AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

No. 44 of 2006

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In the Dispute Between

FIJI PUBLIC SERVICE ASSOCIATION

and

FIJI ISLANDS REVENUE AND CUSTOMS AUTHORITY

FPSA : Mr R Singh and Mr N Tofinga
FIRCA : Mr S Sharma

DECISION

This is a dispute between the Fiji Public Service Association (the Association) and the Fiji Islands Revenue and Customs Authority (the Employer) concerning the appointment of an acting Director – General of Inland Revenue Services.

The Dispute was referred to the Tribunal on 17 December 2004. The Dispute was then listed for a preliminary hearing on 26 January 2005. On that day, at the request of the parties, the Dispute was listed for mention on 30 March 2005.

As there was no appearance by or on behalf of the Employer on 30 March 2005, the Dispute was again listed for mention on 29 April 2005. Again there was no appearance by or on behalf of the Employer on 29 April and the Dispute was relisted for mention on 27 May 2005.

Although there was no appearance by or on behalf of the Employer on 27 May 2005, the Tribunal directed the parties to file preliminary submissions within 21 days. The Tribunal directed the Association's representative to advise the Employer as to the requirement concerning preliminary submissions. The Dispute was again listed for mention on 24 June 2005.

On that day, the parties were granted an extension of 14 days to file their preliminary submissions. The Dispute was listed for mention on 29 July 2005. The Association filed its preliminary submissions later on 24 June 2005.

As there was no appearance by or on behalf of the Employer on 29 July 2005, the Tribunal directed that the Employer file its preliminary submissions within 14 days and the Dispute was listed for further mention on 30 September 2005. The Association was directed to advise the Employer accordingly.

On 30 September 2005 the Employer was granted a further 21 days to file its preliminary submissions and the Dispute was listed for mention on 28 October 2005.

On that day and at the request of the parties, the Dispute was listed for mention on 25 November 2005. On that day the Employer was granted a further 14 days to file its preliminary submissions and the Dispute was listed for mention on 27 January 2006.

The Employer eventually filed its preliminary submissions on 9 January 2006.

When the Dispute was mentioned on 27 January 2006, Mr N G Singh appearing for the Association informed the Tribunal that the Association was ready to proceed to hearing and would be calling one witness. Mr S Sharma informed the Tribunal that the Employer was ready to proceed to a hearing and would be calling two witnesses. The parties requested two days for the hearing which was set down for 27-28 March 2006.

It should be noted at this stage that a dispute is allocated a hearing date only when the Tribunal is satisfied that the Dispute is ready to be set down for hearing. The Tribunal must be satisfied that the parties have filed and exchanged their preliminary submissions. The Tribunal must be advised on the mention day as to the number of witnesses each party intends to call at the hearing, their availability dates and the availability dates of the advocates who will represent the parties at the hearing. This information enables the Tribunal to allocate a hearing date which the Tribunal can reasonably expect will be the date on which the hearing will take place. Although last minute and unforeseen circumstances may require that date, sometimes at very short notice, to be vacated, the Tribunal's expectation is that the parties will be in a position to proceed on the allocated hearing date.

In the event that the date allocated subsequently becomes inconvenient or the parties subsequently become aware that one or other of them will not be able to proceed on the allocated date, then that party is expected to inform the Tribunal at the earliest possible opportunity. This will enable the Tribunal to consider the possibility of listing another Dispute for hearing on that date. This approach to the management of the Tribunal's business reflects a concern to ensure that the Tribunal and its staff, as resources, are utilized in the most economical, efficient and effective manner.

It should also be noted that this has been the practice of the Tribunal since January 2004 and is well known to all the Tribunal's stakeholders. Some aspects of this practice were also set out in the Tribunal's Practice Direction No 1 of 2004 a copy of which was placed on the entrance door to the former hearing room from March 2004 to October 2005.

The Tribunal received on 23 March 2006 by facsimile a letter dated 21 March 2006 which, omitting formal parts, stated :

> ***"The hearings on this dispute are listed for Monday and Tuesday 27th and 28th March 2006 at the Tribunal's Chambers in Suva commencing at 09.30am.***
>
> ***Due to our commitments to a spate of Branch and National AGM's just completed and as the General Secretary is currently absent overseas on duty, the Association hereby applies for the hearing dates to be vacated and the subject matter be re-listed for the General Mention Date on Friday 24 March 2006.***
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> ***We have consulted with Mr Suruj Sharma, of Sharma Patel & Associates, acting on behalf of FIRCA, and they indicate that they would not object to such a deferment being granted at the discretion of the Tribunal.***
>
> ***Any inconvenience cause is regretted. We would appreciate your earliest attention to the foregoing."***

On the same day as that letter was received, the Secretary to the Tribunal telephoned the parties and informed them that they would be required to appear as scheduled on 27 March 2006. The Secretary indicated to the parties that any application concerning the hearing should be made to the Tribunal at the commencement of the hearing.

On 27 March 2006 Mr N Tofinga appeared for the Association and Mr Sharma appeared for the Employer (FIRCA). An application was made by the Association to have the hearing dates vacated for the reasons stated in the letter dated 21 March 2006. Mr Sharma indicated that although he did not oppose the application, he was in a position to proceed should the application not be granted. The Tribunal noted that the Association could not provide any satisfactory explanation as to why the Tribunal was not informed much earlier about the overseas commitments of the General Secretary. Furthermore the Association did not provide any satisfactory explanation as to why the General Secretary had not made arrangements in sufficient time for another of the Association's Officers to prepare and present the Association's case at the hearing on the scheduled commencement date.

After hearing the parties, the Tribunal granted the application and vacated the hearing dates. The Dispute was relisted for mention on 28 April 2006. For the reasons already referred to in this decision, the Tribunal directed that the Association pay $500 as costs thrown away on account of two full hearing days being wasted. The costs were directed to be paid to the Ministry of Labour within 14 days.

On 28 April 2006, at the request of the parties, the Dispute was listed for mention on 26 May 2006.

On that day, and as a result of correspondence dated 10 May 2006, and material enclosed therewith, which had been forwarded to the Tribunal by the Association, the Dispute was listed for special ex parte mention on 8 June 2006 to further consider the Tribunal's directions concerning the issue of costs thrown away. The Dispute was otherwise listed for inter partes mention on 23 June 2006.

The Association's General Secretary, Mr R Singh, appeared before the Tribunal on 8 June 2006 to request the Tribunal to vacate the directions concerning the payment of costs thrown away. After hearing Mr Singh the Tribunal directed that the Association must comply with the directions. The reason for this decision was simply that Mr Singh did not provide any further or additional material to support his application.

On 23 June 2006 the Association informed the Tribunal that it needed further time to consider its position and its options in relation to the Tribunal's directions that it must pay the costs thrown away. The Dispute was relisted for mention on 28 July 2006.

In a letter dated 21 July 2006 and received by the Tribunal by facsimile on the same day, the Association wrote as follows :

> ***"I refer to this trade dispute which was called for mention on Friday 23 June 2006. The matter was deferred and re-listed for mention on 28 July 2006 to permit the Association to seek legal opinion on the matter.***
>
> ***In light of above, the Honourable Tribunal had offered to provide a written position on his previous decision on this issue, should the Association need to consider further legal proceedings.***

> ***It appears that we may consider the option of a legal review and for that purpose would appreciate if the Permanent Arbitrator could issue a written position paper which may be utilized on the foregoing action."***

Consequently, on 28 July 2006 the parties were directed to appear before the Tribunal on Thursday 3 August 2006 for a special mention to enable dates to be allocated for the hearing of the Dispute whilst the Association at the same time pursues its challenge to the Tribunal's directions.

The Tribunal's authority to grant an application for a hearing date to be vacated or to grant an adjournment flows from its inherent authority to control the procedure and process of the arbitration proceedings. It also flows from the powers expressly given to the Tribunal under section 30 of the Trade Disputes Act Cap 97 which states :

> ***"Save as is otherwise expressly provided for in this Act, or in the regulations made thereunder a Tribunal _ _ _ _ shall have the powers of a Commissioner under the Commissions of Inquiry Act and may regulate the procedures in any proceedings under this Act as he or it shall think fit"***

Whether an application to vacate a hearing date is granted is a matter for the discretion of the Tribunal. Certainly one of the grounds which would justify the exercise of that discretion in favour of the applicant would be the unavailability of the party's advocate. In the interests of a fair hearing such an application should normally be granted.

However, the Tribunal considers that the circumstances under which such an application is made to the Tribunal may warrant any costs wasted or associated with that application being awarded as a term of granting the application.

In this Dispute the hearing dates were allocated by the Tribunal with the concurrence of the parties at the mention conducted on 27 January 2006. That allowed the parties about two months to make all the necessary preparations. Just four days prior to the scheduled commencement the Tribunal received a letter from the Association which indicated that due to a number of meetings that had been held and due to the absence overseas of the General Secretary, the Association would not be in a position to start the hearing on 27 March 2006. The material provided by the union indicated that the overseas trade union meetings started in Sydney on 21 March 2006 and continued more or less to the end of April 2006 with the last meeting in Berlin. It is the Tribunal's opinion and there was no assertion by the Association to the contrary, that the Association and its General Secretary knew or ought to have known about these commitments when the dates for the hearing of the Dispute were allocated on 27 January 2006 or at least a short time thereafter. There was no satisfactory explanation for the short notice nor was there any satisfactory explanation for the failure to give timely instructions to another of the Association's two officers who regularly appear before the Tribunal.

Upon the application by the Association, the Tribunal was faced with three alternatives. The first alternative was to require the Dispute to proceed on the day scheduled . This would have vindicated the underlying purpose of a speedy settlement of the dispute by arbitration proceedings but would have prevented the Association from adequately presenting its case and participating in the hearing.

The second alternative was to grant the application to vacate the hearing dates without terms. This would have given the Association an opportunity to fully present its case and participate in the hearing, but would have undermined the purpose of the speedy settlement of the Dispute by

arbitration proceedings. The Tribunal would consider this alternative where the basis for the application was clearly beyond the control of the party making the application.

The third alternative was to grant the application on terms as to the payment of costs for expenses or resources wasted in connection with the application. The tribunal is of the view that the Association failed to give adequate notice of its inability to proceed on alternatively failed to make arrangements in sufficient time for proper representation at the hearing on the scheduled date.

The Tribunal has no doubt in concluding that the Association was well aware at an early date that either its scheduled meeting timetable and/or the travel arrangements of its General Secretary required it to either give adequate notice to the Tribunal or to arrange alternative representation. If it had given adequate notice as soon as it became aware of its difficulties, another dispute could have been allocated the hearing dates. If it had arranged in a timely manner for alternative representation, the hearing of the Dispute would have commenced as scheduled.

In general terms, arbitration is an alternative to court proceedings as a dispute resolution mechanism. Its characteristics are that it is simple, speedy and inexpensive when compared with litigation through the courts. When this is combined with the emphasis in the Trade Disputes Act on the speedy resolution of trade disputes, the Tribunal has concluded that it has an obligation to ensure that there is no unnecessary delay in fixing disputes for hearing, in conducting those hearings and in making its Award.

By way of example, section 4 of the Trade Disputes Act requires the decision of the Chief Executive Officer to be communicated in writing to the parties as soon as practicable. Section 5A (3) of the Act requires a Disputes Committee to hear the parties and make its decision without delay and in any event within 14 days subject to any extension granted by the Chief Executive Officer. Finally, under section 23 of the Act the Tribunal is required to make its award within 28 days subject to any extension granted by the Minister.

The Tribunal also has an obligation to ensure that State resources are not wasted or unnecessarily under-utilized. To ensure that the objective of speedy resolution of trade disputes is met, the Tribunal must necessarily ensure that its resources are used in the most efficient, effective and economical manner.

The amount of $500 was fixed by the Tribunal as appropriate for the unutilized resources of staff and facilities for two days.

INTERIM AWARD

The application for the hearing dates of 27 and 28 March 2006 to be vacated was granted on terms that the Association pay $500.00 costs as expenses thrown away in the form of unutilized resources of staff and facilities.

DATED at Suva this 3rd day of August 2006.

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ARBITRATION TRIBUNAL