

AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO.22 OF 2006

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In the Dispute Between

FIJI ELECTRICITY WORKERS ASSOCIATION

and

FIJI ELECTRICITY AUTHORITY

FEWA : Mr W Kaufuti
FEA : Mr J O'Connor with Ms S Nadakuitavuki

DECISION

This is a dispute between the Fiji Electricity Workers Association (the "Association") and Fiji Electricity Authority (the "Authority") concerning the termination of employment of Mr Davendra Naidu (the "Grievor").

A trade dispute was reported on 29 March 2004 by the Association. The report was accepted on 25 May 2004 by the Chief Executive Officer who referred the Dispute to a Disputes Committee. As the Authority failed to nominate a representative to the Disputes Committee 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 18 June 2004 with the following terms of reference:

"..... for settlement over the termination of employment of Mr Davendra Naidu, a power station mechanical technician, based at Labasa Power Station with effect from 16 December 2003 and the Association contends that the Authority's decision to terminate Mr Naidu is unfair, unreasonable and unjustified. The Association further contends that Mr Naidu be re-instated to his former position and repaid all salary and allowances from the date he was given his suspension".

The Dispute was listed for preliminary hearing on 14 July 2004. At the request of the Authority the Dispute was listed for mention on 11 August 2004. As there was no appearance by the Association on that day the Dispute was relisted for mention on 15 September 2004. At the request of the parties the Dispute was again listed for mention on 13 October 2004. On that day the parties were directed to file preliminary submissions within 21 days and the Dispute was listed for hearing on 18 January 2005.

The Association filed its preliminary submissions on about 25 October and the Authority did so on 25 November 2004.

When the Dispute was called on for hearing on 18 January 2005, the parties informed the Tribunal that for various reasons they were not in a position to proceed. As a result the Tribunal vacated the hearing dates and relisted the Dispute for mention on 26 January 2005. On that day the Dispute was listed for a three day hearing commencing on 2 May 2005.

The hearing of the Dispute commenced on 2 May 2005 in Suva. During the course of the hearing on that day the Association's Advocate became ill and the hearing was adjourned to 3 May 2005. When the proceedings resumed the Tribunal was informed that the Association's Advocate was still indisposed and unable to take further part in the hearing for the next two days. As a result the hearing was adjourned part heard to 27 June 2005.

The hearing resumed on 27 June 2005 in Suva and continued on 28 and 29 June 2005. The Authority called six witnesses and the Grievor gave evidence on behalf of the Association. At the conclusion of the evidence the parties sought and were granted leave to file written final submissions.

The Authority filed its final submissions on 5 August 2005. Those submissions were not received by the Association until 18 January 2006. The Association then filed answering submissions on 1 February 2006. By letter dated 19 April 2006 the Authority informed the Tribunal that it did not intend to file a reply submission.

The Grievor commenced employment with the Authority in 1982 as an apprentice Fitter Machinist in the Mechanical Department. In October 2003 he was employed as a Mechanical Technician at the Labasa Power Station.

On 13 October 2003 Generator No.6 (G6) at the Labasa Power Station tripped, deloaded and was stopped at about 9.35 pm. In the early hours of the following morning (14 October) Sukha Singh and Satish Lal commenced rectification work on G6. The work commenced at about 3.00am.

It should be noted that the Permit to Work (PTW) was only issued at 6.17 am on that morning. It was issued to Satish Lal by the System Controller at the National Control Centre. Rule 32 of the Authority's Safety Manual states that a PTW is required when work is to be carried out on or near HV equipment which renders it unsafe for system purposes. A PTW is required before any work can commence.

From the report prepared by Mr Laweloa, it would appear that when Satish Lal was issued the PTW the Safety tag was placed in the operating room instead of being on or near the equipment in a readily visible position. This contravened Rule 39 of the Safety Rules.

Between 3.00am and 7.30am work continued on G6. It would appear that the problem was related to the fuel pump system. At about 6.30am Pita Soqila, a mechanical fitter provided additional assistance.

At about 7.30am additional fitters were requested to work on G6. It was decided that the fortnightly maintenance work would be carried out on G6 whilst it was down.

At about the same time Satish Lal left the Power Station to change his clothes which had become saturated in fuel. The Acting Station Manager took Satish Lal to his home as it was on his way to a location where he was to deliver tools. It

would appear Satish Lal informed Pita Soqila that he was leaving to change his clothes.

One of the findings in Mr Laweloa's report stated that Satish Lal left the work station without a proper handover or cancelling the permit as required under Rule 32 of the Safety Manual. In the same report on page 5 Mr Laweloa refers to a written statement provided by Pita Soqila in which Soqila indicated that Satish Lal advised the Grievor that "the fault rectification aspect of the work was completed, which work he was responsible for".

Shortly afterwards, an unfortunate chain of events followed. At 8.45am G1 tripped; at 9.15am G3 tripped and at 9.21 am G5 tripped with the result that G2 and G4 then tripped causing a total blackout in Labasa.

The original PTW showed that the PTW was cancelled at 9.05am. It was cancelled by the Controller and the original document stated that it was cancelled at the request of Satish Lal. It was obvious from the evidence that Satish Lal had not returned to the Power Station by that time and he could not have made the request.

It was not disputed that the Grievor had made the call to the Controller to cancel the PTW. Although not expressly stated in Rule 32, it can be implied from that Rule and Rule 44 that the person to whom the PTW is issued is the person who should be responsible for the cancellation of the PTW. The evidence as to what was said by the Grievor to the Controller during the telephone conversation was disputed. However, since the Grievor wrote Satish Lal's name on the Duplicate PTW in Labasa at the same time as the Controller wrote Satish Lal's name on the

original PTW in Vuda, the Tribunal has concluded on balance that the Grievor identified himself as Satish Lal when he called to have the PTW cancelled.

Shortly after the PTW was cancelled the Power Station Operator Narendra Prakash called Mr Sukha Singh on the RT requesting authority to start G6. It was acknowledged by both witnesses that Prakash was directed to wait till he and Satish Lal returned to the power Station. Mr Prakash stated that he was sure that the Grievor was present and heard the conversation over the RT. The Grievor in his evidence admitted hearing that conversation.

The Grievor as the Power Station Mechanical Technician was the responsible person on site at that time. He had some discretion as to how the power failure situation should be handled.

The Grievor instructed the Operator Prakash to start G6 on automatic start. The engine would not start because the barring gear was engaged. An attempt was then made to start G6 on manual mode but again it would not start as the barring gear was still engaged.

It would appear that what happened next was that a Diesel Engine Mechanic Fitter A by the name of Mohammed Rayaz started G6 without being instructed to do so after the barring gear had been released. In the initial report which was prepared on site shortly after the incident Mohammed Rayaz is quoted as stating that no one authorized him to start up G6.

From the evidence it was not possible for the Tribunal to conclude who disengaged or released the barring gear. Neither the fortnightly maintenance

work carried out on G6 that morning nor any of the details of the rectification works on G6 were recorded in the Power Station Work Book.

What happened after G6 was started is best described by quoting from a report dated 18 October 2003 prepared by Mohammed Rafiqsham Ali who was the Labasa Station Manager at the time. He was in Lautoka at the time of the incident and Sukha Singh was acting as Manager in his absence.

On page 2 of that report, he stated:

"The set gained momentum exceeding rated speed and past 850rpm when the throttle lever was put to stop position and Fuel Valve closed by Rayaz. Both Electrical and mechanical protections operated but set could not stop since the Governor was on Full Open position at the initial starting stages and suspect from the previous night, the operator might have raised the governor to hold the load when it was deloading. This could have been also done while the M/C failed to start during the morning. Spark and smoke was noticed from the Alternator and the Prime-mover.

The M/C came to a halt instantly after reaching a speed approximately 1066 rpm when the fuel valve was closed and the rubbing effect amongst the alternator compartments".

In the same report Mr Ali listed in some detail the mechanical and electrical damage to G6. It would appear from the report that the damage resulted from the electrical and mechanical protections being unable to stop G6. It would also appear that this was the result of G6 being started with the Governor on "Full Open". The cost of repairs amounted to some \$400,000.00.

The incident was thoroughly investigated Mr Laweloa who was the Human Resources Officer for the Authority's Western Division. His Report, dated 10 November 2003, contained a number of findings, some of which have already been discussed in this decision. The Report also stated that the fortnightly maintenance was done in conjunction with the fault findings on G6 and the maintenance work was completed within one hour. The Report then stated that under normal circumstances such work is done between 3-4 hours. The Report then suggested that perhaps "the maintenance was done in haste with the intention of starting G6 in order to cope with the load as G1 was starting to trip at 8-45am".

The Report also stated that the System Controller at Vuda only approved the PTW cancellation on the basis that the caller was Satish Lal who was the person to whom the PTW had been issued.

The Report also found that the conversation to acknowledge that the works were completed between the Fitters/Operator and the Grievor was taken for granted. No thorough check took place on both the fortnightly maintenance works and the fault rectification work before G6 was started.

In paragraph 4 of his Report, Mr Laweloa made a number of observations, three of which are of some direct relevance to this Dispute. First, laxity on the part of the Power Station Operator for not placing the tag on the machine has been the practice in the past, which showed their scant regard to the tagging procedures. The supervisor was equally to be blamed for allowing such breach to continue. Secondly, the power Station was in a state of emergency and one of the core

values of having the courage to do what is right for the Authority had to be applied. Thirdly, the deloading of G1, G3 and G5 and frustration amongst the workers may have resulted in procedural deviation and ended starting G6 prematurely.

In his evidence the Grievor stated that he had sought cancellation of the PTW for G6 as there was a partial blackout in Labasa with both G1 and G3 out of action. Although he had heard Sukha Singh direct Prakash not to start G6 until he returned to the Power Station with Satish Lal, he gave instructions to start G6 because Sukha Singh was still some distance away and the town of Labasa was facing a power blackout.

He also stated that he had been informed that the maintenance work was completed and he believed the fault rectifications works had been completed. His evidence as to what he and others checked before G6 was eventually started was unclear and to some extent unconvincing.

Following recommendations made by Mr Laweloa in his report, the Grievor received a suspension letter dated 7 November 2003. Omitting formal and irrelevant parts, the letter stated:

"Further to our investigation concerning the breaking down and damage of generator (G6) in Cawaira Power State on 14 October 2003, and after completing our investigations and looking through the evidence and statements of the Labasa Power Station personnel, it has been decided that you will be suspended for 28 days without pay pending dismissal with effect from Monday 10 November 2003. This is in line with clause 17.1(e) of the FEA/FEWA Collective Agreement.

The following list of offences were committed by yourself on the 14th October 2003 which had been deemed by the Authority as serious misconducts hence the suspension before termination.

- 1. You cancelled the permit to work which was not under your name even though you are an authorized technician.**
- 2. You instructed the operator to start the machine without making the necessary checks to ensure that the main machine was fully repaired and ready to be operated on.**
- 3. You did not reveal your identity to NCC when asking for a cancellation of the permit to work on 14 October 2003 even though the permit was put there by Satish Lal.**
- 4. You put in Satish Lal's name signature on the permit to work when you cancelled it. This action contravenes standard procedures for permit to work which you are well aware of.**

For your information the total damage to the engine alternator assembly in Cawaira Power Station caused by your actions is about AUD\$400,000 as confirmed by the Supplier".

A cc copy of the letter was provided to the General Secretary of the Association. Then followed some correspondence between the Authority and the Association. The Association met with the appropriate representatives from the Authority's management. By memorandum dated 8 December 2003 the Grievor was advised that the period of suspension pending dismissal had been extended for a further seven days to allow the Association ample time to make a presentation on behalf of the Grievor.

By letter dated 16 December 2003 from the Authority the Grievor was informed that he was to be summarily dismissed. The first paragraph of that letter stated:

"After completing our investigation concerning the breaking down causing damage to generator 6 (G6) in Cawaira Power Station on 14 October 2003, and after discussing your case with FEWA officials, we advise that your services will be terminated with effect from Tuesday 16 December 2003".

The letter then listed the offences which the Authority deemed to be serious misconduct justifying the decision to terminate the Grievor's employment.

The first four offences are expressed in identical terms to those listed in the suspension letter dated 7 November 2003. The additional offence stated:

"5. Failing to comply with the Safety the requirements as stipulated in the Safety Manual and likewise section 13 of the Health & Safety 1996.

The Grievor was subsequently paid out all his entitlements by way of annual leave, sick leave bonus, long service leave and retirement benefit. He was not paid any wages in lieu of notice in respect of his dismissal. This confirms that the Grievor's employment was terminated by way of summary dismissal.

It is apparent from both the suspension letter and the dismissal letter that the Grievor's employment was terminated on two distinct grounds. First, his actions surrounding the cancellation of the PTW. Secondly, his instruction to start G6 without checking to ensure that it was fully repaired and ready to be operated on.

The fifth offence which is set out in the dismissal letter has two components. The first relates to failing to comply with the safety requirements in the Safety Manual. This is a general allegation of the more particular allegations set out in offences 1-4. This offence does not add anything further as no specific additional matter were mentioned in the correspondence, the evidence or the submissions. The second aspect of the fifth offence relates to section 13 of the Health & Safety at Work Act 1996. Section 13 (2) creates a quasi-criminal offence for workers (as defined) who contravene safety standards set out in section 13(1). It is a matter which should be dealt with by the Courts and is a

matter which would require proof beyond reasonable doubt. It is not a matter for this Tribunal. Furthermore, the Employer could do not more than make an allegation.

If there was a belief on the part of the Employer that the Grievor had acted in contravention of section 13 then the only appropriate course of action was to report the matter to the relevant agency under the Act.

In relation to the Grievor's actions concerning the cancellation of the PTW, the Tribunal has concluded that the Grievor's misconduct was not sufficiently serious in the circumstances of this Dispute to justify the imposition of the most severe of penalties, summary dismissal. There was a developing crisis at the Labasa Power Station. The person to whom the PTW had been issued had left the Power Station without a proper handover and without cancelling the PTW. The time of his return was not known to the Grievor. Mr Laweloa's report stated on page 5 that Pita Soqila in a written statement mentioned that Satish Lal had informed the Grievor that the fault rectification work had been completed. The Tribunal is satisfied that the Grievor believed on reasonable grounds that the maintenance work had also been completed. The Authority did not charge the Grievor with the specific offence of cancelling the PTW before the works for which it had been issued had been completed. Whilst he did give his name as Satish Lal to the Controller and whilst he did write Satish Lal on the PTW Duplicate copy, the tribunal has concluded that these actions were not dishonest in the sense that they were for personal gain or deceit. In all probability the Grievor acted in that way because he knew only too well that the PTW should have been cancelled by Satish Lal. The Tribunal accepts that a developing desperate situation explained a response which was irregular and not in strict compliance with the Manual.

However, it is apparent that those actions alone, as irregular as they were, were not the direct cause of the damage to G6. It appears to the Tribunal that the real concern for the Authority was the cost of repairing the damage to G6. The cause of the damage to G6 was the inability of the electrical and mechanical protections to stop G6. This in turn was caused by G6 being started with the Governor on full open. It was not clear from the material when the Governor was set at full open or by whom.

The second ground upon which the Employer relied to justify the Grievor's summary dismissal was his failure to check to ensure that G6 was fully repaired and ready to be operated on. As previously stated the Tribunal is satisfied that the Grievor had been informed by Satish Lal that the rectification works had been completed. This was as Satish Lal was leaving to change his clothes. In his evidence the Grievor stated that he relied on what he was told by the fitters concerning the maintenance works. He claimed that he did do a check of G6 but could have overlooked either the Governor or the barring gear. The Grievor stated that he had previously carried out maintenance work on G6. However, it is clear that if the Grievor had conducted a physical check of G6 before giving the instructions to start the generator he could reasonably have been expected to notice that the barring gear was still engaged. However, as it has not been established when the Governor was set at "Full Open", it cannot be said with any reasonable certainty that the Grievor would have seen anything irregular in respect of the governor, even if he had conducted a proper check before giving instructions to start G6.

This is because the possibility cannot be excluded that one of the senior fitters in attempting to start G6 may have set the governor at Full Open.

The ground relied upon by the Employer is the failure to properly check. The Tribunal accepts the following statement of principle as appropriate in cases such as the present:

"Similarly, where an employer invokes its disciplinary powers on the ground that an employee has been careless or negligent in his work, has made a serious error in judgement or has undertaken an operation which he knows to be dangerous and to be in violation of his shared responsibility to ensure that the work environment is safe, the employer has the burden of proving some culpable behaviour on the part of the employee".
(See Canadian Labour Arbitration; Third Edition; Brown and Beatty at paragraph 7.3520)

To the extent that the employer has established any culpable behaviour on the part of the Grievor, the Tribunal is not satisfied that it amounted to sufficiently serious misconduct to justify the Grievor's summary dismissal. The Tribunal is not satisfied that the Employer has established that the Grievor knew or ought to have known that his instructions to start G6 created a potential risk of damage to the Employer's property. Whilst a prudent employee may have conducted a more thorough check, the employee in this case acted in good faith by relying on the information passed to him by Satish Lal and the senior fitters. Even if a thorough check had been made before he gave the instructions to start G6 he may not have noticed the governor's setting as it may not at that time have been set on "Full Open".

The Tribunal has concluded that the summary dismissal of the Grievor in the circumstances of this Dispute was not justified and was as a result unreasonable and unfair.

The Union has not sought to challenge in any significant manner the procedure followed by the Authority. The Tribunal is not satisfied that the Grievor was disadvantaged or prejudiced by the procedure adopted by the Authority. The Grievor's right to procedural fairness has not been breached.

The Tribunal notes that on page 2 of the Authority's final submission it is stated that the "Association during the hearing consented compensation for Davendra Naidu and not reinstatement of employment service. However on page 5 of the Association's final submission, the following appears:

"The Association pleads to the Tribunal that Mr Naidu who had served the Authority for the past 21 years with no blemish record to his career be re-instated by the Authority in the position from where he was terminated and compensated for all costs due to him since he had been out of work since December 16, 2003".

The Tribunal does not have any note that the Association had abandoned its claim for the Grievor to be reinstated.

The Tribunal is satisfied that in this case re-instatement is the appropriate remedy. The Grievor had given many years loyal service to the Authority. There was no material before the Tribunal to suggest that the Grievor would not continue to have the trust and confidence of his employer. The Tribunal is satisfied that the Grievor would continue to be a harmonious and effective member of the Authority's team.

However, the Grievor's actions in relation to the PTW cancellation have been found to be in contravention of the Rules in the Safety Manual. His experience should have resulted in him conducting a thorough check of G6 before giving instructions for the engine to be started. At the very least such a check may have enabled him to determine whether the governor was on Full Open at the time and may have averted the damage to G6.

As a result it is appropriate that the Grievor be reinstated from the date of his suspension with limited compensation. He is to be paid six months wages and the balance is to be deemed leave without pay.

AWARD

The summary dismissal of the Grievor was not justified in the circumstances of this Dispute.

The procedure adopted by the Employer was fair.

The Grievor is to be re-instated from the date of his suspension. He is to be paid six months wages and the balance is to be deemed leave without pay.

DATED at Suva this ^{2nd} day of May 2006.


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ARBITRATION TRIBUNAL