

**AWARD**

**OF**

**THE ARBITRATION TRIBUNAL**

**OF**

**THE REPUBLIC OF THE FIJI ISLANDS**

**NO.21 OF 2006**

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In the Dispute Between

**FIJI BANK AND FINANCE SECTOR EMPLOYEES UNION**

and

**FIJI NATIONAL PROVIDENT FUND**

FBFSEU : Mr P Rae with Mr D Singh  
FNPF : Mr N Rajendra

**DECISION**

This is a dispute between the Fiji Bank and Finance Sector Employees Union (the "Union") and Fiji National Provident Fund (the "Employer") concerning the termination of employment of Mr Shivan Raju (the "Grievor").

A trade dispute was reported on 28 April 2005 by the Union. The report was accepted on 25 May 2005 by the Chief Executive Officer who referred the Dispute to a Disputes Committee. As a consensus decision was not reached, the

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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 3 October 2005 with the following terms of reference:

***"..... for settlement over the termination of employment of Mr Shivan Raju with effect from 31 January 2005 which your Union submits as harsh, unreasonable and unfair. The Union therefore seeks his re-Instatement without loss of pay and benefits".***

The Dispute was listed for preliminary hearing on 28 October 2005. On that day the parties were directed to file preliminary submissions within 21 days and the Dispute was listed for mention on 25 November 2005. On that day the Dispute was listed for hearing on 26 January 2006.

In the meantime the Employer filed its preliminary submissions on 18 November and the Union did so on 22 November 2005.

The hearing of the Dispute took place on 26 January 2006 in Suva. The Employer called four 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 submission on 15 February 2006. The Union filed answering submissions on 7 March 2006 and by letter received by the Tribunal on 7 April 2006 the Employer indicated that it did not intend to file a reply submission.

The Grievor commenced employment with the Employer as an Inspector on a contract basis in January 1997. His initial contract was for one year only. The contract was apparently renewed annually and by memorandum dated 8 March 2000, the Grievor was advised by the Employer that his contract would be extended for a further 12 months to enable the Grievor to improve his performance with particular reference to self-discipline and attitude.

By memorandum dated 10 October 2001 the Grievor was informed that his appointment on the permanent establishment as inspector had been confirmed with effect from 23 October 2001.

By letter dated 25 November 2004 Nausori Highland Logging Co. Ltd. (the Company) complained to the Employer in the following terms:

***"We would like to inform you that I made a cash payment of \$190-08 for the above month to one of your staff (Mr Shivan Raju) since September 9 (09/09/04) and this payment was receipted on two different dates ie. on 24/11/04 and 25/11/04 (rept nos.806092, 806427 & 806765). We would like to raise our concern on why this payment was receipted late since this would incur more surcharge raised.***

***Please kindly note that your official receipts were received in our office on 25/11/04 which was dropped off by officer Mr Shivan Raju".***

The letter was signed by the accounts clerk, Ms Mere Nasilokia who in her evidence before the Tribunal confirmed the facts stated in the letter.

During the course of the hearing Mr Rae for the Union indicated that the Union conceded that the Grievor had received the money from the accounts clerk, that he had retained the money and had subsequently receipted it.

The evidence given by the accounts clerk as to when the money was given to the Grievor was at odds with the Grievor's evidence. The accounts clerk stated that it was in August 2004. The Grievor maintained that it was on 5 November 2004. The Tribunal has concluded that the evidence of the accounts clerk is to be preferred as being more reliable and more probable. The reason for this conclusion is based on two emails, hard copies of which are set out in Exhibit 4. The first email is dated 29 November 2004 from a Mr Jimmy Ravai, one of the Employer's inspectors, addressed to Mr Joseph Fisher, the Employer's Lautoka Branch Manager at the time. In the first paragraph of that email Mr Ravai refers to the complaint by the Company in respect of \$190.08 initially given to the Grievor around August 2004.

A copy of this email was forwarded to the Grievor by Mr Fisher who requested that the Grievor provide a report on the matter.

By email dated 30 November 2004 the Grievor responded with an explanation but did not challenge the allegation that he had been given the money in about August.

As a result the Tribunal is also compelled to find that the Grievor retained the money until it was receipted on 24 and 25 November 2004.

Although there was no assertion by the Employer as to what happened to the money between September and 24 November 2004, the Grievor's explanations were inconsistent. His first explanation was set out in his email dated 30 November 2004 addressed to his Branch Manager:

***"I remember this employer giving me the CS 7/04 with a envelope containing payment at my place since they used to rent the back flat where I am staying. When I came to the office the next day I left the money in 3 different envelopes and left in my drawer and I had gone out for inspection. When I came back I forgot about receipting the payments and it was lying in my drawer. The clerk came to my place recently to enquire about the payment and when I got back to the office I looked for the payments and receipted it accordingly. I would like to apologise for the concerned matter and will not repeat this again and also will not entertain any employers after hours".***

The explanation given by the Grievor when he was interviewed by the Branch Manager (in the presence of Avinash) shortly afterwards was consistent with that set out in the email above.

However in a hand written letter dated 28 January 2005 addressed to the Employer's General Manager, the Grievor gave this explanation:

***"..... I would like to admit that I had used the money because I had some finance problems. I had thought that I will re-imburse the funds once I get my wages. But I forgot to re-imburse the money until the clerk came to my place during my sick leave in November 2004 to enquire ...."***

In his evidence before the Tribunal the Grievor stated that he had received the money from the accounts clerk on 5 November 2004. The Tribunal has already commented on this aspect but would add that the above quotation from the Grievor's letter would appear to be inconsistent with his oral evidence before the Tribunal. In his evidence the Grievor stated that he was on sick leave from 8 November 2004 until 22 November 2004. He stated that he used some of the money on medication and retained about \$102.00.

The Tribunal has concluded that the version of events given by the Grievor in his evidence before the Tribunal was inconsistent with his written explanation as to what had transpired. As a consequence, the Tribunal considers that the Grievor's hand written letter dated 28 January 2005 on the balance of probabilities is the more reliable version of the Grievor's actions and the sequence of events. The full text of that letter will appear later in this decision.

The Tribunal notes that the Grievor was initially given an opportunity to provide an explanation on 29 November 2004. This was in response to a report about the incident set by Mr Ravai to Mr Fisher by email. The Grievor replied by forwarding a brief email explanation dated 30 November 2004 to Mr Fisher. The text of that email response is quoted in full in an earlier part of this decision.

Following receipt of the report, Mr Fisher interviewed the Grievor. This interview is referred to in a subsequent report dated 3 December 2004 prepared by Mr Fisher. The interview took place in the presence of Avinash Vinod.

Mr Fisher's report found its way to the Acting Chief Executive Officer who directed the Manager Human Resources to commence the appropriate procedures for the allegations made against the Grievor.

The Grievor was advised by email dated 8 December 2004 that a formal interview was to be conducted in Lautoka the following morning at 9.30am. The Grievor was informed of his right to have Union representation.

The formal interview between the Grievor and the Manager Human Resources took place in Lautoka as scheduled in the presence of Mr Fisher and the Union representative Mr Sunil Padarath. A written report dated 16 December 2004 was

prepared by the Manager Human Resources and forwarded to the Chief Executive Officer.

By letter dated 14 January 2005 from the Chief Executive, the Grievor was advised that there was to be a disciplinary committee hearing. Omitting formal and irrelevant parts, this letter stated:

***"I have examined the reports submitted to me by the Manager Human Resources relating to the above.***

***I have sufficient evidence to terminate you for your conduct in the matter. However at this stage you are suspended without pay until your case is heard by the disciplinary committee immediately. The Committee is expected to hear your case within 14 days of the date of this letter".***

The letter indicated that a cc copy was to be forwarded to the Union's General Secretary and to the Union's FNPB Branch. The Union's letter dated 26 January 2005 addressed to the Chief Executive confirmed the Union's participation in the discipline process.

The Disciplinary Committee hearing took place in Lautoka. The Committee's written report dated 31 January 2005 was submitted to the Chief Executive. Mr P Achary chaired the Committee whose members consisted of the Manager Human Resources and the Union Representative Mr Satesh Naidu. Although the copy of the Report which was tendered in evidence was not signed by either the Chairman nor the other members of the Committee, its contents were not challenged by the Union. During the course of the hearing the Grievor admitted that he had received the money and used it for personal use.



The Grievor submitted a written statement to the Committee by way of mitigation. The statement took the form of a letter dated 28 January 2005 and omitting formal parts, is now set out in full:

***"With reference to the above subject I would like to submit my report. Sir, I did receive the money from the said Company at home amounting to \$190.08. Sir, I would like to admit that I had used the money because I had some finance problem. I had thought that I will re-imburse the funds once I get my wages. But I forgot to re-imburse the money until the clerk came to my place during my sick leave in November 2004 to enquire. When I came back from sick leave I saw my email system and found out that allegations has been laid against me. I was really confused for what to do. I know I had made a big mistake for which I am taking my apology.***

***Sir, I would like to mitigate to you that I have family (wife, 2 children) to look after. And also I have a big house loan which is under payment. Sir, I would not entertain any business issues at home from now onwards. Once again I would like to apologise for my conduct in this matter.***

***I would appreciate a favourable consideration".***

By letter dated 31 January 2005 the Grievor was informed that his employment was to be immediately terminated. Omitting formal and irrelevant parts, the letter stated:

***"The Disciplinary Committee has submitted to me a final report relating to your conduct on a recent case. You also have admitted in writing that you have used the FMPF contributions received from Nausori Highland Logging Ltd. for your personal use.***

***Therefore, I hereby terminate your employment with the Fund effective immediately. All benefits entitled to you as staff will cease as at 5pm today, which includes medical and insurance."***

The Union submitted in its closing submission that the decision to summarily dismiss the Grievor was unreasonable and unfair because it was disproportionate in the circumstances.

The Union also indicated to the Tribunal during the course of the hearing that there were three issues in particular upon which the Union relied in support of contention that the termination of the Grievor's employment was unreasonable and unfair. Those issues were procedural fairness, pre-determination and proper opportunity to mitigate.

It should be noted that the Union addressed these issues in only one paragraph of its closing submissions. Paragraph 13 states:

***"The Union submits that the Chief Executive Officer had pre-determined the matter as indicated in his letter of 31 January 2005 (Exhibit 11) this failure and the failure of any senior management to allow the Grievor to offer mitigation as to penalty was tantamount to a denial of natural justice".***

The Tribunal assumes that the Union intended to refer to the letter dated 14 January 2005 from the Chief Executive to the Grievor.

The Tribunal has previously observed that it is generally accepted that an employee cannot automatically be terminated from his employment because he has engaged in one or more acts of dishonesty. Dishonesty in the workplace is a very serious act of misconduct which usually justifies the imposition of the most severe of penalties available to an employer, namely summary dismissal. However, the Tribunal is required to consider whether the employer has sufficiently considered such factors as the lack of pre-mediation; the Grievor's length of service with the Employer; the lack of any prior disciplinary record; the

severity in the sense of the amount involved in the dishonesty; the work history and general character of the Grievor and whether it is a first or subsequent offence. In certain circumstances there may be a more appropriate disposition with re-instatement if the Tribunal is satisfied that the employment relationship has not been so damaged that it cannot properly continue. The Tribunal is required to balance the interests of the Grievor and the Employer, and each case must be considered on its facts. The general principles applicable to the problems of dishonesty must be applied by the Tribunal to the facts of the Dispute presently before it.

After carefully considering the evidence and the submissions the Tribunal has concluded that in this Dispute the decision by the Employer to summarily dismiss the Grievor was not unfair or unreasonable. In reaching this conclusion the Tribunal has considered that the aggravating factors outweigh the mitigating factors in favour of the Grievor. In particular the Tribunal noted that the Grievor had been employed for eight years. During that time the Grievor was disciplined in early 1998 in relation to a careless driving incident in 1997. Arising out of the same incident the Grievor was further disciplined by way of a memorandum dated 21 May 1998 in respect of his dishonest report of the incident.

It would appear that the Grievor was given a verbal warning in October 2002 in respect of an incident involving funds and similar to the incident the subject matter of this dispute.

Although the amount involved in the dishonesty was not significant it did represent contributions on behalf of members of the Employers Fund.

The Tribunal is not satisfied that the Grievor took the funds to his Employer's Office at the first available opportunity. It is the Tribunal's conclusion that the funds were only brought to the office when the Grievor prepared three receipts which was after the complaint had been received.

The evidence adduced at the hearing has resulted in the Tribunal concluding that the Grievor's honesty and his credibility during the investigation of the incident by the Employer fell well below the standard which could reasonably be expected by his Employer.

The Tribunal is satisfied that the hearing conducted by the Disciplinary Committee was fair and in accordance with the principles of natural justice. The Grievor was accorded procedural fairness. The recommendation of the Chairman that the Grievor be summarily dismissed was reached after a proper consideration of all the relevant material. It was proper for the Chief Executive to accept that recommendation without the need to duplicate the proceedings by holding any further hearing.

There is no material to suggest that any prior observation made by the Chief Executive influenced the recommendation of the Disciplinary Committee. The Tribunal is not satisfied that the observation made by the Chief Executive in his letter dated 14 January 2005 amounted to a pre-determination of the outcome of the complaints. It represented no more than an observation as to where the matter stood at that time.

The Tribunal has no hesitation in concluding that the Grievor could no longer be regarded as having the trust and confidence of his Employer.

**AWARD**

The decision by the Employer to summarily dismiss the Grievor was justified in the circumstances of this Dispute. The Grievor could not reasonably be regarded as having the trust and confidence of his Employer.

The Grievor was accorded procedural fairness. The Grievor was allowed union representation and was given an opportunity to mitigate in writing. The procedure adopted by the Employer was in accordance with the principle of natural justice.

The summary dismissal of the Grievor was neither unfair nor unreasonable.

**DATED** at Suva this 25<sup>th</sup> day of April 2006

*W. Kulanchani*

**ARBITRATION TRIBUNAL**