AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO. 32 OF 2006

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In the Dispute Between

B.P. (S.S) CO. LTD. AND W.R. CARPENTER GROUP SALARIED STAFF ASSOCATION

and

CARPENTERS FIJI LIMITED

Association: Mr A Singh
Carpenters: Ms B Narayan

RULING

This is a dispute between B.P(SS) Co. Ltd and W.R. Carpenter Group Salaried Staff Association (the "Union") and Carpenters Fiji Limited (the "Employer") concerning the termination of employment of Mr Peter Kitione (the "Grievor").

Shortly after the Employer filed its preliminary submissions on 13 October 2005, the Tribunal directed that the parties consider the Tribunal's Ruling in Award No. 14 of 2005. That Ruling dealt with the scope of the Tribunal's jurisdiction in a

dispute where the issue was whether the termination of employment by notice or payment in lieu of notice was unfair or unreasonable.

The Employer's preliminary submission filed in this Dispute was plainly and briefly stated. Since the Employer had complied with the termination clause in the Grievor's contract of service, the termination of employment was not harsh, unfair or wrong.

As this submission was similar to the issue which the Tribunal considered in Award No.14 of 2005, the Tribunal indicated to the parties that it considered the Ruling in that Award to be applicable to the present Dispute. The Tribunal also indicated to the parties that Award No.14 of 2005 had not been challenged in the High Court.

However, the Tribunal also indicated that it would allow the parties further time to consider Award No.14 of 2005 and make further submissions if they thought it appropriate to do so. The Employer subsequently informed the Tribunal that it did wish to make further submissions on the preliminary issue of the scope of the Tribunal's jurisdiction in a dispute where it is claimed that the termination of employment by notice or payment in lieu of notice was unfair, unjust, harsh and wrong.

As a result, the Tribunal listed the Dispute for mention on 27 January 2006. On that day the Employer was directed to file a submission on the preliminary issue within 21 days and the Dispute was listed for further mention on 24 February 2006. The Employer filed its submission on 10 February 2006.

On 24 February 2006, the Tribunal gave directions for the filing of additional submissions by the Union and the Employer. The Union filed answering submissions on 20 April 2006 and the Employer filed a reply submission on 13 May 2006.

The Dispute had been referred to the Permanent Arbitrator on 15 July 2005 with the following terms of reference:

> ***"... for settlement over the termination of employment of Mr Peter Kitione with effect from 21 February 2005 which the Union submits as unjust, unfair, harsh and wrong. The Union therefore seeks his re-instatement to his present position without loss of salary and benefits from the date of termination".***

The terms of reference requires the Tribunal to determine whether the termination of employment was unjust, unfair, harsh and wrong.

The word "wrong" is generally accepted in law as meaning an illegal act. In civil law a wrong includes a breach of contract.

In effect the Employer has submitted that the Tribunal should limit itself to a consideration as to whether the termination of employment was wrong. The Employer has submitted that the provisions of the Grievor's contact of service have been followed and therefore the termination was not wrong. The Employer then submits that if the termination was not wrong because it complied with the terms of the contract, then neither can it be unfair, unjust or harsh.

However, the Tribunal does not accept that submission. The termination of the Grievor's employment may be in compliance with the technical requirements of

notice or payment in lieu of notice. However that does not necessarily mean that the termination of employment was fair, just or reasonable. The Tribunal accepts that there may not be any substantial distinction in the concepts represented by the words "fair, just or reasonable". There is, however a substantial distinction between on the one hand what is an illegal act and hence wrong and on the other hand what is unfair, unjust or unreasonable.

As a result of the terms of reference, the Tribunal is required to determine whether the termination was wrong and by that the Tribunal is required to determine whether the termination was in accordance with either the express or implied terms of the contract of service. The Tribunal is also required by the terms of reference to determine in addition whether the termination was unfair, unjust or harsh. That latter inquiry is superimposed on the former inquiry.

The Reference does not either by express words or by implication limit the Tribunal's jurisdiction to determining the issues by reference only to the contract of service.

As the Tribunal noted in Award No.14 of 2005, the Tribunal's function is not completed until it has complied fully with the Terms of Reference.

The Tribunal has concluded that the reference requires a determination on two separate and distinct issues. First, was the termination wrong in the sense that the Employer breached the contract of service? Secondly, was the termination unfair, unjust or harsh?

This Tribunal has long taken the position that it cannot examine or question the propriety of the terms of reference from the Chief Executive Officer. If a party

wishes to challenge the Tribunal's terms of reference for whatever reason, including the jurisdiction it purports to give to the Tribunal, then it must do so by way of an application for Judicial Review in the High Court, preferably at the earliest possible opportunity. The correctness of this position has never been challenged by any party and has not been the subject of any adverse judicial comment.

At this state it is appropriate for the Tribunal to indicate that it considers that the observations and reasons set out in Award No.14 of 2005 apply equally to the preliminary issue in the present Dispute.

The Employer has raised a number of specific issues in its submissions which the Tribunal will now briefly discuss. First, the issue is not so much that the Employer should have stated a reason or reasons in the termination letter which was handed to the Grievor. The issue is whether the Employer's decision was unreasonable or unfair. The reference really requires the Tribunal to determine whether the Employer's decision was arbitrary and hence unfair and unreasonable.

The Tribunal considers that sections 24 and 25 of the Employment Act Cap.92 do no more than set out, amongst other things, the minimum legal requirements for the termination of an oral contract (as defined) by the giving of notice or payment in lieu of notice. A contract of service may provide more generous terms on the matter, but where a contract of service is silent or provides for less favourable terms, then the provisions of section 24 and 25 will apply. The statutory provisions relate to the legality of the Employer's conduct and therefore are relevant in determining whether the termination was wrong.

In its submission the Employer has sought to rely on the decision in The State–v-The Arbitration Tribunal exparte Suva City Council Staff Association (JR No.14 of 1999 delivered 30 March 2000). It is the Tribunal's opinion that the facts of that dispute can be distinguished from the facts of the present dispute. The distinction is particularly significant in relation to the terms of reference of each dispute. During the course of his Judgement, the Judge made a number of observations concerning the Terms of Reference in that Dispute. On page 2, His Lordship stated:

> ***"As appears from pages 72 and 73 of the record the sole question before the Tribunal was whether the SCC:***
>
> > ***'In giving 6 months notice to retire the above named officers (was) wrong and unjustified and the notices should be withdrawn'.***
>
> ***.... The main question raised was whether the SCC had a right under the collective agreement unilaterally and without prior consulation to invoke clause 19(ii) ....."***

And on page 3 the Judge noted:

> ***"The Arbitrator's terms of reference which were presumably either drafted by the Applicant or the Permanent Secretary for Labour have already been noted. They are somewhat imprecise but seem to advance a breach of the collective agreement rather than a general allegation of unfairness".***
>
> *.....*
>
> ***The Permanent Arbitrator reached a conclusion as to whether the Suva City Council had breached the terms of the collective agreement which was the question before him for decision".***

As the Tribunal has already noted, the terms of reference in the Dispute presently before the Tribunal advance two distinct issues, namely whether there was a breach of the contact of service and a general allegation of unfairness.

The Employer has referred to the decision of the Fiji Court of Appeal in Diners Club (NZ) Ltd – v – Prem Narayan (Court Appeal No.4 of 1996 delivered 28 November 1997). The Tribunal notes that the appeal was from a decision of the High Court arising out of a claim for damages for wrongful dismissal. Wrongful dismissal is a common law action and is essentially a claim arising out of a breach of contract. It is therefore only concerned with the issue of whether the termination of the contract of service was wrong.

The Tribunal notes that the Supreme Court of Fiji has acknowledged that even in a contract of service there is an implied term that requires an employer to deal fairly with an employee in the context of dismissal (See Central Manufacturing Company Limited –v- Yashmi Kant [Civil Appeal No.10 of 2002]. The scope of that requirement depends upon the facts of each case. However, even apart from this acknowledgement of such an implied term, the Tribunal's jurisdiction extends beyond the Grievor's contract of service and is only limited by its terms of reference.

The Tribunal considers it appropriate to refer to the High Court decision of Sugar Milling Staff Officers Association –v- Fiji Sugar Corporation (1986) 32 F.L.R.82.

Although the decision deals with the scope of the jurisdiction of the Sugar Industry Tribunal, the Tribunal is of the view that the observations of the Court are equally applicable to the Arbitration Tribunal and the context within which it

is established under the Trade Disputes Act Cap.97. At page 89 the Court stated:

> ***"The legislative purpose of the Tribunal is to enable employers and employees to obtain redress without resort to industrial action which would be damaging to an industry which is vital to the economy of Fiji. The Tribunal is there as a substitute to resolve industrial disputes without the risk of such disruption. If it is to serve its purpose the Tribunal must have and must exercise all the powers necessary to achieve the same results as might otherwise be attained by strikes and lockouts. To hold otherwise would be to assume that the legislature intended not only to suppress the rights of the parties to take industrial action, but, to curtail their right to achieve their legitimate objectives by other means".***

The Tribunal accepts the Employer's submission that neither section 28 nor section 35 of the Employment Act Cap.92 are relevant to the present Dispute. Section 28 has the effect of limiting the Employer's common law right to summarily dismiss an employee to the circumstances set out in the section. Section 35 deals with written contracts as defined in the Act. The contract of service in this Dispute is an oral contract evidenced in writing.

An Employer may not be required to provide reasons to an employee when exercising a right to terminate a contract of service by notice or payment in lieu of notice, but it is required to establish that it did not act unfairly or unreasonably. The Tribunal re-affirms its Ruling in Award No.14 of 2005. The Employer carries the burden in this Dispute of establishing, first, that the termination was not wrong, and secondly, that it was neither unfair nor unjust.

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

DATED at Suva this 30th day of May 2006

W. Pulamchari

PERMANENT ARBITRATOR