AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO. 20 OF 2006

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In the Dispute Between

FIJI BANK & FINANCE SECTOR EMPLOYEES UNION

and

FIJI DEVELOPMENT BANK

FBFSEU	:	Mr P Rae with Mr D Singh
FDB	:	Mr D Sharma with Mr M Nand

DECISION

This is a dispute between the Fiji Bank and Finance Sector Employees Union (the "Union") and the Fiji Development Bank (the Employer) concerning the summary dismissal of Jone Rasalato (the "Grievor").

A trade dispute was reported on 26 April 2005 by the Union. The report was accepted on 18 May 2005 by the Chief Executive Officer who referred the Dispute to conciliation. At the conciliation proceedings the parties agreed to refer the Dispute to voluntary arbitration. As a result the Minister authorized the Chief Executive Officer to refer the Dispute to an Arbitration Tribunal for settlement pursuant to section 6 (1) of the Trade Disputes Act Cap.97.

The Dispute was referred to the Permanent Arbitrator on 29 June 2005 with the following terms of reference:

> ***"..... for settlement over the summary dismissal of Jone Rasalato on 21 April 2005 which action the Union views as harsh unreasonable and unfair and seeks his re-instatement without loss of pay and benefits".***

The Dispute was listed for preliminary hearing on 29 July 2005. On that day the parties were directed to file preliminary submissions within 21 days and the Dispute was listed for mention on 26 August 2005. Due to unforeseen circumstances the Dispute was relisted for mention on 30 September 2005. On that day the Dispute was listed for hearing on 4 November 2005.

In the meantime the parties had filed their preliminary submissions on 24 August 2005.

The hearing of the Dispute took place on 4 November 2005 in Suva. The Employer called three witnesses and the Union called the Grievor to give evidence. At the conclusion of the evidence the parties sought and were granted leave to file written final submissions.

The Employer filed its final submissions on 22 December 2005. The Union filed answering submissions on 10 February 2006 and the Employer filed a reply submission on 28 March 2006.

The essential facts of the Dispute may be stated briefly.

In early November 2004 a customer (Mr P Nath) of the Employer completed and submitted an application form for a home loan. Whilst the Grievor was processing the application he indicated to the customer that a processing fee of $50 was required. It was agreed between the Grievor and the customer that the Grievor would accompany the customer to his bank. The customer handed the Grievor $50 in cash. At no stage did the Grievor issue a receipt to the customer for the $50 fee. The Grievor passed the application form to an assessing officer (Mr R Misau) upon his return to the Bank.

The assessing officer noted that section eight of the application form did not contain any details about the fee or its payment. He made a note to that effect on the form, placed his initials next to the notation and dated it 10/11/04. The Grievor admitted in evidence that section eight was blank when he passed the application to the assessing officer. The application was assessed and rejected by the assessing officer not because of the absence of information about the processing fee but because of the applicant's ability to make payments. The General Manager, Mr Hazelman, stated in his evidence that it was not proper procedure for the application to be assessed by the assessing officer without first ensuring that section eight had been completed.

As for the $50 cash, the Grievor stated in his evidence that the cash office was closed when he returned to the Bank. He also stated that he retained the money

in an envelope in his drawer at the Bank for some time and then later used the money for his own purposes. This aspect of the Grievor's evidence was not challenged.

The assessing officer, Mr Robert Misau, gave evidence at the hearing. He stated that he did not return the application form to the Grievor after he had noticed that section 8 had not been completed because the Employer was committed to assessing the application once it had been received. He admitted that his decision to reject the application was not noted on the application form but was recorded on a separate appraisal document. He also stated that this was the first time he had received a home loan application form with section eight blank. He admitted that he would have mentioned the matter to the Grievor at the time but he was very busy.

The Grievor subsequently advised the customer that his home loan application was unsuccessful on the basis that the assessing had assessed the applicant as unable to make payments.

At the same time the Grievor advised the customer to make a further application accompanied by a further $50 application fee. The Grievor stated that he treated the second application as a new application.

It was not disputed that the Grievor should have advised the customer to apply for re-consideration of his application with additional information. The fee for a reconsideration was only $25.00.

The customer submitted a fresh application with additional information and paid a $50.00 application fee which was properly recorded in section eight and

receipted. The second application was processed by the Grievor and then passed to a different assessing officer. It was not disputed that reconsideration applications would normally be passed to the same officer who assessed the initial application.

The Grievor stated in his evidence that the second application was not submitted to the initial assessing officer (Mr Misau) because he was no longer in that position. However that matter was not put to Mr Misau in cross-examination. Mr Misau did not expressly indicate what his position was at the time the second application was being assessed. However, the Tribunal is satisfied based on Mr Misau's evidence that the second application should have been submitted to Mr Misau.

In any event the second application was approved on about 25 November 2004 on the basis of the additional information provided by the customer.

Nothing further transpired until a chance meeting between the customer and one of the Employer's Managers (Mr V Reddy) in the Bank's premises in March 2005. It would appear that the loan application was discussed and the customer pointed out that he had paid a total of $100 for his application. On the basis that the customer may have been overcharged, Mr Reddy arranged to have the matter investigated. The Grievor was approached about the fees paid by the customer. The Grievor made arrangements to pay back $50.00 to the customer at once. In a letter dated 31 March 2005 addressed to the Bank's Chief Executive Officer, the customer acknowledged having received $50.00 from the Grievor.

It should be noted that if anything the Grievor should only have paid $25.00 to the customer and the remaining $25.00 to the Employer. In effect the customer had been overcharged $25.00 and the Bank's loss was effectively only $25.00.

It should also be noted at this stage that the details which subsequently appeared in section 8 of the customer's initial application were added by the Grievor after he became aware that the Employer was investigating the customer's complaint that he had been overcharged for his application. The details were false and indicated that in panic the Grievor was attempting to regularise the transaction.

Following the Grievor's interview by Mr Reddy, the Grievor sent a brief e mail minute dated 6 April 2005 addressed to the Area Manager concerning the incident. Omitting formal parts that minute stated:

> ***"I refer to our discussion this afternoon regarding the above client and shown below are the events that took place regarding his application:***
>
> - ***He came into the Bank in November for a loan and on 10/11/2004 all the information were submitted and the application processed.***
> - ***The application fee that he gave was not receipted but later given back to the client on 18/11/2005.***
> - ***His application was declined and he relodged another application on 25/11/2004 that was approved on the same day".***

The Tribunal accepts that the first and third statements do reflect in a brief manner what transpired. The second statement is incorrect as to the date on which the Grievor repaid $50.00 to the Customer. In his evidence the Grievor

stated that the date was wrong and should have appeared as 1/4/05. He did not give any explanation for the wrong date.

Following further investigation the Grievor met with the General Manager Division Support Services Mr Hazelman. The Employer then wrote a letter dated 15 April 2005 to the Grievor setting out the issues of concern in the following terms:

> ***"I refer to a recent case in which you were found to have not receipted a client home loan application fee. In this case you had failed to follow the procedural requirements. As discussed with you by both your immediate superiors and the CEO your actions are tantamount to larcency by servant and we consider it serious to warrant your dismissal.***
>
> ***Based on our own initial investigations and your comments I am very disappointed to advise that you have breached the trust placed on you as a bank officer.***
>
> ***Your actions were tantamount to the following:***
>
> 1. ***You deliberately converted the application fee to your own personal use and paid it back to the client only after a complaint was received.***
> 2. ***You failed to receipt the original application fee of $50.00***
> 3. ***You misled the client by advising him that his loan was declined and request him to pay a further $50.00 for reconsideration. You are aware that reconsideration fee is $25.00 not $50.00.***
>
> ***I expect a response from you by 4.00pm Friday 15 April 2005 on why you should not be disciplined".***

It is necessary to comment briefly on this letter. First, the conclusion in the first paragraph that the Grievor's actions amounted to larcency by servant warranting dismissal at first glance may give the appearance of pre-determination of guilt

and penalty. However, the Tribunal has concluded, having considered the evidence of the General Manager, that he was doing no more than stating what his conclusion was as to the facts as they stood at that time and the possible consequences for the Grievor. In effect, it was then up to the Grievor.

Secondly, at the time when the Grievor received the initial $50.00 fee from the customer, his actions really amounted to a failure to issue a receipt and pass the money to the cashier. For some time the $50 remained in an envelope in the Grievor's drawer at work. It was not until some time later when the Grievor removed the money from the drawer and then removed the money from the premises that his criminal liability became an issue. Up until that time it was open to the Grievor to hand in the $50.00 to the cashier.

Thirdly, the Grievor admitted that he had misled the customer by informing him that he should lodge a fresh application rather than apply for reconsideration and by informing him that the fee payable was $50 for the second application rather than $25 for a reconsideration of the first application.

As requested, the Grievor responded by letter dated 18 April 2005. Omitting formal parts, the letter stated:

> ***"I refer to your letter dated 15 April 2005 and my explanations regarding the above are as follows:***
>
> - ***I overlooked the initial application fee that was paid when the client was advised to pay another $50.00 that he had paid on 25/11/2005. The loan was then approved and funds disbursed for the construction of his house.***
> - ***This was a genuine error on my part and there was never an intention to defraud the Bank or the Client.***

- ***This is my 15th year in the Bank and as I can remember this is the first case of this kind that I had faced.***

- ***I have a family to look after and some other students from the village who are under my care and do look forward to my support in their strive for better education.***
- ***This had been settled with the client and I am therefore calling on you to forgive me for what that had transpired and promise that this will not be repeated.***
- ***Attached is a letter from the client himself a prove that the above had been settled and the matter cleared.***

I hope that you will consider my applications and will give it your kind consideration".

In relation to the date in the first paragraph the Tribunal has assumed that the year should read 2004 and that the reference to 2005 is a typographical error.

In so far as the last paragraph refers to an attached letter from the client, it was accepted by the parties that the Grievor was referring to a second letter dated 15 April 2005 from the customer addressed to the Employer confirming that $50 had been paid back to him by the Grievor and that there was now no money owing to him.

Following receipt of the Grievor's reply, the Employer's Staff Board convened sometime between 18 and 21 April 2005. The General Manager Mr Hazelman gave evidence that the Staff Board dealt with disciplinary issues for staff up to and including executive managers. In April 2005 the Staff Board consisted of the five General Managers and the CEO who acted as Chairperson. The Staff Board did not interview the Grievor.

It would appear that the Staff Board decided that the Grievor should be summarily dismissed from his employment. The Grievor was formally informed

of the decision by letter dated 21 April 2005 from the CEO. Omitting formal and irrelevant parts, the letter stated:

> ***"We refer to your letter dated 18 April 2005 and wish to inform you that the staff board has met to discuss the mitigating factors you presented.***
>
> ***I am disappointed to note that in your response you have not owned up to the fact that you converted the money to your own personal use although you had admitted it earlier.***
>
> ***You performed your duties in an unprofessional and dishonest manner. The Bank does not condone dishonest activities and attempts by officers to mislead the Bank. The Bank has therefore found your actions as deliberate.***
>
> ***The Staff Board after lengthy deliberation had decided to terminate your employment with immediate effect".***

It appeared from the evidence that the Grievor had been given the opportunity to resign. The Grievor stated that he did not take up the offer because he thought that his good record of 15 years employment with the Employer would entitle him to another chance. The General Manager Mr Hazelman however, stated in cross-examination that the Grievor's 15 years good service was not a factor which the Staff Board took into account in this case because of zero tolerance to dishonesty.

Although the dismissal letter is not entirely clear as to the precise misconduct being relied upon by the Employer as justifying summary dismissal, the General Manager Mr Hazelman in his evidence stated that the Employer's real concern was the Grievor's handling of the first $50 fee paid by the customer. As the second $50 fee had been properly receipted, there was no real issue of dishonesty.

Both the General Manager, in his evidence and the Employer's final submissions emphasised the Employer's policy of zero tolerance for dishonesty on the part of Bank Officers.

In determining whether the Grievor's summary dismissal was unreasonable and unfair, the Tribunal intends to confine itself to the dishonesty connected with the payment of the first or initial $50.00 application fee. The Tribunal has concluded that the request made by the Grievor to the customer to pay a second fee of $50 instead of $25 for a reconsideration was not the basis for the Employer's decision to summarily dismiss the Grievor. This payment was properly receipted and whatever the nature of the misconduct, it did not involve dishonesty.

Generally speaking the more serious or reprehensible the alleged misconduct, the more stringent the proof that is required to be satisfied. Consequently an allegation of misconduct involving dishonesty will need to be established on a standard which is higher than the usual balance of probabilities (See Canadian Labour Law, Third Edition, Brown & Beatty at paragraph 7.2500). The reason for this approach is that dismissal for dishonesty carries with it a stigma and represents a more significant obstacle to the Grievor's ability to find other work than would be the position if the Grievor's employment had been terminated for reasons unrelated to dishonesty.

The Tribunal has no difficulty in concluding in this dispute that when the Grievor decided to remove the envelope containing $50 from his workplace drawer and then actually removed the money from the employer's premises and used it for his own purposes he acted dishonestly. It is not the task of this Tribunal to categorize the dishonesty according to the many offences dealt with by the Penal

Code. The Tribunal notes that the Grievor admitted his actions to the Employer at some stage during the investigation (see dismissal letter dated 21 April 2005).

The Tribunal is not satisfied on the evidence that the Grievor's actions up to that point in time were shown to have been carried out with a dishonest intention.

It is now accepted that a person cannot automatically be terminated from his employment because he has engaged in one or more acts of dishonesty. Dishonesty at the work place 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 look at such factors as the lack of pre-meditation; 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 dishonest misconduct; the work history and general character of the Grievor and whether it is a first or subsequent offence. In such circumstances there may be a more appropriate disposition if the Tribunal is satisfied that the employment relationship has not been so damaged that it cannot properly continue. In effect this involves balancing the interests of the Grievor and the Employer.

However, the Tribunal cannot simply act on compassionate grounds which is essentially a more appropriate matter for the Employer. The Tribunal must be satisfied that there are sufficient factors of substance to enable it to give favourable consideration to the Grievor's assertions.

Whilst summary dismissal is not a necessarily automatic penalty upon proof of dishonesty it should also be noted that the Grievor's previous long and unblemished work record, in the discipline sense, is not by itself an excuse for

such misconduct. Each case must be considered separately. The general principles applicable to problems of dishonesty must be applied to the facts of the dispute which is now before the Tribunal. (See Brown & Beatty supra paragraphs 7:3310 and 7:3314).

In reviewing the above principles in the context of the facts which have been discussed in this decision at some length, the Tribunal has concluded that the Employer has failed to give any consideration or at least sufficient consideration to a number of factors which the Tribunal considers would have resulted in a reasonable Employer concluding that summary dismissal was not the appropriate penalty. In reaching this conclusion the Tribunal has considered the following matters. The Grievor had been employed by the Employer for fifteen years. There was no evidence to suggest hat he was anything but a loyal employee with a good work history and a discipline free record. Although the dishonesty involved $50 the monetary loss to the Employer was $25. It could be said on one reading of the facts that it was the customer who still owed the bank $25. He received services valued at $75.00 and paid only $50.00.

As previously stated the act of dishonesty was forming the intention to remove and the actual removal of the $50 from the Employer's premises. The Tribunal is not satisfied that in respect of that act of dishonesty there was any significant pre-meditation. The Tribunal does not consider that the Grievor's actions were those of a calculating thief. Finally, the Tribunal believes that 15 years loyal service outweighs one indiscretion involving $50.

As has often been stated by this Tribunal, the test for determining whether the Tribunal should exercise its discretion in favour of the Grievor is to ask whether objectively assessed the employee can be said to have the trust and confidence

of his employer and would be a harmonious and effective member of his employer's team.

In this case the Grievor had admitted the actions which amounted to dishonesty and during the investigation stage he apologised to the Employer. In his evidence before the Tribunal the Grievor recognised that his actions were wrong and again apologised. The Tribunal is satisfied from the evidence that the Grievor recognised what he did was wrong and that such conduct would not be repeated. Certainly the Employer is entitled to expect a high degree of trust from its officers, especially those who deal with the Bank's customers. Even taking this into account, the Tribunal is satisfied that the Grievor can be trusted by the Employer and would continue to be a harmonious and effective member of the team.

However in reaching this result, the Tribunal does not wish to be seen to be trivialising the Employer's interest in protecting its reputation, its property and the property of its customers. Dishonesty is wrong, particularly in the banking industry and the Employer's concern for deterrence is valid. However there was no evidence before the Tribunal that this type of misconduct was a serious problem. The final disposition of this Dispute will deter reasonable employees from engaging in similar conduct.

The message to other employees is that only when mitigating circumstances dictate otherwise will dishonesty result in a penalty other than dismissal.

For all of the above reasons, the Tribunal has concluded that the summary dismissal of the Grievor was not justified in the circumstances of this dispute.

There were some questions put to Mr Hazelman concerning the procedure followed by the Employer during the investigation of the incident. The Union's final submission makes a passing reference to the procedure followed by the Employer.

However, the Tribunal is satisfied that the Grievor was not disadvantaged or prejudiced by the procedure. There has not been any breach of clause 51 which would lead to the conclusion that the Grievor has been denied his procedural rights.

There was a meeting between management and the Grievor with union representation present. The issues of concern were discussed. The Grievor then received a letter which set out the issues and possible consequences. The Grievor was given an opportunity to mitigate in writing both as to the facts and penalty. The Tribunal is satisfied that the procedure was in keeping with the requirements of the Collective Agreement and the principles of procedural fairness.

As a result the Tribunal has concluded that the Grievor should be reinstated to his former position without compensation. The Grievor is deemed to have been absent on leave without pay from the date of dismissal to the date of re-instatement.

AWARD

The summary dismissal of the Grievor was not justified under the circumstances of this dispute. As a result the dismissal was unreasonable and unfair.

There was no breach of the Grievor's procedural rights.

The Grievor is to be re-instated to his former position without compensation.

The Grievor is deemed to have been absent on leave without pay from the date of dismissal to the date of re-instatement. Re-instatement should be effected without delay.

DATED at Suva this 21st day of April 2006.

W. Pulenchini

ARBITRTION TRIBUNAL