

AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO 43 OF 2006

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In the Dispute Between

**FIJI NATIONAL TRAINING COUNCIL STAFF
ASSOCIATION**

and

TRAINING AND PRODUCTIVITY AUTHORITY OF FIJI

FNTCSA : Mr R Singh
TPAF : Mr N Shivam

DECISION

This is a dispute between the Fiji National Training Council Staff Association (the Association) and the Training and Productivity Authority of Fiji (the Authority) concerning an alleged breach by the Authority of clause 3.3 of the Memorandum of Agreement.

A trade dispute was reported by the Association on 13 September 2004. The report was accepted on 29 September 2004 by the Chief Executive Officer who referred the Dispute to a Disputes Committee. As a consensus decision was not reached, the Minister authorized the Chief Executive Officer to refer the Dispute to an Arbitration Tribunal for settlement pursuant to section 5A (5) (a) of the Trade Disputes Act Cap 97.

The Dispute was referred to the Permanent Arbitrator on 6 December 2004 with the following terms of reference :

".....The Dispute is over the breach of Memorandum of Agreement clause 3.3 paragraph 2, and the Staff Training and Recruitment Policy of the Authority. The Association therefore desires the Authority to comply with the relevant provision of the said policy."

The Dispute was listed for a preliminary hearing on 26 January 2005. On that day the parties were directed to file preliminary submissions by 26 February 2005 and the Dispute was listed for hearing on 6 April 2005.

The Authority filed its preliminary submissions on 28 February and the Association filed its submissions on 3 March 2005.

When the Dispute was called on for hearing on 6 April 2005, the Association made an application for the hearing dates to be vacated. The application was not opposed by the Authority. The Tribunal granted the application and directed that the Dispute be relisted for mention on 29 April 2005.

As there was no appearance by the Authority on that day, the Dispute was again listed for mention on 27 May 2005.

On that day the Dispute was listed for hearing on 4 August 2005.

On 12 July 2005 the Association made an ex parte application to the Tribunal that the hearing date of 4 August 2005 be vacated. Having heard Mr Anthony for the Association the Tribunal directed that the hearing date be vacated and the Dispute was re-fixed for hearing on 29 September 2005. At the request of the parties that date was also vacated and the Dispute was listed for mention on 25 November 2005. On that day the parties informed the Tribunal that they were having discussions and requested a further mention date. As a result the Dispute was listed for mention on 27 January 2006. On that day the Dispute was listed for hearing on 29 March 2006.

The hearing of the Dispute took place on 29 March 2006 in Suva. The Association called two witnesses and the Authority also 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 4 May 2006. The Authority filed answering submissions on 30 May 2006 and the Association filed a reply submission on 18 July 2006.

The issue before the Tribunal is essentially whether the Authority has breached clause 3.1 of its Staff Training and Recruitment Policy. However the starting point in considering this issue is clause 3.3 of the Memorandum of Agreement between the parties, paragraph 2 of which states :

"The Agreement shall not include the following matters :

- ***Vacancies***
- ***Applications for Posts***
- ***Interviews***
- ***Appointments***
- ***Promotion***
- ***Regrading***
- ***Bonding of employees; and Staff training***

Which matters will be the subject of a Code of Practice published by the Council....."

The parties appeared to accept that the reference to a "Code of Practice" in paragraph 2 of Clause 3.3 of the Agreement (above) was a reference (amongst other things) to the Authority's Staff Training and Recruitment Policy, paragraphs 3.0 and 3.1 which provided :

"3.0 Vacancies

With the exception of Grades 1 to 4 all vacant positions shall be advertised internally by Council through circulars which shall be made available to all staff. Efforts should be made to fill all vacancies within 14 days after staff were informed by circular.

3.1 In the event that internal candidates do not have the necessary requirements to carry out the job successfully, the vacancies shall be publicly advertised in the local daily newspapers or through any other media by which most potential applicants may be reached."

In May 2004 the Authority wished to fill the vacant position of Administration Officer. This was a Grade 8 level position. The position had become vacant due to the resignation of the incumbent, a Mr K Kedrayate.

An internal advertisement was circulated by e-mail to all staff and a copy was placed on the Notice Board. The advertisement was drafted by Mr S Vadel who was and still is the Human Resources Officer of the Authority. The advertisement was approved by Mr W Kwansing the Authority's Corporate Services Manager.

Although the Association sought to challenge the substance of the advertisement, the Tribunal indicated during the course of the hearing that that issue fell outside the Tribunal's terms of reference.

The Association accepted that the vacancy had been internally advertised in compliance with clause 3.0 of the Policy.

It would appear that the vacancy was not filled within 14 days. The Association did not take that matter up during the course of the hearing as it was not the basis of the claim that the Authority had breached the Policy.

The internal advertisement included three minimum qualification requirements under the heading :

"Qualification and Work Experience

- ***Minimum qualification is a Diploma or a Degree in the field of management, Human Resources, Industrial Relations or Personnel Management from a recognized tertiary institution.***
- ***At least 3 years post qualification relevant work experience in a reputable organization.***
- ***High degree of Computer literacy in the use of MS Office package."***

The closing date for applications was 14 May 2004. The Authority received 11 applications as a result of the internal advertisement. The Authority screened the applications and concluded that none of the applicants satisfied the minimum qualification requirements (which are set out above).

As a result the Authority proceeded to advertise externally in July 2004. The Authority received 46 applications, five of which were shortlisted for interview and a successful candidate was ultimately selected from those shortlisted.

Although the Association sought to challenge the credentials of the applicant ultimately appointed to the position, the Tribunal once again indicated that this fell outside the Tribunal's terms of reference.

The Association's claim in this dispute was that interviews should have been conducted for the internal applicants to determine whether any one of them could have carried out the job successfully. However in support of its claim the Association called only one of the internal applicants to give evidence. As a result the Tribunal was placed in the position where it had to assess the merit of the Association's claim based on the evidence of only one of the applicants.

The applicant who gave evidence in support of the Association's claim was Ms Emily Naivalumaira. At the time she applied, Ms Naivalumaira was holding a position as accounts clerk which was the same position she had occupied since joining the Authority in about 1993. The position of Administration Officer was two levels higher than the position of accounts clerk.

In relation to the minimum qualification requirements, Ms Naivalumaira had obtained a Diploma in Quality Management in early 2004 through a franchised course from West Sydney Institute of TAFE. The Tribunal accepts that this was a Diploma in the field of Management and as a result satisfied the first requirement set out in the advertisement.

The Tribunal also accepts the evidence given by Ms Naivalumaira that she had the requisite level of computer literacy to satisfy the third requirement.

However her problem was the second qualification requirement which states that the applicant must have a minimum of 3 years post qualification relevant work experience.

The reference to post qualification can only be a reference to the qualification referred to in the first requirement, namely a degree or diploma.

As Ms Naivalumaira had obtained her diploma qualification in early 2004, she fell well short of the 3 years experience requirement when she applied in May 2004.

The Tribunal accepts the evidence given by Mr Vadei and Mr Kwansing that the Authority's HR Department was not operating well and that the Authority was anxious to appoint someone who had the experience to immediately assist in moving the HR Department forward.

Under the circumstances the Tribunal has concluded that the Authority had not acted unreasonably in concluding that Ms Naivalumaira did not have the necessary requirements to carry out the job successfully.

Subject to any contrary intention in a collective agreement, an employer is generally entitled to require an employee who seeks a particular job to have acquired a certain level of academic standard and/or secured a certain amount and a certain type of practical experience. The Tribunal has concluded on the evidence before it that the circumstances which existed within the Employer's Human Resources department were such that it was reasonable for the authority to short list only those applicants who met or satisfied all three qualification requirements.

The Tribunal wishes to make two final comments. First, it was unfortunate that the Authority saw fit not to acknowledge receipt of Ms Naivalumaira's application nor advise her in writing of the outcome of her application.

Secondly, although not expressly stated in the Policy, consultation by the Authority with the Association would possibly have avoided this matter being reported as a trade dispute and would certainly be in the interests of better employment relations.

AWARD

The Employer did not breach clause 3.3 paragraph 2 of the Memorandum of Agreement and nor did it breach clause 3.0 and 3.1 of the Recruitment Policy when it decided to advertise for an external applicant to fill the vacant position of Administration Officer.

DATED at Suva this 31st day of July 2006

W. Bulanchien
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ARBITRATION TRIBUNAL