NO 45 OF 2006

# AWARD

of

## THE ARBITRATION TRIBUNAL

In the Dispute Between

## NATIONAL UNION OF HOSPITALITY CATERING AND TOURISM INDUSTRIES EMPLOYEES

and

## HOTEL TAKIA

NUHCTIE : Mr F Anthony with Mr T Naivaluwaqa
Takia : Mr A Ram with Ms A Prasad

## DECISION

This is a dispute between the National Union of Hospitality Catering and Tourism Industries Employees (the Union) and the Hotel Takia (the Employer) concerning the termination of employment of five employees (the Grievors).

A trade dispute was reported on 26 January 2002 by the Union. The report was accepted on 28 March 2002 by the Permanent Secretary who referred the Dispute to conciliation. As the conciliation proceedings were declared deadlocked, the Minister authorized the Permanent Secretary to refer the Dispute to an Arbitration Tribunal for settlement pursuant to section 6 (2) (b) of the Trade Disputes Act Cap 97.

The Dispute was referred to the Permanent Arbitrator on 5 December 2002 with the following terms of reference :

> ***".....for settlement over the termination of Luisa McComber, Levi Matavesi, Ada Williams, Rajendra Kumar, and Meli Bakoso with effect from 19 January 2002 which action the Union claims as unfair and unjustified and therefore seeks their re-instatement without loss of benefits."***

The Dispute was listed for a preliminary hearing on 20 February 2003. At the request of the Employer for medical reasons that date was vacated and the Dispute was relisted for preliminary hearing on 3 April 2003. On that day the parties were directed to file preliminary submissions by the end of July and the Dispute was fixed for hearing on 27 August 2003.

At the request of the Employer the hearing date was vacated and the Dispute was relisted for mention on 7 October 2003. A request made by letter dated 11 August 2003 for the hearing to be held in Labasa was declined by the Tribunal due to lack of funds.

The Employer's preliminary submissions were filed in early July 2003 and the Union filed its preliminary submissions in early August 2003.

When the Dispute was called for mention on 7 October 2003, the Tribunal fixed the hearing of the Dispute for 18 November 2003. At the request of the parties that date was subsequently vacated by consent and the Dispute was listed for hearing on 4 February 2004. Once again the Union applied by letter dated 11 November 2003 for the hearing to be held in Labasa.

With the consent of the parties the Dispute was eventually listed for hearing on 4 May 2004. The hearing did commence on 4 May 2005 in Labasa and continued till the end of the following day, by which time the Employer had completed its evidence and closed its case.

On the morning of 6 May 2004 the Tribunal Secretary received a note from the Employer's advocate, Mrs Jaduram, accompanied by a medical certificate which stated that she was unwell and unable to attend for the continuation of the hearing. As a result the Dispute was adjourned part heard to a date to be fixed.

By letter dated 19 May 2004 from the law firm of Gibson & Company, the Tribunal was informed that the Employer had instructed that firm to take over the conduct of the Dispute. In the same letter the Solicitor requested a copy of the record of proceedings. That request was ultimately dealt with by the Tribunal in an interim Award (No 20 of 2004) dated 6 July 2004.

The Dispute was subsequently listed for mention on 14 July, 11 August, 15 September, 13 October 2004, 26 January and 2 February 2005. On that day the Dispute was listed for re-hearing on 31 May 2005.

The Tribunal had directed that the Dispute should be re-heard due to the passage of time which had elapsed since the adjournment of the earlier proceedings and the involvement of legal practitioners for the Employer. These matters are more fully discussed in the Interim Award referred to earlier.

The re-hearing of the Dispute commenced on 31 May 2005 in Labasa. The hearing continued on 1 and 2 June and was then adjourned part heard to 5 July 2005. Due to unforeseen circumstances the re-hearing of the Dispute could not resume until 20 September 2005 in Labasa. The hearing continued on 21 and 22 September 2005. During the hearing the Employer called six and the Union called five witnesses to give evidence.

During the course of the hearing, the Union applied to withdraw the Dispute in respect of the Grievor Levi Matavesi and discontinue the proceedings in respect of that Grievor. The Employer did not oppose the application. In addition, with the consent of the parties the Tribunal corrected a spelling error in the Reference for the Grievor Meli Bakoso whose name was amended to Meli Balekoso.

At the end of the hearing the parties sought and were granted leave to file written final submissions. The Employer filed its final submission on 4 November 2005. Due to the untimely passing away of the Union's General Secretary, the Union's answering submission was not filed until 2 June 2006. The Employer filed a reply submission on 24 August 2006.

Before proceeding to the evidence in respect of the remaining four Grievors, the Tribunal considers it appropriate to make some general comments concerning this Dispute.

First, the issue of the entitlement of the Union to recognition by the Employer for the purpose of collective bargaining. The Union requested by letter dated 12 January 2002 that the Employer grant it voluntary recognition. The Employer did not respond and as a result the Union was granted compulsory recognition on 2 May 2002 which was deemed to have become effective from 12 January 2002.

It would appear from the evidence before the Tribunal that the Employer was not favourably disposed to the prospect of its staff becoming union members. The Employer's attitude is clearly set out on page 5 of its Preliminary submission dated 1 July 2003:

> ***"Hotel Takia is a small family business venture with only a handful of workers, all of them now recognize that their best interest lie in maintaining the present state of affairs rather than having to join any union at this time.***
>
> ***Union activities with regard to small business ventures such as that of Hotel Takia can be disruptive and harmful not only to the hotel but also to the best prospects of the employees themselves."***

It is essential for employers to accept the reality that all workers are guaranteed the right to form and join trade unions under section 23 (1) of the Constitution. This means that no provision in any law can prevent a worker from exercising that right unless one of the limitations set out in section 23 (4) of the Constitution is present. It also means that no employer is permitted to take any action which may be regarded as inconsistent with a worker exercising that right. Both the Trade Unions Act Cap 96 and the Trade Unions (Recognition) Act 1998 contain provisions which are interpreted in a manner which is consistent with that constitutional right.

On the other hand it is also important for workers to understand and accept that trade union membership and recognition for the purposes of collective bargaining do not permit unacceptable behaviour which may amount to a serious breach of the contract of service.

Secondly, the Tribunal is concerned about some comments made by the Legal Practitioners acting for the Employer which appear in their undated Final Reply Submission filed on 24 August 2006.

There is an observation in the second paragraph that "(T)here is no doubt that the Hotel was treated as the complainant in this case". It should be noted that at the time at which the alleged incidents occurred in this Dispute there was no collective agreement between the parties. The accepted principle as applied by this Tribunal and in arbitration proceedings generally is that in disputes involving either termination of employment or summary dismissal the employer has the burden of proving that the action taken was justified. In other words the Employer is required to establish that it had just cause to dismiss the Grievor. In such cases the practice is for the employer to lead and call its evidence first. This was the procedure followed at the hearing of this Dispute. At no stage was any objection raised by either party.

There is a further matter raised by the Employer. It is claimed that whilst the Tribunal allowed the four Grievors to remain in the hearing room throughout the proceedings, the witnesses for the Employer were required to remain outside until called to give their evidence. At the commencement of the hearing the Tribunal sought an indication from the parties as to whether or not witnesses should remain in the hearing room prior to giving evidence. The Union's advocate requested that witnesses remain outside until called to give evidence. A direction was given by the Tribunal accordingly.

The Tribunal took the view that the four Grievors should be permitted to remain in the hearing room during the Employer's evidence as it was not possible at that stage to determine in respect of which grievance each of the Employer's witnesses was to give evidence. Each Grievor was entitled to be present during the course of the Employer's evidence to provide any necessary instructions to their advocate to assist in cross-examination.

The Tribunal also permitted all the Grievors to remain in the hearing room during the course of the Union's evidence on the basis that each Grievor would be giving evidence in respect of his/her own grievance. Each grievance involved a separate and distinct set of circumstances. This was expressly acknowledged by the Employer in paragraph 3 on page 1 of its Reply submission.

There is also a claim by the Employer that since the Dispute involved "four different complaints" the Tribunal should have kept "each of these complainants out of hearing of each other's evidence". The Tribunal does not accept that each of the Grievors was a witness for any or all of the other Grievors. So far as the Tribunal was concerned each Grievor was called to give evidence in respect of his/her grievance. As a result it was not necessary to require any of the Grievors to remain out of the hearing room.

The Tribunal was not assisted by the evidence which any Grievor gave in respect of any of the other grievances. Furthermore the Tribunal regarded as relevant only that evidence given by each Grievor which related to his or her grievance.

Pursuant to section 30 of the Trade Disputes Act, the Tribunal is permitted to regulate its procedure as it thinks fit. Furthermore under section 31 (1) the Tribunal is not bound by the rules of evidence in civil or criminal proceedings.

However, the Tribunal must ensure that the parties are afforded procedural fairness and that the rules of natural justice are followed.

Part of the Union's submission is concerned with the claim that the termination of employment was connected to each Grievor's decision to join and remain a member of the Union. This was the thrust of the Report of the existence of a trade dispute set out in the Union's letter dated 26 January 2002 addressed to the Permanent Secretary. This letter was copied to the Employer.

However in a detailed reply in its letter dated as early as 7 February 2002 and addressed to the Labour Ministry's Permanent Secretary, the Employer set out its position in respect of each of the Grievors. The matters which related to each Grievor are clearly stated and are claimed by the Employer to be the basis of the decisions taken by the Employer in respect of each Grievor.

As a result the Tribunal is satisfied that the Grievors were aware in January 2002 that each of them was the subject of a decision concerning their employment status which had been taken by the Employer and which was factually superimposed and in addition to the controversy which then existed concerning union membership and recognition. As a result the Union knew or ought to have known that the Grievors were the subject of management decisions taken by the Employer which were in addition to the question of union membership and union recognition.

For reasons best known to the Union, neither the factual bases of the Employer's decisions nor any question of fairness concerning the manner in which the decisions were taken was addressed by the Union until some time after it had reported the Dispute. The Union initially chose to challenge those decisions only on the issue of union membership and recognition.

Having carefully considered the evidence the Tribunal has concluded that the question of union membership and union recognition was not the basis of any decision taken in January 2002 by the Employer in respect of the employment status of any of the Grievors. The Tribunal does accept that the issues of union membership and union recognition were matters of concern and bitterness for both the Employer and the Hotel's employees in January 2002. However there were clearly other matters in respect of each of the four Grievors which the Employer has submitted justified the decision taken in respect of each of the Grievors.

As a result the grievances fall into two separate categories. The first category involves the termination of employment of Luisa Mc Comber and Rejendra Kumar. The second category involves a determination as to whether the Grievors Ada Williams and Meli Balekoso were dismissed or were deemed to have resigned by their letters dated 23 January 2002.

The Tribunal proposes to deal first with the Grievors Ada Williams and Meli Balekoso. The Tribunal has carefully considered the evidence which is relevant to these two Grievors and on the balance of probabilities has made certain findings of fact.

The Tribunal has accepted that in January 2002 the Employer was experiencing a downturn in business with particular reference to the occupancy rate.

The Tribunal is satisfied that the House Supervisor Ms D Sivo informed the Grievor Ada Williams and the other three housemaids at a meeting on 18 January 2002 that there was to be introduced a rostered one week on one week off system due to low occcupancy.

The Tribunal has accepted that the Grievor and Ms Gulshan Bi were to be rostered off the following week, commencing Sunday 20 January 2002. The remaining full time housemaid Ms S Kumar, was to be rostered off the week after.

There was no evidence before the Tribunal to suggest that there was any misconduct by the Grievor Ada Williams which would have called for disciplinary action let alone termination of employment.

The Grievor Ada Williams was paid her normal wages for the week on Friday 25 January 2002. The Wages Records also show that the Grievor completed the week's work by attending for work on Saturday 19 January 2002. She did not work the following week. The other housemaid rostered for the first week off did not work as a housemaid that week, but did work two days in the kitchen. The Grievor did not report for work in the week she was meant to resume duties.

The Grievor subsequently signed a letter dated 23 January 2002 addressed to the Employer's Manager. Omitting formal parts, the letter stated :

***"Further to your decision on Friday 18 January 2002, I wish to advise you that you had terminated my employment because of my decision to become a member of the National Union of Hotel and Catering Employees."***

The Grievor acknowledged her signature. The Grievor also stated that another of the four Grievors, Luisa Mc Comber had drafted the letter and had also delivered the letter to the Employer on about 29 January 2002 along with similar letters signed by the other Grievors.

Although the Grievor's version of events differs in almost every respect from that given by the witnesses who gave evidence for the employer, the Tribunal has concluded that the Employer's version is on balance to be preferred as the more reliable account. As a result the Tribunal has concluded that the letter dated 23 January 2002 and signed by his Grievor does not state the real circumstances of her position.

The other Grievor in this category was Meli Balekoso. The Tribunal is satisfied that on Friday 18 January 2002 the Employer's pay clerk, Mukesh Chand, informed the Grievor that as the Hotel was not busy, there was no requirement for security at that time. The Tribunal is satisfied that the Grievor was told in the same conversation that he would be called back when business picked up. Both security staff were stood down, but the other security employee continued with his Night Club duties.

It was acknowledged by the Employer that this Grievor was not called to return to work. Two reasons were given. First, Ms D Silva, the House Supervisor, stated that the Grievor had returned to his village and could not initially be easily contacted when business improved.

Secondly, this Grievor also signed a letter dated 23 January 2002 which was subsequently delivered to the Employer by Luisa Mc Comber on about 29 January 2002. Omitting formal parts, this letter stated :

> ***"Further to your decision on Friday 18 January 2002, I wish to advise you that you had terminated my employment because of my decision to become a member of the National Union of Hotel and Catering Employees.'***

Upon receipt of the letter it appears that the Employer did not see any point in attempting to recall the Grievor to resume employment.

In his evidence the Grievor admitted that he had been told on 18 January 2002 that he was to stay at home and that he would be called when the hote was busy. He stated that he was never informed that his employment was being terminated. There was no evidence to suggest that the Grievor was the subject of disciplinary action for misconduct.

It would appear that the Employer's Manager met with most of the Employees briefly on Wednesday 16 January 2002. Then over the next day or two she met with employees individually. The Tribunal accepts that a these meetings related to Union membership. The Tribunal also accepts that he reference to a decision on Friday 18 January 2002 in the letters signed by hese two Grievors is a reference to the individual meeting each Grievor had th the Employer's Manager. The actual date may or may not have been 18 nuary but the Tribunal does not consider the actual date to be particularly gnificant. In these meetings each Grievor had refused to resign from the ion.

The employment status of these two Grievors should be determined on the basis of whether they had quit their employment. The Employer has maintained the position that their employment had not been terminated. There was no evidence of any allegation of misconduct which would have warranted the implementation of disciplinary procedures.

The Employer has assumed that the Grievors had quit their jobs because of the contents of their letters dated 23 January 2002. In the case of Ada Williams it would appear from the evidence that the Employer also placed some reliance on the fact that she did not report for work in the week following her rostered week off.

However in their letters neither Grievor expressed an intention to quit their employment. In their evidence these two Grievors confirmed that they had not intended to quit their employment. The Tribunal has concluded that the letters did not demonstrate either an intention to quit nor did they amount to letters of resignation.

It must be recalled that the Employer's evidence was that the Grievors had been laid-off, one on a rostered basis, the other indefinitely, due to a downturn in business. By their letters the Grievors were indicating to the Employer that it was their belief that their employment had been terminated as a result of their joining the Union. Their understanding of their employment status, although incorrect, was not unreasonable given the circumstances which existed at the time and the meetings which they had attended with the Employer's Manager.

Since the Employer maintained throughout the hearing that the lay-offs had nothing to do with the union issues, the Employer was put on notice that these two Grievors were mistaken concerning their employment status

Having laid-off the Grievors and then becoming aware that they were mistaken as to the position concerning their employment status, the Employer was not entitled to infer that the Grievors by their letters were quitting their employment. There was simply no basis for a reasonable employer to conclude that the two Grievors had voluntarily severed the employment relationship.

The Grievor Balekoso was not recalled to work when business at the hotel picked up. The Grievor Williams did not return to work in the week following her rostered week off because she considered that her employment had been terminated.

The Tribunal finds that the Grievors did not quit their employment and there was no deemed resignation. As a result the Grievors are to be re-instated with effect from 23 January 2002. They are to be paid six months wages and the balance of the period is to be regarded as leave without pay.

The second category of Grievors involves the termination of employment without notice or payment in lieu of notice. In other words, summary dismissal.

The Grievors, Luisa Mc Comber and Rajendra Kumar, were employed pursuant to individual oral contracts of service. As a result the provisions of Part V of the Employment Act Cap 92 are applicable.

Although there was some reference made during the hearing to section 24 of the Act, it should be noted that section 24 applies to termination of a contract of service by notice. In this Dispute neither Grievor was given any notice nor was there any payment in lieu of notice made to either Grievor.

An employer's common law right to summarily dismiss an employee who is employed under an oral contract of service is now restricted to the circumstances which are set out in section 28 of the Employment Act. So far as is relevant, section 28 states :

> ***"An employer shall not dismiss an employee summarily except in the following circumstances :***
>
> ***a) where an employee is guilty of misconduct inconsistent with the fulfillment of the express or implied conditions of his contract of service;***
> ***b) for willful disobedience to lawful orders given by the employer;***
> ***c) .....;***
> ***d) for habitual or substantial neglect of his duties;***
> ***e) .....***

As has often been stated by this Tribunal not every act of misconduct which falls within one of the categories set out in section 28 will automatically entitle an employer to impose the penalty of summary dismissal.

The misconduct must be of a sufficiently serious nature as would have entitled the employer to summarily dismiss an employee at common law. The position was clearly stated in Award No. 38 of 1999 at page 8 :

> ***"However, the right (to dismiss summonly) does not arise merely because an employee's conduct falls generally within any circumstances described in the section (28). ..... even at common law, it is always a question of degree : only serious or fundamental breaches of the contract of employment entitle the employer to exercise this right. Apart from this common law limitation ----- , in disputes before the Tribunal alleging unfair dismissal, the exercise of the right must also accord with the additional principles of fairness or reasonableness and good industrial practice applied by the Tribunal in such disputes."***

The Grievor Luisa Mc Comber was summarily dismissed on 19 January 2002 as a result of an incident which occurred in the reception area of the Hotel on Friday 18 January 2002. Although the evidence concerning the details as to what exactly was said by whom and in what tone is in sharp conflict, the Tribunal is satisfied that the discussion arose as a result of a proposed change to the roster for the staff at reception. The Tribunal is also satisfied that there was a guest present for some if not all of the duration of the incident. Having considered the evidence the Tribunal is satisfied that the Grievor's behaviour amounted to misconduct. The Tribunal is also satisfied that the response by the Employer's Manager aggravated the situation and contributed to the unpleasant nature of the incident. As a result of that incident and the subsequent discussions between the two, the Tribunal is satisfied that the working relationship between the Employer's Manager and the Grievor Luisa Mc Comber was not sustainable.

Although the misconduct may not have justified the imposition of the severe penalty of summary dismissal, it was certainly grounds for the Employer to terminate the Grievor's contract of service by giving notice or payment in lieu of notice in accordance with the relevant provisions in the Employment Act.

In addition, the Tribunal is not satisfied on the evidence that this Grievor was afforded a reasonable standard of procedural fairness. A reasonable time should have been allowed to pass so that the parties concerned had allowed "the dust to settle" before the Employer's disciplinary action was implemented. It is not appropriate for a clerk to inform an employee that she is to be dismissed without giving that employee an opportunity to be heard by management in a calm and considered atmosphere.

As the Grievor had been an employee of some years standing without any previous history of serious misconduct, the Employer should have demonstrated a more considered approach.

In Central Manufacturing Company Limited -v- Yashni Kant (Civil Appeal No 10 of 2002 delivered 24 October 2003) the Supreme Court of Fiji at page 21 stated :

> ***".....There is an implied term in the modern contract of employment that requires an employer to deal fairly with an employee, even in the context of dismissal. The content of that duty plainly does not extend to a requirement that reasons be given, or that a hearing be afforded at least where the employer has the right to dismiss without cause, and to make payment in lieu of notice. It does extend, however, to treating the employee fairly, and with appropriate respect and dignity, in carrying out the dismissal. Each case must, of course, depend upon its own particular facts."***

The Tribunal is satisfied for the reasons already stated and on the evidence given by the Grievor that she was not treated fairly by the Employer in the manner in which the Grievor's employment was terminated.

Accordingly the Tribunal considers it appropriate to award the Grievor Luisa Mc Comber two months wages as compensation for the manner in which the termination of her contract was effected by the Employer and as payment in lieu of notice.

The Grievor Rajendra Kumar was summarily dismissed on 22 January 2002 for having fallen asleep whilst at the reception desk on Sunday morning 20 January 2002. On the balance of probabilities the Tribunal is satisfied that the Grievor had fallen asleep and as a result had not answered the telephone when the Employer's Manager called early in the morning.

However the Tribunal is not satisfied that the incident amounted to serious misconduct which would have justified a reasonable employer imposing the most severe penalty of summary dismissal. This was clearly a case where a formal written warning would have been appropriate. Although there was a suggestion in the evidence that this was not the first time such an incident had occurred, there were no details provided and as a result the Tribunal does not attach a great deal of weight to that evidence.

There was also evidence that other aspects of the Grievor's work performance were not of a satisfactory standard. It is the Tribunal's opinion that a reasonable employer should have provided some relevant and worthwhile on the job training to assist the Grievor to lift his performance. The evidence indicated that although the Grievor may have been informed that he needed to improve there was no evidence of any training having been provided to assist the Grievor in his endeavours.

The Tribunal is also satisfied that this Grievor was not afforded a reasonable standard of procedural fairness. Without any meeting or interview he was telephoned some two days after the incident and informed that he was not to return to work. He was not treated fairly in the manner in which he was dismissed.

In the case of this Grievor there is no evidence before the Tribunal to suggest that re-instatement is not the appropriate remedy. The Tribunal is satisfied that this Grievor when re-instated and with some appropriate training would continue to be a harmonious and effective member of the Employer's team. The Grievor is to be re-instated from 22 January 2002. The Grievor is to be paid six months wages and the balance of the period is to be regarded as leave without pay.

Although the Grievors Luisa McComber and Rajendra Kumar signed letters similar in content to those signed by the other two Grievor's, the Tribunal does not consider those letters to be of any particular relevance to the issues in their grievances.

Before stating the formal Awards, there are two comments which the Tribunal considers it appropriate to record. First, there was a great deal of evidence adduced during the course of this lengthy hearing which was either not directly relevant to the facts in issue or which was of no assistance to the Tribunal. As a result the Tribunal has not discussed that evidence in this decision.

Secondly, the incidents which gave rise to the Grievances in this Dispute occurred some three and a half years prior to the hearing. A great deal of the evidence given by the parties was in conflict. The Tribunal accepts that over a period of that length, the memory of each witness to a lesser or greater extent became less reliable. In its place witnesses reconstruct events on the basis of what they believe must have happened. Inevitably this process of reconstruction is self-serving.

The Tribunal was left with the difficult task of determining which version on the balance of probabilities was the more likely. In doing so the Tribunal wishes to indicate to the parties that no unfavourable inference was drawn in respect of any of the witnesses concerning the truthfulness of their evidence. Where possible the Tribunal considered the documentary evidence as being the more reliable evidence.

## AWARD

The Grievors Ada Williams and Meli Balekoso did not quit their employment nor are they deemed to have resigned. They are to be re-instated with effect from 23 January 2002 and paid six months wages with the balance to be regarded as leave without pay.

The summary dismissal of the Grievor Luisa Mc Comber was not justified. However her misconduct was sufficient for the Employer to terminate her contract of service by notice or payment in lieu of notice in accordance with the provisions of the Employment Act Cap 92.

The manner of her dismissal was unfair and she was not afforded procedural fairness. She is to be paid two months wages as compensation and as payment in lieu of notice.

The summary dismissal of the Grievor Rajendra Kumar was unjustified and unfair. He was treated unfairly in the manner of his dismissal and he was not afforded procedural fairness. Re-instatement is appropriate and he is to be paid six months wages with the balance of the period to be regarded as leave without pay. In view of the time that has passed since the incident a warning is no longer appropriate.

**Wages** are to be calculated at the current rates.

**The** Dispute in respect of Lev. Matavesi is withdrawn and the proceedings **dis**continued.

**DATED** at Suva this day of September 2006

**ARBITRATION TRIBUNAL**