

AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO. 2 OF 2006

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In the Dispute Between

NATIONAL UNION OF MUNICIPAL WORKERS

and

SUVA CITY COUNCIL

NUMW : Mr P Rae
SCC : Ms T Waqanika

DECISION

This is a dispute between the National Union of Municipal Workers (the "**Union**") and Suva City Council (the "**Employer**") concerning the termination of employment of Jone Tabuya (the "**Grievor**").

A dispute was reported on 14 February 2005 by the Union. The report was accepted on 7 April 2005 by the Chief Executive Officer who referred the Dispute to conciliation. As the Dispute was not resolved the parties agreed to the Dispute being referred to voluntary arbitration. Consequently 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 Arbitration on 11 May 2005 with the following terms of reference:

"..... over the termination of employment of Mr Jone Tabuya with effect from 7 January 2005 which the Union views as unreasonable, harsh, unjust and unfair and seeks his reinstatement without loss of pay and benefits plus compensation for humiliations and distress suffered by the Council's unjustified action".

The dispute was listed for a preliminary hearing on 27 May 2005. On that day the parties were directed to file preliminary submissions within 21 days and the Dispute was listed for final hearing on 18 August 2005.

The Employer filed its preliminary submission on 21 June 2005 whilst the Union filed its submissions on 2 August 2005.

The hearing of the Dispute took place in Suva on 18 August 2005. The Employer called two witnesses whilst 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. With the consent of the Employer the Union filed a

supplementary submission on 23 September 2005. The Employer filed its final submissions on 6 October 2005 and the Union filed answering submissions on 3 November 2005. By letter dated 17 November and received by the Tribunal on 28 November 2005, the Employer indicated that it did not intend to file a reply submission.

Before dealing with the Dispute itself, the Employer has raised a preliminary issue concerning the standing of the Union and the appropriate Collective Agreement. This Tribunal has frequently stated that it has no jurisdiction to deal with such questions. Neither the terms of reference nor the provisions of the Trade Disputes Act Cap.97 bestow any jurisdiction on the Tribunal to deal with such questions. Unless and until a court determines otherwise, the Tribunal is required to assume that the reference is proper and regular in all respects. The proper forum to raise such questions is the High Court by way of an application for judicial review.

The Grievor was employed by the Employer as Financial Controller for a period of three years commencing on 29 June 1999 pursuant to a written individual contract of employment which was signed by the Grievor and the Employer on 3 August 1999. The Grievor's commencing salary was \$38,000.00 per annum which was payable fortnightly.

It would appear that during the course of this contract the position title of Financial Controller was changed to Director Finance. This meant that the position was upgraded and the Grievor's salary was increased to \$45,000.00 per annum. Although there was no evidence as to how this variation was affected, the Tribunal has concluded that the Grievor's terms and conditions otherwise remained the same.

Although the written individual contract concluded at the end of June 2002, it would appear that the Grievor continued to be employed as Director Finance until November 2003. Although there was no specific evidence on this point the Tribunal has concluded that the on-going employment of the Grievor beyond June 2002 was an extension of his contract and as a result his terms and conditions of employment continued to be those which were contained in the written individual employment contract.

Pursuant to an internal memorandum dated 21 November 2003 from the Town Clerk, the Grievor was advised that his contract was to be extended. Part of that memorandum stated:

"Please be informed that the Council at its Emergency Meeting of 21 November 2003 has resolved the following in regard to the extension of your contract:

- 1. Director Finance's contract be extended for a further six months as at 24 November 2003 to 24 May 2004".***

The Tribunal has concluded that the contract which is being extended by this correspondence is the written individual contract of employment signed by the parties on 3 August 1999.

In a letter dated 31 May 2004 from the Town Clerk the Grievor was informed that his employment was to be extended for a further 12 months. The first two paragraphs of the letter are relevant:

"Dear Sir,

Subject: Extension of Employment

In accordance with the Council resolution passed in the April 2004 ordinary Meeting of Council, your employment is extended to another year commencing from 25 May 2004 and ends on 25 May 2005.

However your continued employment is based on the fact that you are no longer Director of Finance as from 25 May 2004 and assumed the specially created position of Special Project (Management) with a reduced transition measure salary of \$35,000 per year until the Council obtains a comparative worth of your special functions and responsibilities by sourcing the market and as such determined your salary accordingly".

The Tribunal has concluded that the Grievor's employment was extended on the same terms and conditions as those which had previously applied. At all times the Grievor's terms and conditions were those set out in the written individual contract of employment except for those which were expressly varied by the parties. The position title and the salary were such variations. At no time did the parties agree that the Grievor's terms and conditions were those set out in the Employment Act Cap 92. At no time did the parties agree that the Grievor's status was changed to that of permanent employee. At all times the Grievor remained an employee on a written individual contract which had been extended and varied by agreement.

Although the Grievor did protest at the reduction of his salary in an internal memorandum dated 22 June 2004, it would appear that he accepted the extension of his contract for 12 months on the terms and conditions set out in the letter of 31 May 2004 and the written individual contract of employment.

By internal memorandum dated 24 December 2004 from the Town Clerk, the Grievor was advised that his employment was terminated. The memorandum, omitting formal and irrelevant parts, started:

"Council had resolved in its Ordinary Council Meeting on 20 December 2004 that your services be terminated forthwith due to non-performance.

In this regard your non-performance was due to your failure to submit to our external auditors G Lal and Co. our internally reconciled accounts for 2003 on the agreed time line on 2 December 2004 so as to enable the mentioned Accounting Firm to commence their auditing of our annual accounts for 2003.

To date the subject annual account for 2003 has yet to be submitted to our external auditors G. Lal & Co.

As required under section 24 (1) (c) of the Employment Act Cap.92, you are hereby issued with the fourteen (14) days notice and therefore your services will be terminated at the close of business on Friday the 7th day of January 2005".

It is clear from the memorandum that the Employer intended to terminate the Grievor's employment by way of notice rather than by way of summary dismissal. The question of the correct amount of notice which was required to be given to the Grievor will be dealt with later in this decision, however the Tribunal has no hesitation in proceeding to consider the termination of the basis that it was by way of notice.

As a result the Tribunal's task is to determine whether the decision taken by the employer to terminate the contract of employment was made in good faith. In other words, was it a fair and reasonable decision?

The letter of termination clearly states that the non-performance related to the non-submission of the 2003 Accounts.

The Tribunal accepts that the Grievor informed the Council's Finance Committee at a number of its monthly meeting that the 2003 accounts would be finalised by a certain date. On each occasion the accounts were not ready and a further extension was required. The Tribunal accepts that the Grievor could have and should have taken additional measures to ensure that the finalisation of the accounts was expedited. The Councillors were not unreasonable when they resolved to terminate the contract for non-performance. The Grievor knew or ought to have known that the Finance Committee and the Council were concerned about the delays for a number of reasons.

It is noted that most of the matters to which the Grievor made reference in his letter dated 28 December 2004 were not matters which had been raised by the Grievor at any of the meeting which took place between August and December 2004.

The Tribunal has noted that the Employer had decided not to re-appoint the Grievor as Director Finance in May 2004. His individual contract of employment was extended for a further 12 months for specific purposes which were made known to the Grievor. The Employer found it necessary to seek to appoint another person to occupy the position of Director Finance. In view of the evidence the Tribunal has concluded that this was because of the Grievor's performance in the position. These matters were known or ought to have been known to the Grievor.

The Tribunal is satisfied that by offering the Grievor an extension of his employment contract for a further 12 months in the specially created position of

Special Project (Management) the Employer gave the Grievor an opportunity to demonstrate his skills and to improve his work performance by finalising the 2003 Accounts within an acceptable time frame. The Grievor did not meet the targets which were set at each Finance Meeting. He did not in his evidence satisfy the Tribunal that the Employer was in any way responsible for this failure.

As stated above the Tribunal has concluded that the Grievor's terms and conditions of employment remained those set out in his initial written individual contract of employment.

Although clause 5.2 of the agreement stated that the Grievor should not expect a renewal for a further term and that any renewal must be evidenced in writing, the parties can by agreement vary any term of a contract.

Neither a renewal meeting which is contemplated by clause 5.3 nor a termination meeting which is contemplated by clause 5.4 took place.

The Agreement can otherwise be terminated in accordance with clause 12 of the Agreement.

The Tribunal has already concluded that the Grievor did not at any time commence a new contract for another position. The material before the Tribunal leads to the conclusion that the initial contract was being extended subject only to agreed variations.

As a result the Tribunal is satisfied that the Grievor's contract could only be terminated in accordance with clause 12. The requirements for termination by notice are set out in clauses 12.4 and 12.6 of the Agreement. Section 24 of the

Employment Act did not apply to the Grievor.

Under clause 12.6, the Town Clerk at any time during the term of the contract may terminate the Grievor's employment by notice in writing and upon the payment of three months total remuneration as compensation.

The Grievor was given two weeks notice in his termination letter. The Grievor is entitled to the amount for which provision is made in clause 12.6 less any amount previously paid to the Grievor after the date of the termination letter – ie. 24 December 2004.

The last sentence in clause 12.4 requires the Town Clerk to give the Grievor two written warnings concerning the matters which require improvement before giving three months notice of termination. It was not disputed that the Grievor did not receive any formal written warnings as contemplated by clause 12.4. Under the circumstances the Grievor should receive a further two months total remuneration on account of the Employer's failure to comply with this clause.

In Central Manufacturing Company Limited –v- Yashni Kant (Civil Appeal No.10 of 2002 delivered 24 October 23) the Supreme Court of Fiji at page 21 stated:

".... There is an implied term in the modern contract of employment that requires an employer to deal fairly with an employee, even in the context of dismissal. The content of that duty plainly does not extend to a requirement that reasons be given, or that a hearing be afforded at least where the employer has the right to dismiss without cause, and to make a payment in lieu of notice. It does extend, however, to treating the employee fairly, and with appropriate respect and dignity, in carrying out the dismissal. Each case must, of course, depend upon its own particular facts".

The Tribunal has concluded that in this case the termination of the contract was not carried out in a manner that could be described as unnecessarily humiliating or distressing.

The only other matter requiring comment is the material in the Union's Supplementary Submission. To the extent that it is alleged that Mr R Chand may have not told the truth when giving evidence under oath, the Union should seek legal advice as to how best that matter should be pursued.

To the extent that the union is attempting to demonstrate that the preparation of the 2003 Accounts was the responsibility of some other person or persons, the Tribunal is not convinced that the material, under the conditions upon which it has been submitted, is of sufficient weight to in any way affect the Tribunal's conclusions.

AWARD

The Employer's decision to terminate the Grievor's contract of employment due to non-performance was fair and reasonable.

The Employer has not complied with the contractual requirements of three months compensation and two written warnings.

The Grievor is to be paid the amount specified in clause 12. 6 less any payment made to the Grievor after 24 December 2004.

The Grievor is to be paid a further two months full remuneration in respect of the Employer's non compliance with clause 12.4.

There has been no breach of the implied term that the termination of the contract be carried out with appropriate respect and dignity.

DATED at Suva this 26th day of January 2006.

W. Palaneheni
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ARBITRATION TRIBUNAL