

AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO. 10 OF 2006

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In the Dispute Between

FIJI PUBLIC SERVICE ASSOCIATION

and

DAILY POST COMPANY LTD.

FPSA: Mr N Tofinga
Daily Post: Mr D Sharma

DECISION

This is a dispute between the Fiji Public Service Association (the "Association") and the Daily Post Company Ltd (the "Company") concerning the transfer to Lautoka of Josephine Prasad (the "Grievor").

A dispute was reported by the Association on 25 October 2004. The report was accepted on 29 October 2004 by the Chief Executive Officer who referred the Dispute to a Disputes Committee. The Committee was not formed within the prescribed time and as a result the Minister authorized the Chief Executive Officer to refer the Dispute to an Arbitration Tribunal for settlement pursuant to the Trade Disputes Act Cap 97.

The Dispute was referred to the Permanent Arbitrator on 2 June 2005 with the following terms of reference:

"..... for settlement over the transfer of Josephine Prasad to Lautoka on the wrongful pretext that the majority of the Daily Post reporters do not have any confidence in her ability to manage the newsroom effectively. The Association intends that the transfer is an act of discipline and therefore unfair, unjustified, and against the principles of natural justice".

The Dispute was listed for preliminary hearing on 24 June 2005. On that day the parties were directed to file preliminary submissions within 21 days and the Dispute was listed for hearing on 26 September 2005.

The Association filed its preliminary submissions on 14 July and the Company did so on 20 July 2005.

The hearing of the dispute commenced in Suva on 26 September and continued to its completion on 27 September 2005. The Association called a total of seven witnesses to give evidence and the Company called two witnesses.

At the conclusion of the evidence the parties sought and were granted leave to file written final submissions. The Association filed its final submissions on 10

November 2005. The Company filed answering submissions on 24 January 2006 and the Association filed a reply submission on 8 February 2006.

By memorandum dated 16 October 2004 the Grievor was informed by the Company's Editor that she was to be transferred. Omitting formal and irrelevant parts, the correspondence stated.

"Recent events have led me to believe that the majority of our reporters do not have the confidence in your ability to manage the newsroom effectively.

You are to be transferred to Lautoka as West Bureau Chief effective 01 November 2004. You will be in charge of both news and sports.

Please be advised that I cannot work with senior staff I have no confidence in.

I trust that you will understand my position and that we will work together for the betterment of this company".

The issue for the Tribunal to determine, in accordance with the Reference, is whether this was a disciplinary transfer or whether the Company exercised a management right to transfer the Grievor as and when required according to the business needs of the Company.

The parties had signed a memorandum of agreement dated 14 February 2003. The Agreement was reached following industrial action towards the end of 2002. The Agreement is brief and does not refer to the question of transfer. Clause 8.1 sets out a procedure to be followed when a disciplinary incident arises and clause

8.2 sets out the grounds upon which an employee may be summarily dismissed. There was no other agreement in place in September 2004.

The Grievor's letter of appointment dated 13 January 1999, which confirmed her appointment as a cadet reporter and which set out some basic terms and conditions, did not identify a particular employment location and did not deal with the issue of transfer from one office to another.

The Association submitted that the Grievor's transfer was a disciplinary measure taken by the Company as a result of unsubstantiated allegations concerning her ability to manage the newsroom. The Association also claimed that in the process of deciding to transfer the Grievor, the Company failed to give the Grievor an opportunity to be heard on the allegations. The Association also submitted that the Company's conduct is inconsistent with the right to fair labour practices under section 33 (3) of the Constitution.

The Company submitted that the Grievor was transferred because it needed a competent manager in its West Office and because it appeared desirable to move the Grievor out of the Suva Office until the issues raised by staff could be settled. The Company in effect submitted that it exercised a management right for reasons which were of benefit to both the Company and the Grievor. The Company denied that it was a disciplinary response and did not allege any act of misconduct on the part of the Grievor.

The Tribunal accepts that the Company could not exercise its management right to transfer the Grievor, contrary to her will, when the real or a material reason for the transfer was that the Grievor's conduct amounted in substance to a disciplinary offence. If the transfer would not have been directed but for the

Grievor's conduct that appeared to constitute a prima facie offence, the disciplinary procedure in clause 8.1 should have been followed before the Grievor could be transferred. The Grievor is entitled, under those circumstances, to the various safeguards provided by the discipline procedure and the rules of natural justice. (See Fijian Teachers Association -v- Public Service Commission Award No.52 of 1999 at page 12).

The Tribunal has considered the evidence carefully and has concluded that the evidence given by Mr Wesley is preferred as being more reliable and more probable. He appeared to have the better memory of events and he appeared objective and detached in his evidence. The Grievor's evidence was unconvincing in relation to critical issues.

The Tribunal has concluded that at the time when the transfer letter was written to the Grievor the Company was required to deal with a number of management issues. Mr Wesley gave evidence that some members of the Suva Office staff had complained to him about the Grievor's management style. Mr Wesley also gave evidence that at the same time there was a problem with the management of the Company's Office in the West. The Grievor was considered to be the most appropriate person, under the circumstances, to move over to the West, on a temporary basis, until both situations were resolved.

Mr Wesley confirmed that he had a good working relationship with the Grievor. The Tribunal accepts this evidence but notes that the working relationship appeared to come under some pressure shortly before the Grievor's transfer. An exchange of correspondence dated 15 and 16 September 2004 between the Grievor and Mr Wesley and between Mr Usman Ali and the Grievor arose partly as a result of the management issues in the Company's West Office.

The Tribunal does not consider that the content of the Grievor's memorandum dated 16 September 2004 to Mr Wesley amounted to misconduct or constituted a prima facie discipline offence.

The Tribunal does not consider that the staff complaints concerning the Grievor's management style amounted to misconduct or constituted a prima facie discipline offence.

It was open to the Company to conclude that the appropriate short term solution to the various management problems confronting it at the time was to transfer the Grievor to a management position in West Office. Mr Wesley indicated that her terms and conditions were to be the same and that if there was any aspect of the arrangement about which the Grievor was not happy, then there would be further discussions to come to some agreement.

The Tribunal is also satisfied that Mr Wesley discussed the transfer with the Grievor in his office. He stated that she appeared to him not to be happy with the proposal. There was no requirement for agreement to be reached. The Grievor had been consulted and the Company decided to proceed with the transfer.

The Tribunal is satisfied that the Company was justified in concluding that it was in the interests of the Company for the transfer to take place. The Tribunal is not satisfied that there was any misconduct which would have triggered recourse to the discipline procedure.

There are some other matters which require brief comment.

First, there was a great deal of evidence concerning conflicting partitions from staff. These partitions were put together after the Grievor received her letter dated 16 October 2004. The evidence was not helpful and only indicated to the Tribunal that as at about 20 October 2004 there were staff who opposed and staff who supported the Grievor's transfer to the West.

Secondly, the Grievor gave evidence concerning the pressure she was under as a result of her being a state witness in a trial relating to the 2000 Coup. She indicated that she feared for her safety and that she felt more secure in Suva. The Tribunal has concluded that the Company's management was aware of the nature of the evidence that the Grievor was to give at the trial and had concluded that the interests of the Company outweighed the perceived risk to the Grievor's safety and security were she to be transferred to the West.

Thirdly, the Tribunal is not satisfied that any reservations expressed by Mr Usumaki concerning the content of the Grievor's newspaper column had anything to do with the decision to transfer the Grievor. In any event the owners (ie. the shareholders) of the company were entitled to input into policy. Management is expected to take note of policy considerations and pass on to staff appropriate directions in relation to policy. There was insufficient evidence to conclude what, if any, impact the content of the Grievor's journalistic work played in the decision taken by the Company to transfer the Grievor.

Finally, the Association has claimed that the transfer of the Grievor was not conducive to fair labour practices which is a right afforded to the Grievor pursuant to section 33 (3) of the Constitution. The concept of fair labour practices is a broad expression which is not really capable of precise definition.

In National Education Health and Allied Workers Union – v- University of Cape Town and Others 2003 (3) SAI (CC) at paragraph 33, Ngcobo J said:

"The concept of fair labour practices is incapable of precise definition. The problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgement. It is therefore neither necessary nor desirable to define this concept".

The Tribunal has concluded that the decision taken by the Company to transfer the Grievor was not inconsistent with the Grievor's right to fair labour practices for the reasons already stated.

AWARD

The Company has a management right to transfer staff as and when required.

The Company exercised that management right after discussing the transfer with the Grievor.

There was no conduct on the part of the Grievor which would amount to an offence requiring the Company to invoke the discipline procedure in clause 8.1 of the Agreement.

There were management issues in both the Suva and the West Office which justified the Company's decision to transfer the Grievor.

The transfer was not disciplinary and was therefore not unfair nor against the principles of natural justice.

There was no breach of the Grievor's right to fair labour practices.

DATED at Suva this 2ND day of March 2006.

W. Palanichini
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ARBITRATION TRIBUNAL