

AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO 48 OF 2006

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In the Dispute Between

FIJI PUBLIC SERVICE ASSOCIATION

and

LAND TRANSPORT AUTHORITY

FPSA : Mr N Tofinga
LTA : Mr V Vosarogo

DECISION

In Award No 9 of 2002 (dated 28 February 2002) the Tribunal directed that the Grievor (Ms Melala Baleiwal) be reinstated with effect from the date of dismissal. In addition it was also directed that the Grievor be paid eight (8) months arrears of salary and the balance of that period be deemed as leave without pay.

The effect of the Award was that the Grievor was to be re-instated from 17 October 2000 being the date on which the Grievor had been dismissed. In respect of the period from 17 October 2000 to 28 February 2002 the Grievor was to receive 8 months arrears of salary. The balance of the period up to 28 February 2002 was to be treated as leave without pay. On and from 28 February 2002 the Grievor was entitled to receive her wages and would no doubt return to work as soon as possible.

By letter dated 19 October 2005 the Fiji Public Service Association (the Association) applied to the Tribunal for a variation of that Award.

The application was listed for mention on 28 October and 25 November 2005. At the request of the parties and to allow further time for discussions, the application was relisted for mention on 27 January and 24 February 2006. The parties were directed to file preliminary submissions within 21 days and the application was re-listed for mention 24 March 2006. On that day the Land Transport Authority (the Authority) was granted a further 14 days to file its preliminary submission. The Dispute was again listed for mention on 28 April 2006. On that day, the Authority was allowed a further 14 days to file its submissions and the Dispute was listed for mention on 26 May 2006.

On that day, the Authority was directed to file its submissions by 4.00pm. Both parties were directed to serve their submissions by 4.00pm on 30 May 2006. The Dispute was listed for mention on 23 June 2006.

The Association had filed its submissions on 20 March and the Authority did so on 31 May 2006. The parties were then directed to file a signed statement of agreed facts within 21 days and the Dispute was listed for mention on 28 July and 1 September 2006.

On that day the parties confirmed that they did not require a hearing, that their submissions had been served and that they had filed a signed statement of agreed facts on 31 August 2006.

Section 28 of the Trade Disputes Act Cap 97 states :

"No application to vary any award shall, except with the permission in writing of the Minister, be made within nine months of the publication of the award"

The Authority has raised in its submissions the question of the Tribunal's jurisdiction to deal with this application. On page 4 in paragraphs 10 and 11, the Authority makes its submission as follows :

"10 The questioncannot be now moved for variation purposes as under section 28 a variation can only be made within 9 months from the date of the Award.

11 It is the Authority's submission that not only would an application by the FPSA be barred from applying for a variation, the Tribunal does not have jurisdiction to vary an award at the end of the 9 months from the Award."

The Tribunal does not accept this submission. The effect of section 28 is that a party may apply for a variation of an award but if it wishes to do so within 9 months from the date of publication of the award, it must first obtain the written permission of the Minister. This has been the approach taken by this Tribunal over a period of many years.

In a decision delivered in March 1996 involving a Variation of Award No 1 of 1995, the then Permanent Arbitrator Ratu Joni Madraiwiwi stated at page 216 of the 1995 Awards :

"In allowing this variation to be sought the Tribunal treated the nine month period as running from the award dated 1 March 1995. Had it determined the period was to run from the date of the interpretation (i.e. 29 January 1996) the Company would have had until November 1996 before being able to seek the variation."

(See : Air Pacific Flight Attendant's Association -v- Air Pacific Limited 1995 Awards Page 214).

As the present application has been made at least four years after the Award was published, there is no requirement to obtain the Minister's written permission. The application has been made in accordance with the section and the Tribunal has jurisdiction to deal with and determine the application.

Following the Award, there have been two developments. First, the Authority commenced Judicial Review proceedings which have now been completed. Secondly, the Grievor was re-instated on 7 October 2004 and was paid the equivalent of 8 months pay (160 days) with the total balance being treated as leave without pay.

Dealing first with the Judicial Review application. The application for leave to apply for Judicial Review was dated 23 April 2002. The Authority sought, amongst other orders, an order staying the decision of the Permanent Arbitrator.

Although it is not clear from the material whether a stay was granted, it will be assumed for the present purposes that the Authority was granted a stay. As a result the grant of leave by the Court to move for judicial review operated as a stay of the implementation of the Award to which the judicial review application related until the determination of that application or until the Court ordered otherwise.

In a Judgement delivered on 15 September 2004 the High Court dismissed the application for judicial review. As a result the stay relating to the implementation of the Award was extinguished and the parties returned to the position which existed when the Award was made on 28 February 2002. The Tribunal has no hesitation in concluding that, as a result of the unsuccessful application for judicial review, that is the date upon which the Award became effective.

As noted previously, the Grievor was eventually re-instated on 7 October 2004. By cheque dated 19 October 2004 the Grievor was paid \$6,769.07 as arrears of salary due to re-instatement. This amount was calculated on the basis of 20 working days in each of eight months for a total of 160 days.

This Tribunal is satisfied that when the Permanent Arbitrator made his award on 28 February 2002 he intended that the Award would take effect on that date. As a result the Tribunal's Award meant that the reference to the period which was to be deemed as leave without pay was the balance of the period up to 28 February 2002. Taking into account the arrears of salary of 8 months, the balance came to approximately 8½ months. This Tribunal has concluded that in his Award the Arbitrator intended that the Grievor was to be deemed to have been on leave without pay for 8½ months.

