IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO.: HBJ 45 OF 2007

BETWEEN:

THE STATE v. ARBITRATION TRIBUNAL

First Respondent

FIJI POSTS & TELECOMMUNICATIONS EMPLOYEES ASSOCIATION

Second Respondent

JONE KELO

Third Respondent

EX-PARTE: TELECOM FIJI LIMITED

Applicant

Counsels: Mr. D. Sharma for Applicant
Ms S. Serulagilagi for First Respondent
Mr. R.P. Singh for Second and Third Respondents

Date of Hearing: 28th February 2008
Date of Judgment: 7th March 2008

JUDGMENT

BACKGROUND:

[1] With the consent of counsels for which I am grateful I have used the expedited procedure and dealt with the entire judicial review together instead of dealing with leave first.

[2] Jone Kelo and one Camaibau were employees of Telecom Fiji Limited. Telecom owns telephone cables. On 2nd June 2006, the two were repairing cables at Vatuwaqa, Suva. One other person Mr. Lovovou was also present. Camaibau touched Jone Kelo's back pocket jokingly, a few times. Camaibau continued with this form of joking, even though Kelo had asked him to stop and had warned him that he might get punched. As a result of Camaibau's persistence Kelo punched him. This assault led to disciplinary action being taken by Telecom against Kelo and Kelo being terminated from employment.

[3] Kelo was member of the second respondent association. The Association reported a trade dispute to the Chief Executive Officer of the Ministry of Labour who referred the dispute to the Permanent Arbitrator with the following terms of reference.

> ***". . . . .for settlement over the termination of employment of Mr. Jone Kelo with effect from 20 June 2006. The union claims that the termination was unfair, unreasonable and unjustified and that Mr. Kelo be re-instated without loss of pay and benefits."***

After hearing the evidence and submissions of the parties the Tribunal concluded that the summary dismissal of Kelo was unfair and unreasonable and he ordered his reinstatement. The applicant has applied to have the award of the Tribunal judicially reviewed. The grounds on which review is sought are that the Tribunal committed an Error of Law, that its findings were unreasonable and that it failed to consider relevant factors and took into account irrelevant factors.

Error of Law:

[4] The errors of law which the Tribunal is alleged to have committed are that it reasoned that an assault against an employee of the same level and

which does not undermine management authority may be considered less serious than an assault on a supervisor, manager or senior employee. Secondly that the Tribunal erred in holding that the company should have charged Kelo under Clause 49(j) of the Company's Instruction Manual and that Kelo should have received one of the penalties prescribed for that offence. Thirdly it says that the Tribunal erred in ignoring powers of dismissal the applicant had under Clause 51 of the Manual.

[5] It is not easy to define error of law. At one end of the spectrum is a misinterpretation of statutory provisions. At the other end there may be errors in drawing of inferences from the findings of primary facts. The Tribunal may also commit an error if it takes legally irrelevant matters into consideration.

[6] Misconduct is the usual but not the exclusive ground for summary dismissal. Misconduct is intentional and positive wrongdoing. There is no fixed rule of law defining the degree of misconduct which will justify dismissal: Clouston & Co. v. Corry (1906) A.C. 122 at 129. Further there is no rule of law which defines what constitutes misconduct for purposes of dismissal.

[7] Lord Evershed MR in Laws v. London Chronicle (Indicator Newspapers) Ltd. (1959) 2 ALL ER 285 stated that an employer is entitled to dismiss the employee summarily if the conduct complained of is such that it shows that the employee has disregarded an essential condition of contract. A single act of misconduct would justify dismissal if it was of such a nature as to show that the employee is repudiating the contract or one of its fundamental terms. The gravity of the single act decides whether it constitutes the requisite misconduct for dismissal.

[8] It is not in dispute that Kelo punched a fellow employee. Further medical report shows that the victim suffered bruising on the temporal and facial region and temporary impairment of hearing.

[9] The Tribunal made following findings. It said not all the six punches landed. He also noted that there is a special relationship of *"tauvu"* between the two so Camaibau may have extended his liberties of teasing Kelo a bit too far even though he was told by Kelo that Kelo wanted to get on with work.

[10] He also noted that Camaibau did not want to report the matter to police but it was the workplace supervisor who encouraged him to do so. He also concluded that the assault was not premeditated but provoked.

[11] The applicant submits that the assault was a vicious assault in which the victim's hearing was impaired. The applicant states that it had a zero tolerance policy towards assaults on fellow employees. This was a policy introduced in December 2004. Whether this policy was made known to the employees in Suva is uncertain. While the Association conducted awareness programme regarding the policy in Western Viti Levu, there is nothing to indicate it was done in Suva and Northern Division. Even if the policy was made known to the workers, the Tribunal would still be entitled to look at the total circumstances of an assault in its deliberations. Here an employee with 20-year good record acted out of character. And that too after he had told the other that he wanted to get on with the job instead of fooling around. I find the Tribunal's conclusions entirely convincing. There was no error of law in considering the mitigating factors. That is how misconduct must be looked at in its totality.

[12] The Tribunal considered that the applicant over-reacted in laying five charges against Kelo all arising out of one incident. The Tribunal was of the view that Kelo should properly have been charged under Clause 49Q) of the Manual. Clause 49 of the Manual provides list of disciplinary offences and in Clause 49(j) assaulting a fellow employee is listed as a disciplinary offence.

[13] Mr. Sharma submitted that the Manual, provides for three types of offences: those which attract instant dismissal as penalty; disciplinary offences and minor offences. He further submitted that the Tribunal erred in law in holding that the proper penalty for Kelo's offence was that provided for 49(j) offence as per Company's Instructions Manual II.

[14] Mr. Sharma submitted that it was for the company to decide the penalty and even for disciplinary offences under Clause 49, summary dismissal was still open to it. He submitted that dismissal was not only confined to those charged under Clause 51.

[15] Clause 51 applies to those who commit gross misconduct or a serious criminal offence. The adjective ***"gross"*** and ***"serious"*** describe the nature of misconduct and offence. Once the Tribunal came to the conclusion having looked at the surrounding circumstances and the offence that it was not a serious assault, the sting is taken out of Mr. Sharma's submissions. Granted Kelo was charged for the offence of Assault Occassioning Actual Bodily Harm but he was not represented and pleaded guilty in court. Given the reluctance of Camaibau to report the matter to police, it is likely that he would have reconciled with Kelo and proceedings probably terminated under Criminal Procedure Code.

[16] I do not consider that the Tribunal was making any general remarks that the applicant could never terminate an employee charged for assault but his comments are made in the context of circumstances of this case and because the applicant had provided for penalties in the Manual. He concluded that in the circumstances of this case, the applicant ought to be restricted as provided in the penalties provisions for disciplinary offences.

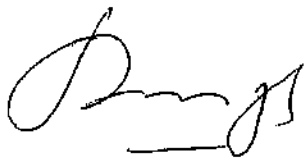
Findings were Unreasonable:

[17] I shall look at the next three grounds together as the facts and reasons overlap. The applicant is raising Wednesbury unreasonableness. Wednesbury unreasonableness or irrationality requires a very high

threshold before court comes to that conclusion. The reason for this in that even ***"two reasonable persons can perfectly come to opposite conclusions on the same set of facts without forfeiting their title to be considered reasonable"*** : R.W. (An Infant)(1971) A.C 682 at 700. Before a court intervenes, it must be shown that the decision is so wrong that no person could sensibly take that view: Secretary of State v. Tameside BCC - 1977 A.C. 1014 at 1026 or ***"so outrageous in its defiance of logic. . . . .that no sensible person. . . . .who had applied his mind to the question to be decided could have arrived at it":*** Council of Civil Service Unions v. Minister for Civil Service - 1984 3 ALL ER 935 at 939. In short the decision must be shown to be absurd, outrageous or perverse before the court would intervene.

[18] The Tribunal has given its reasons; he analysed the facts. I do not find anything in the Tribunal's judgment which reaches this absurd threshold. In fact far from it. It is a well reasoned judgment with which I would concur even on merits.

[19] Accordingly, I dismiss the application for judicial review. I award costs to the Association in the sum of $700.00 to be paid in fourteen (14) days. I also order the applicant to pay $200.00 costs to the first respondent for preparation of the records to be paid in fourteen (14) days.



[Jiten Singh]
JUDGE

At Suva
7th March 2008