IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0069 OF 2006S
(High Court Civil Action No. HBJ 26/2005)

BETWEEN:	LIFE INSURANCE CORPORATION OF INDIA	*Appellant*
AND:	ARBITRATION TRIBUNAL	*First Respondent*
AND:	FIJI BANK AND FINANCE SECTOR EMPLOYEES UNION	*Second Respondent*
AND:	ASERI KOLIKATA	*Third Respondent*

Coram:	John Byrne, JA Thomas Hickie, JA Andrew Bruce, JA
Hearing:	Wednesday, 9th July 2008, Suva
Counsel:	H. Nagin for the Appellant No appearance for the First Respondent R. Singh for the Second Respondent No appearance for the Third Respondent
Date of Judgment:	Thursday 17th July 2008, Suva

JUDGMENT OF THE COURT

A cashbox on top of a safe

1 Aseri Kolikata was an employee of the Life Insurance Corporation of India. By 17 March 2004, she had been an employee for something of the order of 13 years. On that date, she was employed as a cashier. She had been working in that position prior to formal appointment as cashier for something of the order of three years. She

was responsible for a cashbox. Generally, what she was supposed to do was ensure the safety of that cashbox and its contents. It was lockable and when she was not in possession of the cashbox she was expected to lock it in the Corporation's safe. The Deputy General Manager of Life Insurance Corporation of India held a key to the safe. Ms Kolikata did not. In other words, to secure the cashbox in the safe, she needed the attendance of the Deputy General Manager.

2 On 17 March 2004 she left her workplace between 4:30 p.m. and 4:45 p.m. Prior to leaving, she had placed a locked cashbox on top of a safe in the Managers office. The Deputy Manager was away from his office at the time that the cashbox was placed on the top of the safe. It should be noted that 4:00 p.m. was the time that Ms Kolikata normally left work.

3 On any view, the locked cashbox should have been placed in the safe. At the time, it contained a substantial amount of money. It was left unattended on the top of the safe while the office was still open.

4 It will not surprise anyone to learn that Ms Kolikata's employer was aghast at this act. On 18 March 2004 she was given a letter of suspension by her employer the letter required her to show cause why she should not be dismissed for "substantial neglect of duty." As will shortly appear, this specific phrase has some relevance to the proceedings.

5 Aseri Kolikata replied to the letter from her employer on 23 March 2004. In that letter she urged that she should not be dismissed because:

(1) she had been a good employee for 14 years;

(2) the person who should have been there to receive the locked cashbox was not there at the time. She made the point in this context that her hours of work were from 8 a.m. to 4 p.m. and the person who was supposed to receive the cashbox was not there at 4 p.m.;

(3) she apologised; and

(4) gave information about her financial commitments and her need for the salary.

In the letter, Ms Kolikata assured her employers that this would not happen again.

6 Three days later, on 26 March 2004, the Chief Manager of the insurance company indicated to Ms Kolikata that she would be dismissed for "substantial neglect of duties."

7 It is relevant to note that her supervisor was also disciplined for his part in this incident. The penalty that he suffered was demotion.

A trade dispute arises

8 At the time of the incident, Aseri Kolikata was a member of the Fiji Bank & Finance Sector Employees Union. The Union has a Memorandum of Understanding (which has also been referred to as the "Collective Agreement") with the Life Insurance Corporation of India as to terms and conditions of work. This is in the nature of a collective agreement and is significant in later developments in this case. The union was notified of Ms Kolikata's plight at some stage after the letter of suspension was given to her. Apparently, the union assisted her in drafting the reply to which reference has already been made.

9 After the Life Insurance Corporation of India terminated Ms Kolikata's employment, the union immediately requested details of the dismissal and asserted that the dismissal was harsh, unreasonable, unjust and unfair. There was correspondence in reply.

10 The union reported a trade dispute under the mechanism provided by the Trade Disputes Act.

11 The dispute thus reported was "accepted" under the procedures under the Act and was then referred to a Disputes Committee. The referral was under the Act. The Disputes Committee became deadlocked and the dispute was referred to the Arbitration Tribunal.

12 On 25 February 2005 the Arbitration Tribunal delivered its award. The Tribunal determined that the dismissal of Ms Kolikata was harsh and unjust. The termination of her employment was also held to be unfair in the sense that she was not afforded

procedural fairness in accordance with clause 16 of the Collective Agreement between the Fiji Bank & Finance Sector Employees Union and the Life Insurance Corporation of India. The Collective Agreement sets out many if not most of the terms of contract between persons in the position of Ms Kolikata and the insurance company. It also provides disciplinary procedures to be observed.

13 The Arbitration Tribunal also ordered by way of award:

(1) that Ms Kolikata be reinstated with effect from the date of the termination of her employment;

(2) Ms Kolikata be paid for months arrears of wages with the balance (*ie* the time between the date of the dismissal and on the date of the award of the Arbitration Tribunal) being treated as leave without pay;

(3) Ms Kolikata was to be issued a warning letter under clause 16(a) of the Memorandum of agreement to remain effective for 12 months from the date of issue of the letter.

Application for judicial review

14 The Life Insurance Corporation of India applied under Order of 53, Rule 3 of the High Court Rules for leave to judicially review the award of the Arbitration Tribunal.

15 In applying for leave to judicially review the Arbitration Tribunal, the Life Insurance Corporation of India did not ask for a stay of the orders of the Tribunal.

16 Leave was granted to the Life Insurance Corporation of India to judicially review the decision when the matter came on before Winter J in the High Court. The Arbitration Tribunal, the Fiji Bank & Finance Sector Employees Union and Aseri Kolikata were made Respondents to the application. The thrust of the case for the Life Insurance Corporation of India was that the decision was that the Arbitration Tribunal erred in law in ordering reinstatement. (appeal record, page 8 paragraph 15, judgment of Winter J)

17 Winter J gave judgment on 2 June 2006.

18 It is not to be overlooked that by the time that Winter J gave judgment, just under 2 years and 3 months had elapsed from the date of the incident the subject of the dismissal. In his judgment, the learned judge:

(1) dismissed the judicial review;

(2) awarded costs;

(3) and

(4) ordered that Ms Kolikata be paid for arrears of wages from 25 February 2005 to the date of judgment and normal wages thereafter.

The learned judge also confirmed the written warning letter should issue as the Arbitrator had ordered.

An appeal to the Court of Appeal

19 The Life Insurance Corporation of India appealed to the Court of Appeal against the orders made by Winter J in dismissing the judicial review.

20 The grounds of appeal are:

1. **THE** Learned Judge erred in law in not holding the Arbitration Tribunal was wrong when he held that he found that the termination of **ASERI KOLIKATA** was harsh, unreasonable and unjust when her conduct itself was serious breach of confidence and her explanation for her conduct was unsatisfactory.
2. **THE** Learned Judge erred in law in his interpretation of clause 16 of the Collective Agreement.
3. **THE** Learned Judge erred in law in not properly applying the case of ***Pritchett v Dyjasek and McIntyre Limited*** 1987 IRC 359.
4. **THE** Learned Judge erred in law and in not holding the Arbitration Tribunal erred in law in holding that the Third Respondent's action was not of dishonesty or fraudulent intent and that LICI did not suffer any loss and the potential risk lasted no more than five minutes.
5. **THE** Learned Judge erred in law and in not holding the Arbitration Tribunal erred in law in not properly applying clauses 4 and 20 of the Collective Agreement.
6. **THE** Learned Judge erred in law in properly dealing with the issue of reversing of the onus of proof by the Arbitration Tribunal.
7. **THE** Learned Judge erred in law in wrongly applying the New Zealand case of ***Northern Distribution v. B P Oil (NZ) Limited*** [1992] 3 ER NZ 483.

8. **THE** Learned Judge erred in law and in not holding that the Arbitration Tribunal erred in law when he held that mutual duties of confidence, trust and good faith had not broken down.
9. **THE** Learned Judge erred in law in not properly applying the Award No.14/95 in the Dispute between ***National Union of Factory and Commercial Workers & Fiji Food Limited.***
10. **THE** Learned Judge erred in law in not properly considering and applying the following cases referred to him:
    (i) ***BSC Sports & Social Club v Morgan*** (1987) IRLR 391.
    (ii) ***Jupiter General Insurance Co. Ltd. v. Shroff*** [1937] 3 All ER 67 PC.
    (iii) ***Sinclair v. Neighbour*** *[1966] 3 All ER 988.*
    (iv) ***Aspinall v. Mid-West Collieries*** *(1926) 3 DLR 326.*

21 Again, no stay of either the orders of the Arbitration Tribunal or the High Court were sought.

22 At the hearing of the appeal, the principal focus of the submissions of counsel for the Appellant concerned the interpretation of clauses 4 and 16 of the Memorandum of Understanding to which reference has already been made; that the conduct and failures of Ms Kolikata was just too serious for the Arbitration Tribunal to hold that the dismissal was harsh, unreasonable and unjust; the order for reinstatement was wrong and the order of Winter J as to payment of wages from 25 February 2005 to the date of judgment and normal wages thereafter. There were other points in the grounds of appeal and the written argument but counsel treated those as incidental to his main arguments. We have done the same.

Construction of the Collective Agreement

23 The first principal complaint of the Appellant was that the Arbitration Tribunal was wrong in law in its construction of clauses 4 and 16 of the Collective Agreement.

24 Clause 4(a) of the Collective Agreement empowers the employer to summarily dismiss an employee covered by the agreement where the employee is guilty of misconduct inconsistent with the fulfillment of the express or implied conditions of

his or her contract of service for, amongst other things "habitual or substantial neglect of his or her duties". It is to be recalled that the phrase "substantial neglect of her duties" was critical to the initial correspondence between employer and employee over the incident. The Life Insurance Corporation of India was plainly seeking to invoke Clause 4 in the correspondence. Clause 20 of that agreement reinforces the nature of the duties imposed on Ms Kolikata by requiring that she exercise due care, skill and diligence while attending to her duties to abide by instructions; to safeguard the financial interests of her employer and always act in the best interest of the employer.

25 Ms Kolikata breached her duties by reference to Clause 20. However, the Arbitration Tribunal concluded (appeal record, page 47-48) that given that the cash box was left unattended for something of the order of 5 minutes; that she had been employed about 14 years with the employer with a previous good record; and that there was no suggestion of any dishonest or fraudulent motive behind the conduct, the penalty of the summary dismissal was harsh under the circumstances. The Arbitrator also considered that the supervisor of Ms Kolikata had failed in his duty and had been let off very lightly in the in relation to the disciplinary sanctions imposed upon him. The learned Arbitrator held:

> A prudent employer acting reasonably and taking into account the relevant circumstances, the question of equality of treatment (parity of penalty) and the good work record of [Ms Kolikata] would have concluded that that a lesser penalty was appropriate.

26 Winter J, within the strictures of the law relating to judicial review, held that he could find nothing wrong with the Tribunal's reasoning or decision in connection with the finding by the Tribunal that a prudent employer acting reasonably and taking into account the relevant circumstances should have concluded that a lesser penalty was appropriate. It is true that Winter J actually doubted (see paragraph 40 of the learned judge's reasons) that there had been a breach of Clause 20. While we respectfully disagree with that view, this was not critical to the reasoning of the learned judge and, in our view, takes the manner nowhere. The real question, which the judge emphatically answered against the position taken by the Appellant, was whether

there was anything wrong with the reasoning of the Tribunal in making the finding that it did.

27 In this regard, in arguing the case for the Appellant before the Court of Appeal, counsel referred to a series of decisions of Fijian courts which considered whether, on the specific circumstances of the case under consideration, summary dismissal was justified. The cases cited included ***Varea v Fiji Times Ltd*** [2001] FJCA 16 which would appear to be a case of gross dereliction of duty resulting in actual loss to the employer. Further, in ***Bula v Housing Authority*** [2004] FJCA 41, the employee was in a position of substantial responsibility and granted or restructured loans in direct contravention of well-established instructions. (Reading between the lines there might even have been elements of private sector corruption involved.) Certainly the Court of Appeal was undoubtedly correct in holding in that case that the conduct amounted to grave and serious misconduct justifying summary dismissal. Further, in ***Diners Club (NZ) Ltd v Prem Narayan*** (Civil Appeal ABU 4 of 1996), the employee failed to disclose the reasons for leaving his previous employment. He was appointed to a position of high responsibility as the Fiji manager of the company which, of course, is an internationally-recognized credit card business. The point of that decision was to revert to the common law position about dismissal upon payment in lieu of notice. In that regard, the court referred to well-known decisions to the effect that employment may be terminated by notice without any reason being given. The basis of the decision in the *Diners Club* case concerned a common-law contract of employment and has no real relevance to the present situation. Further, in ***Narayan v Westpac Banking Corporation*** [1996] FJCA 11, the issue concerned a bank manager who, contrary to standing instructions, mishandled a series of checks over a substantial period of time and exposed the bank to risks of the order of $756,000. Again, although this case involves, when viewed superficially, the mishandling of substantial amounts of money, this case was way out of the league of the case presently before this Court. In any event, it looks like, although it is not absolutely plain from the judgment, that the contract of employment was a purely common-law contract and had little to do with collective bargaining which might

have attracted considerations similar to the present case under the Trade Disputes Act. The next case referred to by counsel for the Appellant was ***Awadh Narayan Singh v Fiji Posts & Telecommunications Ltd*** (Civil Action 210 of 1994) in which the employee faced summary dismissal for tampering with the mail. The employee was employed as a postal officer. On any view, the case involved blatant dishonesty in that the plaintiff was caught red-handed when he was seen tampering with the mail. Small wonder he was dismissed. It is even less of a surprise that the courts upheld the dismissal.

28 Counsel for the Appellant in his written submissions referred also to well-known English cases on this topic. They too were very fact-specific and do not assist the argument.

29 This possibly over-brief summary of the authorities referred to this Court demonstrates clearly how cases of summary dismissal are highly fact-sensitive. It is true that each of these cases have features, one or more of which arises in varying degrees in the present case. However, that can only be taken so far. We are firmly of the view that none of the cases which we have briefly attempted to summarise in any way to assist the Appellant in his argument. Although there is a degree of artificiality in constructing any comparative table of gravity of conduct by employees, in regard to the cases cited by counsel for the Appellant, we do not think that the conduct of Ms Kolikata was anything near the scale of the cases to which we have made reference. That, of course, does not finally address the issue of whether the learned Arbitrator was correct in his determination that summary dismissal was harsh, unjust and unreasonable.

30 In addition, counsel referred to a decision of the Arbitration Tribunal in award No. 14 of 1995 in a dispute between the National Union of Factory & Commercial Workers and Fiji Food Limited. It appears to this Court that in the scale of things, this case actually involved potential dishonesty on the part of the dismissed worker but the problem was detected before the oil, which the worker had been handling, left the factory which employed the worker. In short, while the Tribunal in that case seemed

to resolve the matter by reference to gross negligence, the better characterisation would appear to be attempted theft or something very close to it. This case does not begin to assist the argument of the Appellant. There is nothing in the conduct of Ms Kolikata which gave rise to her summary dismissal which even began to approach dishonesty.

31 It must not be forgotten that this is an appeal from an application to judicially review the Arbitration Tribunal. All that we need to determine is whether the conclusion of the Arbitration Tribunal that the termination of employment was harsh and unjust, if correct in law, was on the facts found by the Tribunal within the range of conclusions realistically open to him. We have not the slightest hesitation in saying that it was well within the range of conclusions which the Tribunal could have reached.

32 The Arbitration Tribunal also considered whether or not Clause 16 of the collective agreement had been breached. That sets out a procedure which is to be followed when an employee is to be interviewed in connection with an alleged irregularity which may lead to disciplinary action against the employee. There is a proviso to clause 16(e) which reads:

> Provided however that this procedure shall not be followed in cases of dismissal [. . . .] in cases of summary dismissal in terms of clause 4 of this Agreement.

The Arbitration Tribunal concluded that the procedures under clause 16 still had to be followed when the employer is contemplating summary dismissal as a penalty. He concluded that proper procedures under the collective agreement were not observed.

33 This was one of the two matters which the Arbitration Tribunal took into account in giving its award. (Appeal record, page 51)

34 Winter J noted that the Tribunal criticised the employer for failing to observe not only the letter but the spirit of clause 16. That learned judge described the conclusion of the Tribunal as unassailable given the lack of consultation or investigation concerning the matter. He said that: (appeal record, page 13)

These basic rights cannot be discarded as a meaningless formality. Any employer that does so runs the risk of adverse comment about standard and procedural unfairness. The moderate findings of the Tribunal cannot be disturbed accordingly.

35 In our judgment, Winter J's approach to Clause 16 is unassailable. Counsel for the Appellant contended that the employer, merely by describing a dismissal as summary dismissal justified under clause 4 of the collective agreement, took the matter out of the coverage of clause 16. That appears to us to be an unrealistic construction of clause 16 and contrary to the letter and spirit of that clause and the Collective Agreement as a whole. In short, we are of the view that when an employer under this Collective Agreement is considering summary dismissal, the strictures of clause 16 must be observed. Otherwise, as Winter J correctly observed, these rights would be rendered a "meaningless formality". It follows that the Arbitration Tribunal was not in error when it construed clauses 4 and 16 of the Collective Agreement in the way that he did.

36 There is nothing in counsel's alternative argument that Clause 16 was complied with in substance.

Reinstatement

37 **Issues on appeal.** The next complaint concerned the order by the Arbitration Tribunal for reinstatement. It was not clear at the hearing whether counsel for the Appellant Life Insurance Corporation of India was saying that the Arbitration Tribunal had no power to make that order or that he had such a power but it was inappropriate in the circumstances. In this judgment, we have attempted to consider this issue from both standpoints. Plainly, if the Arbitration Tribunal had no legal power to order reinstatement, then it is unnecessary to consider whether the exercise of the discretion by the Tribunal to order reinstatement should have been judicially reviewed.

38 **Power to award reinstatement: statutory framework.** Section 3(1) of the Trade Disputes Act permits the reporting of a trade dispute (whether existing or

apprehended) to the Ministry of Labour, Industrial Relations and Productivity. Section 3(2) of the Act requires that the report be in writing and specify the matters set out in that sub-section. In the instant case, a dispute was reported to the Minister on 5 April 2004 and accepted by him on 16 April 2004. The process of acceptance of the dispute by the Minister arises by reason of section 4(1) of the Act. Where the Minister accepts the dispute within the meaning of that section, he has a number of options open to him. One of those options is to refer the dispute to a Disputes Committee under section 4(1)(h). In the present case, that was the first step that was taken.

39 The Disputes Committee is required by section 4(3) to hear the parties to the dispute and make its decision without delay and in any case within 14 days of the date of referral. Section 4(4) provides that any decision of the Disputes Committee that is arrived at by consensus shall be binding on the parties and shall be deemed to be an award.

40 In the event, no consensus could be reached within the disputes committee and the matter was referred back to the Minister. On 25 May 2004 Mr Brian Singh, the Chief Executive Officer of the Ministry of Labour, Industrial Relations & Productivity, acting under a delegation from the Minister of that department, exercised powers under section 5A of the Act to refer the dispute to an Arbitration Tribunal for settlement.

41 No challenge was taken as to:

(1) the existence of a trade dispute;
(1) the acceptance of that dispute by the Minister;
(2) the referral of the dispute to a Disputes Committee;
(3) that the disputes Committee could not resolve the matter by consensus; or
(4) the referral to the Arbitration Tribunal.

42 Sections 20-22 of the Trade Disputes Act provide for the creation and constitution of an Arbitration Tribunal. Under section 23 of that Act the award must be made within 28 days of the reference unless the period is extended by the Minister. Section 24 provides that the award may be retrospective. Section 26 requires the award to be

published. Section 30 gives the Tribunal wide powers which are equivalent to the powers of a Commissioner under the Commissions of Inquiry Act.

43 Section 31 of the Act gives the Tribunal wide powers to take evidence. Under section 32, the Act regulates the representation of parties that appear before the Tribunal. It is to be noted that under this section a party may, with leave, be represented by barrister and solicitor. Sittings may be in public or in private: section 33.

44 The procedural powers of the Arbitration Tribunal have been set out above. The Trade Disputes Act does not directly deal with the substantive powers of the Tribunal *ie* what orders the Tribunal may lawfully and validly make. In this regard, some assistance may be derived from section 2 of the Act which defines trade dispute as including a dispute:

> (a) between any employer and a registered trade union recognised under the Trade Unions (Recognition) Act (Cap. 96A) and connected with the employment or with the terms of employment or the conditions of labour of any employee

The phrase in the part of the definition of trade dispute which refers to "connected with the employment, or with the terms of employment" is a very wide phrase. It would appear that the Arbitration Tribunal is charged with the task of resolving the trade dispute in that connection. Clearly in the context of more general terms and conditions awards, the Arbitration Tribunal would appear to be permitted by long-standing practice to interfere with the terms and conditions of employees. In other words, an employer in the position of the Appellant does not have complete freedom of contract to deal with its employees. While there is no doubt that the common law and many of the principles of the law of contract will inform the manner in which an Arbitration Tribunal proceeds, it is plain that the Tribunal is entitled to make awards outside that which would normally be within the ambit of a common law arrangement. Generally speaking the Arbitration Tribunal is empowered to make an award in a trade dispute connected with the employment, or with the terms of

employment and to make orders incidental thereto. As mentioned above the dispute is referred to the Tribunal for settlement: section 5A.

45 Further, the Arbitration Tribunal does not have complete freedom of action. It seems reasonably clear that the Tribunal can only make an award in a dispute involving an employee and the employer of that employee within the ambit of the trade dispute which is referred to the Tribunal by the Minister or his delegate. Thus, in the instant case the ambit of the trade dispute which was referred to the Arbitration Tribunal is as follows: (Appeal record, page 70)

> This dispute is over the termination [of employment] of Aseri Kolikata with effect from the 26th March 2004. The union submits that the management action is in breach of disciplinary procedure as per section 16 of the Collective Agreement and is unjust and therefore should reinstate her without loss of benefits.

It will immediately be seen that the trade dispute concerned, amongst other things, a demand for reinstatement. That is what the Tribunal had to settle within the meaning of section 5A.

46 In ***Sugar Milling Staff Officers Association v Fiji Sugar Corporation*** [1986] 32 FLR 82, the High Court was concerned with an appeal from the Sugar Industry Tribunal and the legislation which then governed industrial relations in the sugar industry in Fiji. An industrial dispute had arisen because a person employed by the Fiji Sugar Corporation who was a member of the Sugar Milling Staff Officers Association had been dismissed from his employment. In the result, the matter was referred to the Sugar Industry Tribunal. The Tribunal ruled that it did not have power to order the reinstatement of the member of the union. In the Supreme Court, Rooney J examined the structure of the legislation and came to the conclusion that the Tribunal did have such a power. What is significant about the case is that in some respects the structure of that legislation is the same as the structure of the Trade Disputes Act. In particular, in both the sugar industry legislation, like the Trade Disputes Act, the powers of the Sugar Industry Tribunal in dealing with a dispute under the sugar industry legislation were also not explicitly specified just as they are in respect of the Arbitration Tribunal under the Trade Disputes Act. Rooney J concluded that it was important to look at the

purpose of the legislation which was to reduce industrial action in the sugar industry. He recognized that in the ordinary course of things reinstatement was not available as a remedy under the common law.

47 Rooney J also recognized that a legitimate object for a strike would be the reinstatement of a member. (It is probably not irrelevant to the history of the sugar industry case that the member who had been dismissed in the sugar industry case was, as it happened, the president of the union concerned. However, there is nothing in the judgment of Rooney J to suggest that the power was limited to union officials. It is obvious that a union is just as concerned with the unfair treatment of its members. To suggest otherwise would be to miss the point of the union movement.) As has been indicated, that Rooney J had no hesitation in concluding that, given that was the purpose of the Sugar Industry Tribunal, it was open to the Tribunal to order reinstatement. Although it could not be said that the sugar industry legislation is precisely the same as the Trade Disputes Act, the parallels as to the structure of the Tribunal are very similar. Given that there is a very clear and strong parallel in the objects of the two pieces of legislation, the inescapable conclusion is that the Arbitration Tribunal does have power to order reinstatement.

48 **Arbitration Tribunal has power to reinstate subject to statute.** We are of the view that given that the Arbitration Tribunal is required to deal with trade disputes referred by the Minister, given the scope of the first paragraph of the definition of "trade dispute" in the Act, it is an inescapable conclusion that the Tribunal has such a power. Such a power might be considered discretionary at least in the sense that it will not always be appropriate to award because the primary consideration is whether that amongst a range of outcomes is appropriate to resolve the trade dispute. It must not be forgotten that the Arbitrator, apart from observing fundamental requirements of fairness, will inevitably have experience of industrial relations in Fiji which will no doubt inform this exercise of judgement on his part. Whether, even if the Arbitrator considers that it is the appropriate mode or means of resolving the trade dispute the Arbitrator should still consider as part of this discretion whether it is appropriate

taking account of, perhaps, clearly identified specific concerns arising out of the specific employer/employee relationship. There may well be other considerations. However, sight must not be lost of the primary mandate of the Arbitrator: the resolution of the trade dispute.

49 The Arbitration Tribunal considered the issue of reinstatement. We have reviewed the submissions both preliminary and final placed before the Tribunal by the parties. In those submissions, it is to be noted that the issue so far as reinstatement was concerned was simply whether it was appropriate. Nowhere did the representatives of Life Insurance Corporation of India suggest that the remedy was outside the powers of the Arbitration Tribunal.

50 The Tribunal recognized that the remedy of reinstatement is discretionary. The Tribunal concluded:

> There was no allegation of dishonesty or fraudulent intent. The Employer suffered no loss and the potential risk lasted no more than five minutes. The admitted neglect on the part of [Ms Kolikata], for whatever reason, does not necessarily point to a breakdown in the mutual relationship and duties of confidence, trust and good faith that must exist in any employment relationship.
>
> Under the circumstances there is no evidence for the Tribunal to suggest that reinstatement would not be an appropriate remedy in this case.

51 Nevertheless, the Tribunal, clearly as a mark of the failure of Ms Kolikata to carry out to duties in a proper manner, then ordered that she be paid only 4 months of arrears of wages and the balance was to be deemed to be leave without pay. What is clearly meant by that order is that by the time the decision of the Arbitration Tribunal was given on 25 February 2005, something of the order of 10 months had elapsed since the summary dismissal. Essentially, what the Tribunal was doing was saying that the appropriate penalty included the loss of 6 months wages. This form of award was incidental to the resolution of the trade dispute. The contrary was not suggested.

52 On the judicial review, Winter J, employing his extensive experience of industrial relations in Fiji, said this:

> In Fiji reinstatement to the employee's previous position has been the primary remedy for the Tribunal particularly in view of the absence of unemployment benefits coupled with the scarcity of alternative employment. However Arbitrators are often cautious to point out that such a remedy is not automatic but discretionary.

The learned judge held that the Arbitration Tribunal was not in error in awarding reinstatement.

53 **Submissions before the Court of Appeal on reinstatement.** Before the Court of Appeal, counsel for the Appellant argued with considerable vigour that the conduct of Ms Kolikata was so grave and heinous that she had completely lost the trust of the employer. With respect, this seriously overstates the position. If the Life Insurance Corporation of India was sufficiently tolerant of the conduct of the Deputy Manager who also failed in his duty, it seems that such a respected corporate member of the Fijian community as this company would be more than capable of accepting Ms Kolikata back into employment. It may be that the fact that the employer does not want a particular employee back is a factor that that Tribunal should take into account. However, given that the charter of the Tribunal is to resolve a trade dispute, that attitude on the part of the employer could not be such as to operate as a veto or to preclude such an award. That said, it is a matter which should be taken into account and there may be circumstances where in the exercise of the proper functions of the Tribunal another form of award would be appropriate.

54 In our view, the learned Arbitrator correctly approached the issue as one involving his discretion. He appears to have been fully informed of the facts (including the stated position of the employer), and the remedy that he ordered was well within the range of remedies reasonably available to him. The High Court was entitled to conclude that this was not appropriate to judicially review this decision.

Monetary award

55 Finally, the Appellant argued that the order of Winter J in ordering wages paid from the date of the award into the future was either not within the powers of the High Court on judicial review or if such an order was within the powers of the court, that

his discretion miscarried. We used the word "argued" because this matter is not specifically mentioned in the pleaded grounds of appeal. The only conceivable basis upon which this could be found in the grounds of appeal is in the general averment "upon such other grounds as the Appellant may be advised in due course." - whatever that means. The Appellant never advised the Court before the hearing of this ground that this point would be raised. The Appellant never advised any of the Respondents. Counsel (we take him at his word) said that this added another approximately $50,000 to the liabilities of the Life Insurance Corporation of India up to the end of the hearing before Winter J. On that logic, given the open-ended nature of Winter J's order, the Life Insurance Corporation of India has been exposed to something like a further $100,000 until the date of the hearing before the Court of Appeal.

56 Even more curious is the absence of any mention of this complaint on the part of the Appellant in the written argument filed by counsel for the Appellant. Clearly no notice was given to any of the Respondents of this point because there is nothing in the written submissions from the 2nd Respondent - the union. (We would not expect anything from the 1st Respondent the Tribunal. Traditionally, that type of Respondent simply submits to the jurisdiction.) The 3rd Respondent (Ms Kolikata) did not appear or file submissions.

57 No point was taken by the 2nd Respondent when counsel for the Appellant came up with this point.

58 No attempt was made to amend the grounds of appeal. No authority or statute was cited by the Appellant to assist the Court. In this regard, Rule 5 of the Court of Appeal Rules is apposite. That provides:

> The Appellant shall not, without the leave of the court, urge or be heard to support any ground of objection not stated in his notice of appeal but the Court of Appeal in deciding the appeal shall not be confined to the ground so stated:
>
> Provided that the Court of Appeal shall not rest its decision on any ground not stated in the notice of appeal, unless the Respondent has had sufficient opportunity of contesting the case on that ground.

59 It is necessary to recall that it is the 3rd Respondent who has a pecuniary interest in the order made by Winter J. The second Respondent, the union that assisted the 3rd Respondent has no pecuniary interest in this specific order. The 2nd Respondent has, very properly, an interest in upholding the order of the Arbitration Tribunal and, by implication, supporting the decision of Winter J because that is, as pleaded in the grounds of appeal, the issue with which it had to deal. The union in this case has ably and responsibly assisted the 3rd Respondent. However, admirable though that assistance is, it is based on the relationship between the union and its member. The union has no legal relationship which entitles it to stand in the shoes of the third Respondent. It is not, in that sense, a trustee, agent or any other form of relationship which would entitle it to be heard in relation to the financial orders made by Winter J. Accordingly, we have not thought it necessary or appropriate to invite further submissions under Rule 5 of the Rules of the Court of Appeal even though we were minded to entertain the submissions of the Appellant not pleaded or otherwise notified before a hearing of the appeal.

60 Given that all members of this court asked questions of counsel for the Appellant about this topic in the course of the hearing of this case before the Court, it is to be implied that the Court proceeded on the basis that leave was given within the meaning of Rule 5 of the Rules of the Court of Appeal.

61 As will shortly appear, we have undertaken an examination of this point. The point was, in our view, the only point with any real merit in the whole appeal. In undertaking an examination of this, we wish to state that it is simply not acceptable that grounds of appeal be developed and presented in this manner. This is not a concern about preserving the dignity of the Court or anything like that. It is about ensuring that proper consideration of points of complaint made by the Appellant is undertaken by the Court of Appeal in preparing the appeal before hearing oral argument. Grounds of appeal should not be presented "on the fly".

62 We have already noted that there was, perhaps strangely, no attempt on the part of the Life Insurance Corporation of India to protect its interests by applying to stay the order of the Arbitrator pending an application for judicial review or to stay the orders of Winter J pending appeal. The latter is the more strange of the two. Not the least reason for this is that counsel for the Life Insurance Corporation of India told the Court during argument that this order by Winter J was, in a sense, out of the blue because this issue had not been raised during the hearing of the application for judicial review. That said, counsel with the experience of Mr Nagin would know that that if this was so, it was open to him to raise the matter in open court with the judge before the order was sealed. Further, it is clear that what Winter J was trying to do was continue the monetary order of the Arbitrator. The suggestion that the Appellant was not afforded a proper hearing on this topic of the monetary order did not appear to form an important part of counsel's argument and, against that background, we pass on to what we consider to be more important issues.

63 The first concern in relation to this order is whether or not the High Court has power to make the form of order at all. Although it is well established that damages and pecuniary orders on judicial review are within the powers of the High Court, it is at least open to doubt whether such orders could be made in favour of any party who has not specifically invoked the jurisdiction of the court to make the order. Naturally, the Appellant in its application for leave to apply for judicial review did not seek such orders. No such order was sought by the 2nd or 3rd Respondent. The researches undertaken by the court (no assistance was given in this regard by counsel for the Appellant) seemed to reveal that the only beneficiary of damages or other pecuniary orders is the party that originally invoked the jurisdiction of the High Court.

64 It is conceivable, but only just conceivable, that the order could have been made under paragraph 1(c) of the prayers for relief in the notice issued by the Appellant

applying for leave to judicially review the decision of the Arbitration Tribunal. That prayer is as follows:

> (c) Further Declarations or other relief as to this Honourable Court may seem fit. (*sic*) [emphasis added]

65 The open-ended nature of this order by Winter J is curious. The learned judge does not record that any enquiries were made as to the position of Ms Kolikata by the time that the judgment of the High Court was delivered. By the date of the learned judge's order, considerable time had elapsed. None of that time lapse could be laid at the feet of Winter J. He delivered judgment very shortly after hearing the application for judicial review. Nevertheless it seems to us that only if the position was that Ms Kolikata still wanted this job and Life Insurance Corporation of India was deliberately shutting her out could consideration of making such an order even begin to be undertaken.

66 This Court cannot find any authority which supports the making of the kind of order that was made in the instant case. As we have already lamented, we did not have the benefit of full argument on the topic and it is conceivable that there is such a power. What we are very clear about is that order should not have been made in this case because the learned judge appears to have made insufficient enquiries as to the present status of the 3rd Respondent. Did she wish to return? Had she made any effort to return? Had the employer, in effect, shut her out of returning? Further, the order is completely open-ended.

67 All of that said, even a casual perusal of the submissions for the Appellant before the High Court on the application for judicial review (appeal record, page 196-204) would have left Winter J in no doubt that the position of the employer was utterly set against any re-employment. The same could be said about the submissions before the Tribunal. Winter J could readily have inferred a degree of recalcitrance on the part of the employer and, it may well have been in an attempt to do broad justice that the learned judge made the monetary order that he did. However, we think that he needed a great deal more information before such an order (assuming it to be within

the power of the High Court) could have been made. Accordingly, we think that it is right to set aside that part of the order of the High Court which he ordered the payment by the Life Insurance Corporation of India of wages from 25 February 2005 (i.e. the date of the award by the Tribunal) "down to the date of judgment and normal wages thereafter".

68 In the result, we think that the order made by the learned judge was simply inappropriate on the information that was available to him.

69 In holding that this order was not appropriate, we would not wish to be understood as saying in any way that Ms Kolikata may not be entitled to that amount (or some other amount) if she sought to enforce the award of the Arbitration Tribunal. It is not appropriate for this Court to say anything about the merits of such litigation. Not the least reason for this proposition is that the court simply does not have sufficient information about matters such as whether or not Ms Kolikata presented herself for reinstatement and, if she did, what response she received from her employer. Some may find it disturbing that an award remains in force but not obeyed nearly 3 1/2 years after it was made. But those who do find such a fact potentially disturbing would want to know more about the post-award circumstances before condemning this failure.

Costs

70 For reasons relating only to the issue in relation to the monetary orders made by Winter J, the appeal succeeds but to that extent only. Had the 3rd Respondent actually taken part in this appeal and sought to uphold the monetary orders of Winter J, matters may have become more complicated. However that did not arise. The 2nd Respondent who, as we have already held, ably and responsibly assisted the 3rd Respondent here and below has sought to uphold the refusal by the High Court to order judicial review of the award of the Arbitration Tribunal. In that regard it has been wholly successful in that it attended before this Court and responded to the grounds as pleaded in the Notice of Appeal. We have already held that the 2nd Respondent had no financial interest in the monetary order made by Winter J. During

the course of the oral hearing of this matter we did seek the assistance counsel for the 2nd Respondent to this ground of appeal propounded by the Appellant "on the fly". We did so more upon the basis of the traditional position of the union that is a party who has assisted one of its members rather than as a party to that aspect of the appeal. As costs are a matter within the discretion of the court we think that the appropriate order for costs is that the 2nd Respondent should have the costs of appeal to be taxed if not agreed. Given the 3rd Respondent took no part in the appeal and given she was never notified of the complaint in relation to the monetary orders made by Winter J, in a perverse way it might be said that she "lost" the appeal. This court does not consider such perversity and there will be for the avoidance of doubt no order for costs in respect of the 3rd Respondent. The 1st Respondent is, of course, a nominal Respondent submitting to the jurisdiction of the Court and, from the avoidance of doubt there will be no order to costs in respect of the first Respondent.

Disposition

71 The Orders of this Court are:

(1) The appeal be allowed to the extent only that the part of the order of the High Court dated 22 June 2006 which ordered that the 3rd Respondent therein was to be paid "full arrears of wages from the 25th of February 2005 down to the date of judgment and normal wages thereafter" is set aside.

(2) The 2nd Respondent to have the costs of the appeal to the extent that those costs were incurred in responding to the first 11 grounds of appeal pleaded in the notice of appeal dated 4 July 2006.

Byrne, JA

Hickie, JA

Bruce, JA

Solicitors:

Sherani and Company, Suva for the Appellant
No appearance for the First Respondent
Kohli and Singh, Suva for the Second Respondent
No appearance for the Third Respondent