# AWARD

# OF

# THE ARBITRATION TRIBUNAL

# OF

# THE REPUBLIC OF THE FIJI ISLANDS

# NO. 34 OF 2006

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## THE ARBITRATION TRIBUNAL

In the Dispute Between

## FIJI BANK AND FINANCE SECTOR EMPLOYEES UNION

and

## FIJI NATIONAL PROVIDENT FUND

## DECISION

This is a dispute between the Fiji Bank and Finance Sector Employees Union (the "Union") and Fiji National Provident Fund (the "Employer") arising out of an agreement signed by the parties and dated 8 December 2004.

A trade dispute was reported by the Union on 10 February 2005. The report was accepted on 16 August 2005 by the Chief Executive Officer who referred the Dispute to a Disputes Committee.

The Tribunal notes that the delay in accepting the report was due to a pending appeal dealing with the validity of the Trade Disputes Act (Amendment) Decree 1992.

As the Employer failed to nominate a representative to the Committee, the Minister authorized the Chief Executive Officer 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 21 September 2005 with the following terms of reference:

> ***"..... for settlement over FNPF's failure to pay salary increases in accordance with the agreement dated 8 December 2004".***

The Dispute was listed for a preliminary hearing on 30 September 2005. As there was no appearance by the Employer the Dispute was relisted for mention on 28 October 2005. On that day the parties were directed to file preliminary submissions within 21 days and the Dispute was listed for further mention on 25 November 2005. The Dispute was subsequently listed for hearing on 17 January 2006.

The parties filed their preliminary submissions on 18 November 2005.

The hearing of the Dispute commenced on 17 January 2006 in Suva and was completed on 18 January 2006. The Employer called two witnesses and the Union called one witness to give evidence. At the conclusion of the evidence the parties sought and were granted leave to file written submissions.

At the Tribunal's request, the dispute was listed for mention on 23 January 2006. On that day the Tribunal raised with the parties certain issues relating to the terms of reference, the meaning of clause 2 of the Agreement dated 8 December 2004 and the evidence adduced at the hearing. The Dispute was listed for further mention on 6 February 2006 to enable the parties to consider these issues.

On that day the Tribunal's direction concerning the schedule of dates for the filing of final submissions was vacated and the parties had further discussions with the Tribunal. The Dispute was listed for further mention on 20 and 24 February 2006. The parties were directed to file written submissions on the meaning of clause 2 of the Agreement dated 8 December 2004 by 24 March 2006.

The Employer filed its submissions on 15 March and the Union did so on 28 April 2006.

These submissions were requested by the Tribunal to enable the parties to address the ambiguities identified by the Tribunal in clause 2 of the Agreement dated 8 December 2004. This agreement is at the centre of the Dispute and is the core issue in the Tribunal's terms of reference.

The Agreement dated 8 December (the Agreement) is set out in a letter dated 6 December 2004 from the Employer's Manager Human Resources to the Union's National Secretary.

Omitting formal and irrelevant parts, the letter stated:

***"Following our meeting this morning on the above, the following agreement was reached:***

1. ***That the merit index of 5% as approved by the Board be applied.***
2. ***That the structural adjustments be done based on the 2004 PWC market survey. The revised salary scale attached is effective from 1 July 2004 and is calculated at 80% to 120% of the midpoint and will be guided by the Fund's practice line at 5% above median and up to the upper quartile of the B & F sector. The new scale will allow salary increases up to the following percentages:***

| | | |
|---|---|---|
| ***U1*** | ***-*** | ***2.13%*** |
| ***U2*** | ***-*** | ***5.76%*** |
| ***1A*** | ***-*** | ***5.02%*** |
| ***1B*** | ***-*** | ***5.43%*** |
| ***2A*** | ***-*** | ***5.54%*** |
| ***2B*** | ***-*** | ***5.635*** |
| ***3A*** | ***-*** | ***5.86%*** |
| ***3B*** | ***-*** | ***6.72%*** |
| ***3C*** | ***-*** | ***7.58%*** |

3. ***That we will endeavour to make all payouts by Thursday 9 December 2004.***

***If you agree to the above, please sign and return the copy of this letter immediately to allow us to process the payouts immediately."***

The letter was countersigned by the Union as an agreement dated 8 December 2004.

In accordance with the requirement set out in section 34(1) of the Trade Disputes Act, the agreement was registered as an amendment to the Collective Agreement with the Chief Executive Officer on 18 December 2004. Pursuant to section 34(2) the terms of a collective agreement (and any amendments made to

a collective agreement) are required to be set out in writing. Under section 34 (7) the provisions of a collective agreement are an implied condition of the contract of service between the employee and the employer. The agreement generally takes effect from the date on which it is signed by the parties (section 34(8)).

Attached to the letter constituting the agreement was a second page containing a table with the heading "Revised Salary Structure – effective 1 July 2004".

One of the issues of concern to the Tribunal is that the new salary scales set out in column 5 of the Table do not appear to have been calculated in the manner which is described in clause 2. The evidence before the Tribunal is that the salary scales for each Grade have simply been increased by the percentage figures listed in the second part of clause 2.

The second issue of concern to the Tribunal is the phrase "up to the following percentages". The Tribunal indicated to the parties that the phrase suggested that increases in the salaries of employees in each grade would be allowed up to the percentage shown. The problem for the Tribunal was that there was no evidence to indicate how each employee's increase was to be determined.

During the course of the hearing neither party adduced any evidence concerning the meeting or the oral agreements to which reference is made at the commencement of the letter which sets out the agreement.

The Tribunal indicated to the parties that as the ambiguities had not been clarified by the evidence adduced during the hearing, it may be open to the

The Tribunal has carefully considered the helpful submissions filed by the parties. The task of the Tribunal in interpreting the terms of a collective agreement is to determine the intention of the parties who have signed it. In doing so, the Tribunal proceeds on the basis that the parties are assumed to have intended what they have said and therefore the meaning of the agreement is to be sought in its express provisions. In determining the parties intention with respect to a particular provision such as clause 2 the language used in the provision should be considered in its normal or ordinary sense, unless that would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense.

The Tribunal accepts that in interpreting a collective agreement, it should be presumed that all of the words used were intended to have some meaning and that they were not intended to conflict. However, if the only reasonable interpretation leads to a conflict then the Tribunal must attempt to resolve that conflict.. [See Canadian Labour Arbitration Third Edition Brown & Beatty at paragraph 4.2100]

In this Dispute the first part of the second sentence in clause 2 refers to the revised salary scale which is set out in an attached document. The second part of the same sentence describes the method by which the scale was calculated. It is apparent that there is an inconsistency between the methodology described in the second part of sentence and the attached table setting out the new scale.

The attached document is what is sometimes called an incorporated document and is inconsistent with the incorporating document. This would generally result in the table not forming part of the agreement. However, as there is a clear

intention by the parties to confer a financial benefit the Tribunal has concluded that the intention of the parties is expressed by the first part of the second sentence of clause 2 which incorporates the revised salary scale. The Tribunal considers that it is appropriate to apply that part of the clause which was written first in preference to that which was written later as it clearly spells out the overriding effect intended by the parties.

As for the words "up to the following percentages" at the end of the paragraph in clause 2, the Tribunal accepts the Union's submission. The Tribunal accepts that the words "up to" are used in clause 2 in a sense other than what might be described as its ordinary or normal sense. The Tribunal accepts that in accordance with a common manner of expression in Fiji, the parties intended by the words used that salaries would be increased by the percentages shown against each grade. The words up to should in this sense be taken to mean increases to the percentages shown.

As a result the Tribunal has concluded that the agreement is not so uncertain as to render it unenforceable. The Tribunal has concluded that to determine the intention of the parties in relation to the meaning of clause 2, it is necessary to disregard the method which purports to describe how the salary scale increases were calculated in the second part of the second sentence of clause 2. Furthermore, the expression "up to" at the end of the paragraph should be read as being intended to mean salary increases would be allowed by the percentage set out for each Grade.

The Tribunal proposes to direct the parties to prepare for the hearing of the Dispute to be re-opened. The terms of reference requires the Tribunal to settle

a dispute where the Union has claimed that the Employer has failed to pay salary increases in accordance with the agreement dated 8 December 2004.

As a result the Union carries the burden of proof. It will be required to establish first that the Employer has not complied with the Agreement and secondly the amount or amounts owing to employees or alternatively the formula which the Employer should have applied in respect of each employee.

The Dispute will be listed for mention on 23 June 2006.

**DATED** at Suva this 5th day of June 2006.

**ARBITRATION TRIBUNAL**