AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO 50 OF 2006

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In the Dispute Between

NATIONAL UNION OF FACTORY AND COMMERCIAL WORKERS

and

MORRIS HEDSTROM LIMITED

NUFCW : Mr J Raman
MH : Mr J Waqaivolavola

DECISION

This is a dispute between the National Union of Factory and Commercial Workers (the Union) and Morris Hedstrom Limited (the Employer) concerning the termination of employment of Ms Makareta Daunibau (the Grievor)

A trade dispute was reported on 18 February 2005 by the Union. The report was accepted on 10 March 2005 by the Chief Executive Officer who referred the Dispute to conciliation. During the course of the conciliation proceedings the parties agreed to refer the Dispute to voluntary arbitration. Consequently, the Minister authorized the Chief Executive Officer to refer the Dispute to an Arbitration Tribunal for settlement pursuant to section 6(1) of the Trade Disputes Act Cap 97.

The Dispute was referred to the Permanent Arbitrator on 5 May 2005 with the following terms of reference:

> ***"..... over the termination of employment of Mrs Makareta Daunibau with effect from 7 January 2005 on the grounds given by the management as unsatisfactory performance, which the union submits as unjustified, unreasonable and harsh. The union therefore seeks her re-instatement to her present position without loss of salary and benefits from the date of termination.***

The Dispute was listed for preliminary hearing on 27 May 2005. On that day the parties were directed to file their preliminary submissions within 21 days and the Dispute was listed for mention on 24 June 2005. On that day the Employer was granted an extension of 14 days to file and serve its preliminary submissions and the Union was directed to serve its submissions within 14 days. The Dispute was relisted for mention on 29 July 2005.

The Union had filed its preliminary submission on 17 June 2005 and the Employer did so on 28 July 2005.

The Dispute was then fixed for hearing on 5 October 2005. By consent that hearing date was vacated on 30 September and the Dispute was relisted for mention on 28 October 2005. On that day the Dispute was relisted for hearing on 12 December 2005.

The hearing of the Dispute commenced on 12 December in Suva. It was adjourned part heard on that day and was completed on 13 December 2005. The Employer called 5 witnesses and the Union called the Grievor to give evidence.

At the conclusion of the evidence the parties sought and were granted leave to file written final submissions. The Employer eventually filed its final submissions on 7 April 2006. The Union filed answering submissions on 21 July 2006 and the Employer filed a reply submission on 12 September 2006. All these submissions were filed after the due date and any extension of time granted by the Tribunal.

The Grievor commenced employment as a security officer with the Employer in about January 1995. Between 1995 and 2005 the Grievor worked at a number of the Employer's stores in the greater Suva area.

By letter dated 7 January 2005 the Grievor was advised that her employment had been terminated. Omitting formal parts, that letter stated :

> ***"Senior Management has reviewed your performance and to date you have not shown any improvement.***
>
> ***This letter therefore serves to confirm that your services are hereto terminated for unsatisfactory performance effective immediately.***

By copy of this letter the Payroll Supervisor is advised to pay all monies owing to you including all outstanding leaves and one week's pay in lieu of notice."

Although the wording is somewhat ambiguous, the Tribunal has concluded that the Grievor's employment was terminated by way of payment in lieu of notice pursuant to sections 24 and 25 of the Employment Act Cap 92. It is clear that this is not a case of summary dismissal pursuant to section 28 of the Employment Act. There was no evidence before the Tribunal to suggest that the Employer had at any stage alleged that the Grievor's performance amounted to misconduct sufficiently serious to justify the imposition of the penalty of summary dismissal.

It is also clear the Employer cannot rely on clause 34 (iii) of the Collective agreement which states :

"Warnings for lateness, incompetence, malingering, absenteeism and other similar offences may be given by the Foreman or Supervisor of the employee. Such warnings if they are to be held against the employee, shall be confirmed in writing by the Departmental Manager or Works Manager and two such confirmed warnings shall render the employee liable to dismissal for a third offence; Provided that no written warning shall be valid for a period of more than one year."

The evidence before the Tribunal was that the Grievor had been given a first written warning dated 9 September 2004 in accordance with clause 34 (iii).

The evidence before the Tribunal indicated that the incident for which the Grievor received that written warning was one of three incidents involving the Grievor which occurred in 2004. It involved the Grievor giving her rear gate dispatch key to an unauthorized employee who organized the disposal of rubbish. This occurred on 7 September and the Grievor received her written warning two days later.

The first of the other two incidents occurred in April 2004 at the Employer's Value Levu store. Essentially it involved the Grievor purchasing packets of potato chips. An investigation established that there was a failure on the part of the Grievor to follow the correct procedure, rather than any dishonesty on her part. She was counselled and given an oral warning.

The third incident occurred on 21 December 2004 and involved a failure by the Grievor to follow an instruction given by her supervisor. It would appear that the Supervisor noticed two female customers in the MH Plaza Store. These customers were known shoplifters. The Grievor's supervisor asked the Grievor to check the customers' bags as they left the store. The Grievor failed to do so. Her explanation was that the bags were too small to contain any stolen goods.

The basis for terminating the Grievor's employment was unsatisfactory performance. However it does appear to the Tribunal that the incident which occurred in December 2004 was a matter which clearly justified the Grievor being given her second written warning in accordance with the Collective Agreement In itself it was not misconduct which justified summary dismissal but was of the type of misconduct for which the warnings clause in the Collective Agreement was intended.

If the Grievor had been given a formal written warning for that incident, she would have been at risk of being dismissed for any further misconduct which might have occurred up to 9 September 2006.

The Tribunal is of the opinion that as a result of the Agreement, the parties intended that the Grievor should have been given a second written warning for the December incident.

However, the Employer, instead, decided to exercise its contractual right under sections 24 and 25 of the Employment Act. Section 24 provides that an oral contract of service may be terminated by either of the parties giving to the other, in this case, not less then seven days notice. Section 25 provides that payment of wages may be in lieu of notice. There was no evidence before the Tribunal that the Collective Agreement made between the parties contained any contrary provision in relation to the period of notice to be given. It would appear that the Grievor did in fact receive payment in lieu of notice.

The Collective Agreement made between the parties provided for a system of warnings to be followed for what might be termed "minor transgressions." Written warnings are generally regarded as the least severe form of the traditional penalties available to an employer. However as a disciplinary measure a written warning forms part of the Grievor's employment record and is designed to induce an improvement in behaviour or performance. The Tribunal has concluded that the parties intended that clause 34 (iii) of the Collective Agreement should be utilized and exhausted before any decision is taken to terminate employment in respect of minor transgressions.

As a result the Tribunal finds that the Employer has acted unreasonably and at the very least in a manner which is contrary to the spirit of the Collective Agreement.

Furthermore the Tribunal is not satisfied that the Grievor was treated fairly by the Employer in carrying out the dismissal. Apart from a brief meeting between the Chief Security Officer and the Grievor later on the same day as the third incident occurred (21 December 2004), there was no other meeting between the Employer and the Griver prior to the termination of employment. There was no opportunity for the Union to make any representation on behalf of the Grievor. The Grievor was not informed at any time that the Employer was considering termination of employment. The Grievor was simply called over to a vehicle and handed her termination letter on 7 January 2005 some two weeks after the incident which occurred on 21 December 2004. It is the opinion of the Tribunal that the Grievor was not treated fairly and with respect as a result of the indifferent and almost callous manner in which her employment was terminated. As a result the Employer has breached the implied term of the Grievor's contract of service which required the Employer to deal fairly with Grievor even in the context of dismissal . (See Central Manufacturing Company Limited -v- Yashni Kant Civil No 20 of 2002 delivered 24 October 2003).

The issue then is what remedy is appropriate. In the circumstances of this particular case the Tribunal has concluded that re-instatement is not appropriate. Apart from the three incidents which occurred in 2004, there were earlier instances of misconduct which on at least two occasions had resulted in the Grievor receiving written communication from the Employer. The Tribunal has concluded, after considering all the evidence, that on balance the Grievor could no longer be regarded as an effective and harmonious member of the Employer's team.

The Grievor is to be paid three months salary at the present rate as compensation.

AWARD

The Employer acted unfairly and contrary to the intention of the parties as set out in the Collective Agreement when it terminated the Grievor's employment following the incident which occurred on 21 December 2004. A second written warning would have been a reasonable and appropriate disposition.

The Employer did not treat the Grievor fairly and with appropriate respect when it effected the termination. Re-instatement is not appropriate in this case. The Grievor is to be paid three months wages at the current rate as compensation for the unreasonable and unfair termination of employment.

DATED at Suva this day of October 2006

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ARBITRATION TRIBUNAL