal is satisfied on the evidence presented that this delay was in no way attributable to the Grievor.

Although the Grievor's entitlement to in-patient sick leave came to an end on 1 September 2001, there is a discretion given to the Employer under clause 4.21.6 to grant further in-patient sick leave to the Grievor. This clause states:

> ***"Thereafter, further in-patient sick leave of up to one hundred and eighty (180) days with full or reduced salary, may be granted at the discretion of the Authority".***

Considering the recommendation of the Medical Board and the fact that the delay in the performance of the surgical procedure was not brought about by the Grievor the Tribunal has concluded that the Employer should have exercised its discretion in favour of the Grievor and paid further in-patient sick leave at full salary at least up till the date of the surgery, ie. from 14 September to 29 October 2001.

The only remaining issue is to determine whether the Employer should have exercised its discretion and paid to the Grievor either his full or a reduced salary for some or all of the balance of the 180 days after the 29 October 2001. The 180 days entitlement under clause 4.21.6 would have come to an end on 28 February 2002.

The Employer had apparently exercised its discretion under clause 4.21.6 and decided not to pay any further in-patient sick leave after 13 September 2001.

In its preliminary submission the Employer submitted that there were two reasons why it had discontinued in-patient sick leave payments to the Grievor.

First, the Employer submitted that due to his active involvement in Union activities the Grievor must have falsified his sick leave to justify his absence from work.

In the course of the hearing the Grievor gave evidence about his level of involvement in Union activities during this period. He acted as Secretary, was not paid a salary, only allowances and remained based in Nadi, travelling to Suva once a week. The Employer's witness, Mr Nath, did not take the matter any further. The Employer's closing submission does not refer to this aspect of the Dispute.

The Tribunal is satisfied on balance that the Grievor's activities did not provide any basis for the Employer's decision to discontinue the payment of in-patient sick leave under clause 4.21.6.

Secondly, the Employer appears to be relying on the fact that between 13 June 1999 and 10 September 2001 the Grievor was absent from work for more than 380 days on one type of leave or another. The Grievor gave detailed evidence concerning these absences. The leave taken was either long service leave, annual leave, sick leave or leave without pay. It was not disputed that the Grievor was doing no more than taking leave to which he had become entitled. Mr Nath did not take the matter any further and the Employer's closing submissions did not expressly refer to this matter.

The Tribunal is satisfied that this was not a matter which would in any way justify the Employer's decision to cease in-patient sick leave payments. Indeed it

would not be a valid reason for deciding not to exercise its discretion under clause 4.21.6.

The Employer has also submitted that the Grievor had not formally requested payment under clause 4.21.6 It must be noted that there is no express requirement that the Grievor must formally apply. The clause simply allows for the continuation of the in-patient sick leave payments under clause 4.21.5 for up to a further 180 days on either full or reduced salary at the discretion of the employer.

The discretion relates to two distinct matters. First, there is a discretion as to whether the Grievor is to be entitled to further in-patient sick leave for a period of up to 180 days. Secondly there is a discretion as to whether the Grievor is to receive his full or a reduced salary during the period of leave which has been granted.

The Tribunal has noted the contents of the Report dated 1 November 2001 from Mr John McKie, his subsequent Report dated 20 November 2001, the Report dated 3 December 2001 from the Physiotherapist Jo Hopkinson and the Report dated 16 February 2002 from the Diagnostic & Specialist Medical Centre in Nadi. The Tribunal is satisfied that the contents of these Reports were known to or ought to have been known by the Employer.

The Tribunal is satisfied that these Reports showed that the Grievor remained unfit to work at least until the beginning of March 2002. As a result the Tribunal is satisfied that the Reports were sufficient to entitle the Grievor to continue to receive in-patient sick leave payments up to the end of February 2002 being the full 180 days allowed under clause 4.21.6.

The Tribunal is also satisfied that taking into account the Grievor's 40 years employment, his good work record and in the interest of good employment relations practices, the Grievor should have been paid the in-patient sick leave entitlement at his full salary for the 180 days up to 28 February 2002.

AWARD

The Grievor is entitled to be paid in-patient sick leave payments for the period 14 September 2001 to 28 February 2002 at his full salary in accordance with clause 4.21.6 of the 1998 Collective Agreement.

DATED at Suva this 8th day of February 2006.

W. Calanchini

ARBITRATION TRIBUNAL