AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO. 9 OF 2006

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In the Dispute Between

FIJI BANK AND FINANCE SECTOR EMPLOYEES UNION

and

COLONIAL NATIONAL BANK

FBFSEU: Mr P Rae with Mr D Singh
Colonial: Mr H Nagin

DECISION

This is a dispute between the Fiji Bank and Finance Sector Employees Union (the "Union") and Colonial National Bank (the "Employer") concerning the termination of employment of Akuila Qio Cavucavusau (the "Grievor").

A dispute was reported by the Union on 9 February 2005. The report was accepted on 21 February 2005 by the Chief Executive Officer who referred the Dispute to conciliation. The Dispute was not settled. As the parties had agreed that the Dispute should be referred to voluntary arbitration, 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 10 April 2005 with the following terms of reference.

> ***"... over the termination of employment of Mr Akuila Qio Cavucavusau with effect from 19 July 2004, the Union views such action as unreasonable, unjust, harsh and unfair and seeks his re-instatement without loss of pay and benefits".***

The Dispute was listed for preliminary hearing on 29 April 2005. On that day the parties were directed to file preliminary submissions by 29 May 2005 and the Dispute was listed for mention on 24 June 2005.

The Union filed its preliminary submissions on 8 June and the Employer did so on 20 June 2005.

On 24 June 2005 the Dispute was listed for a two day hearing on 3-4 October 2005. By letter dated 28 September 2005 the Employer's legal representative informed the Tribunal that one of the Employer's witnesses would not be available to attend on 3-4 October due to a recent family bereavement.

As a result the Dispute was listed for mention on 30 September 2005. On that day the Tribunal by consent vacated the hearing dates and relisted the Dispute for hearing on 9 November 2005.

The hearing commenced in Suva on 9 November 2005 and was adjourned part heard to 11 November 2005. The hearing was completed on that day. The Employer called two witnesses and the Grievor gave evidence on behalf of the Union.

At the conclusion of the evidence, the parties sought and were granted leave to file written final submissions. The Employer filed its final submissions on 23 November 2005. The Union filed answering submission on 8 December 2005 and the Employer filed a reply submission on 13 January 2006.

The Grievor was employed as a teller at the Rakiraki Branch of the Employer Bank. He commenced employment on 1 November 1994. The terms and conditions of employment were set out in three documents. First there was his letter of appointment dated 28 October 1994. Secondly, the Grievor signed a Declaration dated 2 November 1994. Thirdly the parties signed a Collective Agreement dated 1 March 1999 which became an implied condition of the Grievor's contract of service with effect from 1 August 1998. It is assumed that this agreement replaced an earlier agreement between the parties.

The Grievor's letter of appointment contained, amongst other things, the following conditions:

"You will be required to adhere to disciplinary standards laid down by the management of the Bank. This includes the entire question of regular attendance, obedience, dressing up during office hours, attitude towards your colleagues and supervisors and manner while attending to the public.

.... Other terms and conditions are laid down in an Agreement between the Bank and the Fiji Bank Employees Union, which agreement is on display in each office of the Bank"

In his Declaration the Grievor undertook to:

"(a) faithfully, honestly and to the best of my ability render, do and perform all services, acts, matters and things which the Bank shall from time to time lawfully require in or in connection with its operators;

(b) faithfully comply with the Bank's Rules and Instructions for its staff".

The relevant provisions of the Collective Agreement are found in clauses 4B and 21:

"4B (i) The services of an employee who has completed his or her period of probation may be terminated by the giving of not less than four weeks' notice or by the payment of a sum equal to four weeks of the Employee's salary either by the employee or National Bank.

(ii) Nothing contained in sub-clause (i) above shall be construed as in any way detracting from National Bank's right to dismiss summarily any employee within the regulations agreed to upon the commencement of his or her employment and in the following circumstances:

(a) where an employee is guilty of misconduct inconsistent with the fulfilment of the express or implied conditions of his or her contract of service;

(b) for wilful disobedience to lawful orders given by National Bank or its authorized representative.

(c).....

(d) For habitual or substantial neglect of his or her duties.

(e) For continual absence from work without the permission of National Bank and without other reasonable excuse".

Clause 21 of the Agreement, so far as is relevant provides:

"(a) Warnings for habitual lateness, malingering, absenteeism and other similar offences may be given by a Manager or his nominee to the employee. Such warnings if they are to be held against the employee, shall be confirmed by a letter by the management and two such confirmed warnings may render the employee liable to termination of employment for a third offence; provided that no written warnings shall be valid for a period of more than a year".

It is appropriate at this stage to state briefly the Tribunal's views on how these clauses operate in conjunction with section 28 of the Employment Act Cap 92.

Section 28 of the Employment Act 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 fulfilment of the express or complied conditions of his contract of service;

(b) for wilful disobedience to lawful orders given by the employer;

(c) for lack of the skill which the employee expressly or by implication warrants himself to possess;

(d) for habitual or substantial neglect of duties;

(e) for continual absence from work without the permission of the employer and without other reasonable excuse".

In this regard the Tribunal adopts the views expressed in Award No.38 of 1999 at page 7:

> ***"The employer's right of summary dismissal (or 'instant' dismissal) is a long-standing common law right. It arises from the terms of the contract, whether express or implied. It is the employment law equivalent of the right to terminate any contract for a fundamental breach".***

It should be stressed, however, that at common law whether or not the employee's conduct, being incompatible with the discharge of his duties, was sufficiently serious to give to the employer the right to summarily dismiss the employee, was to be decided on the particular facts of each case.

In Fiji, section 28 of the Employment Act has limited the Employer's common law right of summary dismissal to the five circumstances set out in the section. What this means is that a contract of service cannot provide grounds for summary dismissal which go beyond those set out in section 28. It is of course open to the parties to set out in a contract of service grounds for summary dismissal which are limited to some but not all of the five circumstances set out in section 28. In this Dispute clause 4B(ii) provides grounds for summary dismissal which are in identical terms to those in section 28.

In the same Award the Tribunal observed at page 8:

> ***"However, the right does not arise merely because an employee's conduct falls generally within any circumstances described in the section. ..... 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".

Clause 21 of the Agreement deals with what is sometimes referred to as "progressive discipline". In certain circumstances it provides the employer with right to terminate the contract. The tribunal does not consider it necessary to determine whether clause 21 provides the Employer with the right to terminate the contract by the normal method of either giving notice or payment in lieu of notice or by way of summary dismissal. It should be noted that it is now accepted that the right to dismiss summarily for serious offences under section 28 of the Employment Act is a right to dismiss not just without notice, but also without warning.

The Tribunal also notes the use in clause 4 B(i) of the words "termination" and the use in clause 4B(ii) of the words "summary dismissal". The use of the word "termination" in clause 21 would tend to indicate that the contract of service may be brought to an end in the manner prescribed in clause 4B(i) once the conditions set out in clause 21 have been established.

This conclusion would not limit the employer's right to terminate the contract under clause 4B(i) to the circumstances set out in clause 21. However, as this Tribunal stated in Award No.14 of 2005, when an employer purports to exercise a right to terminate a contract of service such as exists in clause 4B(i) of the Collective Agreement, the employer must be able to establish that it has not acted arbitrarily. The Employer is required to exercise that right (along with any other right contained in the Agreement) in good faith, reasonably and fairly.

By letter dated 14 July 2004 from the Employer's General manager Personnel the Grievor was advised that his employment contract was to be terminated. Omitting formal and irrelevant parts, the letter stated:

> ***"We refer to your Branch Manager's recent report dated 12 July 2004 regarding absence from work without the permission of Branch Management and without reasonable excuse. More so, your admittance of being excessively drunk on Thursday 8 July despite being on sick leave and failure to report to work on Friday 9 July 2004 being under the influence of alcohol is totally unacceptable to management.***
>
> ***This despite numerous previous warnings and counselling sessions with your Branch Manager and Area Manager following a special counselling session by the undersigned prior to your being issued with a Final Warning on 6 November 2003.***
>
> ***Your failure to report to work has caused undue pressure on other Branch staff, and disrupting workflow. Management will not tolerate this conduct implying a serious lack of interest and concern for the work entrusted to you and no further leniency can be extended to you. You have been counselled previously by Senior Management and issued with a final warning on 6 November 2003 pertaining to your work performance and work attendance due to your consumption of alcohol which has been a recurring habitual problem over the last 6 months with only minor improvements.***
>
> ***Consequently I regret to advise you that you are hereby terminated from the Bank's employ with effect from the close of business Friday 16 July 2004 in accordance with Clause 21 of the Collective Agreement between the Union and Colonial. You are entitled to only that salary and any leave balance payments owing to you as at date of your termination ...."***

By letter dated 19 July 2004 from the Employer's General Manager Personnel the Grievor was advised that his "termination date will be effective from the close of

business today, Monday 19 July 2004". He was also informed that he would be paid for 24 days being salary and leave balance owing to him as at the date of his termination.

The reason for the second letter is that the first did not reach the Grievor in Rakiraki in time for it to take effect.

It is apparent that the Grievor's employment contract was terminated by way of summary dismissal. The Grievor was not given four weeks notice nor four weeks payment in lieu of notice as required by clause 4B(i) of the Agreement.

It is also apparent that the Employer relied upon clause 21 (a) of the Agreement as the basis for terminating the contract of employment by way of summary dismissal.

As previously noted, the Tribunal is by no means certain that the right to terminate a contract of employment under clause 21(a) gives rise to a right to do so by way of summary dismissal. However in the circumstances of this Dispute it is not necessary to decide the issue as the Tribunal has concluded that the requirements outlined in clause 21(a) did not exist to enable the Employer to terminate employment. The effect of clause 21(a) is that in order for the Employer to terminate employment there must be two written warnings within the previous 12 months at the time of the third occurrence which would have given rise to a third warning. Under those circumstances the employee is rendered liable to termination of employment.

What then was the position in relation to written warnings prior to 8/9 July 2004? The first formal written warning was dated 6 November 2003. It was

issued to the Grievor by the General Manager Personnel and followed an initial written report dated 9 October 2003 from the Grievor's Branch Manager.

Before that, a formal written warning was issued to the Grievor on 21 November 2001 again by the General Manager Personnel. As the Branch Manager, in her memorandum dated 9 October 2004, correctly observed, that earlier warning had expired.

The Tribunal has therefore concluded that as at the date of the third occurrence on 8/9 July 2004, there had only been one formal written warning issued to the Grievor in the previous 12 months. The requirements set out in Clause 21 (a) were not present and the Employer was not entitled to terminate employment under that clause.

In relation to the events on 8/9 July 2004 the Tribunal makes the following observations. It was not suggested that the medical certificate for 8 July 2004 was obtained by deception. The Grievor admitted drinking on the night of 8 July which may have aggravated his illness and thereby prevented him from attending work on Friday 9 July 2004. The drinking of alcohol on the night of 8 July was unwise and inappropriate. Whilst the Tribunal does not condone indifference by the Grievor to obligations owed to his employer, it is nevertheless important that employers do not impose excessively severe penalties. The Grievor was at fault on 9 July 2004 for failing to inform the Employer that he would not be at work on that day and for otherwise being absent from work without a reasonable explanation.

Clause 21(a) indicates that a warning may be given for absenteeism. Certainly it would have been appropriate to either deduct pay or treat the day's absence as

a leave day. No doubt each case needs to be considered according to its own facts. This is a case which may best be described as borderline.

The Union takes issue with the procedure followed by the Employer in respect of the decision taken by management to terminate the Grievor's employment. The Tribunal has concluded on the evidence that the Employer did not comply with the procedure which is set out in clause 21 (b) in respect of the incident on 8/9 July 2004. There was only one interview conducted and that was by the Branch Manager in Rakiraki on 12 July 2004. That interview did not comply with clause 21 (b) which states:

> ***"(i) When an employee is being interviewed in connection with an alleged irregularity, which may lead to disciplinary action against the employee he/she shall be informed by the manager or his/her nominee of :***
>
> ***1. the purpose of the interview***
> ***2. the fact that disciplinary action may result***
> ***3. the employee shall be informed of his/her rights ie. if he/she wishes to be accompanied and represented by a Union representative.***
>
> ***(ii) If following such interview the employer proposes to take disciplinary action, the employee shall be informed of the proposed disciplinary action. Such advice may be given in writing and a copy to the Union if required by the employee.***
> ***(ii) - (iv) ....."***

As a result the Tribunal has concluded that the decision taken by the Employer to terminate the Grievor's employment pursuant to clause 21 was unfair and unreasonable in that the requirements for doing so under clause 21(a) were not present and the procedure outlined in clause 21 (b) was not followed.

However the Tribunal does not consider that re-instatement is appropriate in the circumstances of this case.

The Tribunal has no hesitation in concluding that the Grievor's conduct over a prolonged period of time was such that it could not be said that he would continue to be a harmonious and effective member of his employer's team. His work performance had placed unreasonable pressure on the other staff of the small Branch at Rakiraki. Transfer to another Branch was not going to solve the real problem which was the Grievor's inability to perform to the standard required by the Bank.

The evidence supports the conclusion that there were ample grounds for the Employer to terminate the Grievor's contract of service in the normal manner under clause 4B(i). Such a decision could not have been challenged on the grounds that it was arbitrary, unfair or unreasonable.

The Tribunal has concluded that the evidence established that the Grievor had over a period of time inadequately performed the duties he was required to carry out under his contract of service. The Tribunal is satisfied on the evidence that the Grievor's work performance had been appropriately assessed and that he had been warned that improvement was required. The Tribunal is satisfied that the Grievor had been allowed adequate opportunity to demonstrate his skills and to improve his work performance. The Grievor continued to perform his duties and behave unsatisfactorily although a reasonable period of time for improvement had elapsed.

There was therefore sound reasons for the Employer to exercise its right to terminate the contract of service under clause 4B(i) in good faith, acting fairly and reasonably. The Tribunal does not accept that the Grievor's work performance or behaviour amounted to serious misconduct sufficient to justify summary dismissal under clause 4B(ii).

Under the circumstances the Grievor is to be paid four weeks salary in lieu of the notice which the Grievor would otherwise have received pursuant to Clause 4B(i).

Although the Grievor had received two Certificates of Commendation dated 30 September 2003 and 31 March 2004, the Tribunal has concluded that the evidence adduced by the Employer outweighed the probative value of the two Certificates.

AWARD

1. The Employer's decision to terminate the Grievor's employment under clause 21 of the Agreement was unfair and unreasonable. The requirements set out in the Clause to activate the right to terminate were not satisfied. The procedure in clause 21(b) was not followed.

2. The Grievor's work performance and behaviour were not sufficiently serious to justify summary dismissal under Clause 4B(ii).

3. Re-instatement is not appropriate as the evidence before the Tribunal would have justified a decision by the Employer to terminate the Grievor's employment under clause 4B(i) of the Agreement.

4. The Grievor is to be paid 4 weeks salary in lieu of notice which is required under clause 4B(i).

DATED at Suva this 23rd day of February 2006

W. Pulanchini

ARBITRATION TRIBUNAL