

*Case No. 1 of 2006*

**AWARD**

**OF**

**THE ARBITRATION TRIBUNAL**

**OF**

**THE REPUBLIC OF THE FIJI ISLANDS**

**NO. 1 OF 2006**

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**The Arbitration Tribunal**

In the Dispute Between

**Tropik Wood Employees and Allied Workers Union**

and

**Tropik Wood Industries Limited**

TWEAWU: Mr F Anthony  
TWIL: Mr J Bale

**DECISION**

This is a dispute between Tropik Wood Employees and Allied Workers Union (the "**Union**") and Tropik Wood Industries Limited (the "**Company**") concerning the termination of employment of Mr Moape Serukalou (the "**Grievor**").

A trade dispute was reported by the Union on 2 July 2004. The report was accepted on 27 July 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 30 August 2004 with the following terms of reference:

***" ..... for settlement over the unfair termination of Mr Moape Serukalou on 6 May 2004 for allegedly releasing company's information to the media, which the Union contends unfair, unjust and seeks re-instatement with no loss of wages as compensation and no loss of benefits".***

The Dispute was listed for preliminary hearing on 15 September 2004. As there was no appearance by or on behalf of the Company, the Dispute was 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 further mention on 19 November 2004.

The hearing of the dispute commenced on 22 February and continued on 23 February 2005 in Suva. The Union called two witnesses including the Grievor and the Company called one witness to give evidence.

At the conclusion of the evidence the parties sought and were granted leave to file written final submissions. The Company filed its final submissions on 18 March 2005. The Union filed answering submissions on 25 August and the Company filed reply submissions on 4 November 2005.

The Grievor commenced employment with the Company on 13 July 1992 as a quality control assistant.

His appointment letter dated 30 July 1992 sets out, amongst other things, the principal terms and conditions of his contract of employment. One of these terms was headed "Company Rules" and stated:

***"You will be required to comply with Company Rules as set out in the Company Rules booklet, a copy of which you have been given and should read prior to accepting this offer".***

Furthermore, clause 4(c) of the Master Agreement states:

***"(a) All new employees shall be deemed to be engaged under the provisions of this Master Agreement and specifically understand the Company Rules that are attached hereto as Appendix 1 and copies of which are available either through the Union or at specific locations on the Employer's premises"***

As the parties have expressly incorporated the Company Rules by reference, they become part of the Agreement and function in the same manner as any of its other terms or provisions.

The Grievor accepted the terms and conditions by signing an acknowledgement on 3 August 1992. During his evidence the Grievor accepted that it was his signature on the acknowledgement.

Rule 9 of the Company Rules so far as is relevant states:

***"Employees are not permitted to communicate to the media any information or comments that they may have on the affairs of the Company, its management or other employees, and any other***

**related organisation as well as those with whom the Company has dealings. They are also expected to avoid doing anything that will prejudice the interests of the Company and the industry at large".**

So far as is relevant, Rule 13 of the Company Rules provides:

**"The following offences constitute serious misconduct for which an employee will be liable for dismissal. An employee considered by the Company to be guilty of such serious misconduct shall be initially suspended.**

- .....  
**Copying or divulging confidential Company information without proper Management authority.**

- .....  
**Where disciplinary action is to be taken against an employee the Union will be given a copy of any written warning or communication by the Company unless the employee expressly requests that this should be done".**

At this stage it is convenient to refer to clause 6 of the Master Agreement which deals with "Discipline and Disciplinary Action". So far as is relevant clause 6 (as amended) states:

**"Employees failing to comply with the Company Rules as set out herein or any other reasonable instruction or are in breach of any terms of this Master Agreement may be disciplined and this may include any or all of the following: -**

- (a) warning (verbal or written)**
- (b) suspension – with or without pay**
- (c) Dismissal – with or without notice**

- (a) .....**

**(b) Suspension**

***An employee may be suspended with or without pay pending investigation for an alleged misconduct. Before suspending any employee, the Management shall discuss with the Union Executives and the Company shall take one month to investigate the matter.***

***The Employee must be advised in writing of the allegations prior to the investigation held (Union/Company) prior to any further disciplinary action being taken. Failure to substantiate the allegations will require the employer to re-instate the employee without loss of any benefits.***

***The Employee shall be advised of the outcome of the investigation committee's decision in writing stating reasons for further disciplinary action should the Committee decide.***

**(c) Dismissal**

***Any employee who is guilty of serious misconduct may be dismissed with or without notice or payment in lieu thereof.***

It is important to note that any provision in any agreement relating to the right of an employer to summarily dismiss an employee must be construed in a manner which is consistent with the provisions of section 28 of the Employment Act Cap.92.

In the edition of the Fiji Times dated 28 February 2004 a news article appeared without the name of the journalist who was responsible for the article. The article discussed two issues. First there was a reference to a claim by the Union for a pay increase. Secondly, there were references to the mahogany timber business of the Company. A number of comments on both issues were attributed to the Grievor. Other comments were attributed to an unnamed source at the Company.

During the course of his evidence, the Grievor admitted that the following comments were correctly attributed to him:

- (a) The Tropik Wood Employees and Allied Workers Union also urged landowners of mahogany forests to claim higher stakes in profits from mahogany (para.2)
- (b) Union's General Secretary, Moape Serukalou said: "Although the Government is saying that mahogany is being harvested on a trial basis the story seems to be different" (para.3 )
- (c) Tropik Wood has been processing mahogany since last year and a lot of it has been sold to buyers from Mexico and China ( para.5 );
- (d) Mahogany from Tailevu is being ripped at a sawmill in Galoa, Navua and sent to Tropik Wood for processing ( para.6)
- (e) Landowners should wake up and see how much they are being paid for their mahogany ----- (para.7)
- (f) Mr Serukalou said the demand for mahogany was high. "People have been coming to the sawmill from overseas and they are willing to buy all the mahogany", he said (para.9)
- (g) It is time that landowners wake up and talk to the Government about their mahogany and the money it is fetching ( para.10)
- (h) The Union is looking for a wage increment this year because the Company has recorded good sales of mahogany and pine products (para. 11)
- (i) We hope that the Company will be prepared to accept our demand considering the money it has made in recent months (para.12)
- (j) Mr Serukalou did not reveal the percentage increment the Union was looking at but said the Union would definitely fight for a pay rise (para.13)

It should be noted that in only three of the above paragraphs does the Grievor refer to a claim for a wage increase. The other paragraphs all deal with landowners and financial returns from mahogany.

The Grievor denied making the comments in paragraphs 1, 14, 15 and 16 of the article. In relation to paragraph 4 the Grievor stated that he informed the journalist that he had been warned by management not to go to the media but he denied linking the warning to mahogany. The Grievor denied informing the journalist about the price being paid per cubic metre of mahogany as was stated in the second half of paragraph 7.

The Grievor admitted in his evidence that he had made no effort to rectify the material which he claimed had been wrongly attributed to him by the article. He could have contacted the journalist to seek an apology and/or corrections. He could have written a letter to the editor for publication in the newspaper.

The Tribunal accepts that it may be appropriate for the Grievor as the Union's General Secretary to issue media releases on matters and issues concerning the Union and its members. However the Tribunal is satisfied that the question of financial returns to landowners for mahogany, the countries seeking to purchase mahogany and the price paid for mahogany products are not employment relations issues. In making public comments about what the Tribunal accepts were at the time commercially sensitive issues, the Grievor was acting outside the scope of his responsibilities as General Secretary.

The Tribunal accepts the evidence that there was in fact no wage claim being actively pursued by the Union at the time the article appeared in the newspaper. In this regard the Tribunal has noted the content of an agreement made by

the parties concerning terms and conditions of employment. Exhibit 16 is a copy of the 2003 Log of Claims and seeks, amongst other things, an increment increase of 10% on all wages effective from 1 July 2003. The exhibit 17 Agreement provided that all wages and allowances be increased by 2.2% with effect from 1 July 2003.

By letter dated 22 March 2004 the Company informed the grievor that he was to be suspended with immediate effect without pay whilst the Company investigate the matter. Although the letter is lengthy, it sets out in clear terms the bases of the Company's actions and therefore is quoted in full, omitting formal parts:

***"Management is gravely concerned about the statement attributed to you in the article titled "Workers to fight for pay rise" in the Fiji Times of 28 February, 2004.***

***Your statements quoted in the article relate to information which, whether true or not, you knew was an important part of the commercial operations of this Company which also happens to be your employer. The fact that you deliberately published this information though the media despite being warned not to do so, as you acknowledged in the article, indicates to the Management your deliberate defiance of the requirements of Company Rule 9.***

***Management, therefore, considers that you have committed a serious disciplinary offence under Company Rule 13 for the following reasons:***

- By threatening to divulge and actually ending up divulging to the media for public information such information as you obtained either from Tropik Wood Industries Limited (TWIL) or from someone else about TWIL's operations, after you were warned not to do, you obviously intended to do some harm or to embarrass this Company.***
- If you had wanted to use such information only for the purpose of supporting your trade union's claims for better wages, then***

***you should have discussed this with Management and not go to the media about it.***

- ***The information, whether true or false in so far as they can relate to the trading operations of this Company is part of what may be termed as the "trade secrets" of the Company. For any employee to deliberately divulge such information is grossly mischievous and malicious against the interests of the Company. Whether it actually causes harm is immaterial.***
- ***Your warning to mahogany landowners to be aware of such information and to incite them to use such information for the purpose of demanding better returns on mahogany forests on their land can be harmless stirring, if it came from an outsider. However, the information, whether true or not, is prejudicial to the business interests of Fiji Hardwood Corporation Limited (FHCL), as the seller of mahogany logs to Tropik, as well as to Tropik as buyer of mahogany logs from FHCL. The information and the manner in which you published it was deliberately and maliciously done against the business interest of this Company.***

***You are therefore, hereby notified of these allegations in accordance with Clause 6 of the Master Agreement as amended on 26 October, 1999.***

***In view of the seriousness of the allegations against you, Management has decided that you should be suspended with immediate effect without pay pending the completion of the investigations into the allegations and the making of a final decision thereon. During the period of your suspension, you are not to enter the Company compound except on official business with the Company, and you are not to interfere with witnesses with evidence.***

***The President of your Union has been notified about these allegations and your suspension in accordance with Clause 4 of the Master Agreement as amended on 24 September, 1998. Also in accordance with Clause 4 of the Master Agreement you are notified that Management intends to complete all investigations and come to a final decision within one month from the date of your suspension.***

***You are required to give Management your written response to the allegations against you within seven (7) days from the date of service on you of this letter. Management may also need to interview you orally during its investigations"***

The letter contains the assertion that the Grievor's statements amount to a breach of Company Rule 9 (supra) which in turn amounts to serious misconduct under Company Rule 13 (supra)

Although the second last paragraph refers to clause 4, the letter is purporting to comply with clause 6 (supra) of the Agreement i.e. the requirement that the employee be advised in writing of the allegations prior to investigation. The Grievor is then advised that he is to be suspended without pay pending the completion of the investigation, again in accordance with clause 6 of the Agreement.

The letter complies with Rule 13 in that a copy was given to the Union President.

By letter dated 31 March 2004 the Grievor responded to the suspension letter as he was requested to do. The second paragraph of that letter stated:

***"The comments in the Fiji Times dated 28 February 2004 quotes my name to certain statements that I did not make. I did give my view regarding the issue on wage increase but am surprised to learn that the whole issue in question has been labelled with my name".***

In the letter, the Grievor claimed that the confidential information was leaked to the same journalist by someone from the Company. However the Grievor's evidence did not provide any assistance on this point.

The Tribunal accepts that the grievor consented to an additional two weeks for the Company to complete the investigation and that the period of suspension be also extended by the same period. This is the effect of the correspondence dated 19 and 20 April 2004.

The Grievor was interviewed on 29 April 2004. Apart from the Grievor and the General Manager, Finance and Administration (Mr D Mani) there was also a Union and a company representative present. Following the interview, typed notes of the interview were prepared and on the same day signed by the Grievor. The Grievor acknowledged his signature during the course of his evidence.

The Grievor's employment was terminated by letter dated 6 May 2004. Omitting formal and irrelevant parts, the letter stated:

***"After taking into account all the evidence now available to Management regarding allegations made against you in my letter dated 22 March 2004, including your written and oral responses, I am to inform you that Management is satisfied that the totality of your conduct as an employee in publicly disclosing information relating to the business of the Company as and when you did amount to a serious and malicious breach of trust and provisions of clause 6 of the Master Agreement between Tropik Wood Employees and Allied Workers Union and the Company as well as Clauses 9 and 13 of the Company Rules.***

***Management has therefore decided that you should be and you are hereby, as a result, dismissed from your position as an employee of this Company, effective from today .....***

A cc copy of the letter was forwarded to the Union President.

It is clear that the Grievor's employment was terminated by way of summary dismissal.

In its preliminary submission, the Union claimed that the Company breached clause 6 of the Agreement, as amended by not discussing the matter with Union Executives before it suspended the Grievor. The Union also claimed that the Company breached clause 6 as amended by failing to jointly investigate the allegations. Finally the Union claimed that the Grievor's conduct amounted to the legitimate giving of a press statement in his capacity as Union General Secretary.

In its closing submission the Union also adds that the comments made by the Grievor were fair and that nothing confidential was revealed in the article. The Union also submits in its closing submission that there were outstanding wage issues at the time. The evidence on this matter was somewhat contradictory and inconsistent. In any event, the Tribunal has made a finding on this issue and the question was of minor importance in the context of the Dispute.

The Tribunal is satisfied that the Grievor's conduct amounted to a breach of Rule 9 of the Company Rules. The Tribunal is also satisfied that the misconduct was sufficiently serious to justify the penalty of summary dismissal in accordance with Rule 13 of the Company's Rules and section 28 of the Employment Act Cap.92.

Furthermore the Grievor breached his duty of loyalty by engaging in public comment which was detrimental to the Company's legitimate business interests. Having considered the accuracy of the information, the confidential nature of the information, the manner in which it was made public and the extent to which it

compromised the business reputation of the Company, the Tribunal has concluded that the misconduct was serious in nature.

The Tribunal is satisfied that the Company acted reasonably in concluding that summary dismissal was an appropriate disposition in this instance.

Although the Grievor claimed during the course of the evidence that he had spoken to the journalist about forest certification, the article made no mention whatsoever about this matter. Once again it is noted that the Grievor made no effort to rectify this omission.

In his evidence Mr L Simpson, the then Union President, admitted meeting with Mr Mani on 22 March 2004. It was not, apparently, a particularly helpful discussion as Mr Simpson took the view that the decision to suspend had already been made by the Company. This conclusion was based on the fact that Mr Simpson was handed his cc copy of the suspension letter when he entered Mr Mani's office. Mr Simpson stated in evidence that he saw no purpose in discussing the matter any further.

The Tribunal is not satisfied that the Company genuinely attempted to discuss the matter with the Union President prior to the suspension of the Grievor. There was certainly the suggestion of pre-determination which effectively prevented any meaningful discussion.

The next question concerns the nature of the investigation. The team appointed to investigate the allegations consisted of the Chief Executive Officer, the Human Resources Manager and Mr Mani. The Tribunal is not satisfied that the amendment to clause 6 requires that a joint Union/Company team be appointed

to investigate disciplinary allegations on every occasion. Although instances of joint investigations were put to Mr Mani in cross-examination, there was no evidence adduced by the Union to substantiate whether such joint investigations actually took place. The Tribunal concludes that the clause as presently worded is ambiguous and the parties should clarify their intentions so far as investigations are concerned.

The Tribunal is satisfied that the Grievor was in all other respects afforded procedural fairness.

In correspondence passing between the Company and the Union, the Union has raised two other issues which require a brief comment.

First, the issue of "Freedom of Expression and Speech" is raised by the Union in its letter dated 31 March 2004 addressed to the Company's CEO. Section 30 of the Constitution guarantees the right to freedom of speech and expression.

However the same section makes it manifestly clear that this right is not absolute. The Tribunal does not consider that Company Rule 9 is in breach of section 30 of the Constitution, to the extent that the guarantee is binding upon persons (as defined in section 194) as distinct from Government (ie. horizontally).

Secondly, the Union in the same letter refers to ILO Conventions, Trade Union Rights and Fiji's Constitutional rights.

The Tribunal is satisfied that the Company's Rules do not breach any of the rights or guarantees set out in either section 32 or 33 of the Constitution.

The relevant International Labour Organization (ILO) Conventions are No.87 being the Freedom of Association and Protection of the Right to Organize Convention and No.98 being the Right to Organise and Collective Bargaining Convention.

It should be noted that Fiji ratified Convention No.87 in 2002 and Convention No.98 in 1974.

However, both Conventions remain what are termed "unincorporated treaties" in the sense that the Parliament has not passed legislation which incorporates the Conventions thereby making them part of the domestic law of Fiji. As such the Conventions do not form part of the law of Fiji.

The practice has developed where domestic courts refer to the provisions of unincorporated treaties such as ILO Conventions 87 and 98 when determining the rights and obligations of parties under domestic law such as section 33(3) of the Constitution which provides that every person has the right to fair labour practices. In particular it is accepted that there are certain principles of interpretation such as the presumption of compatibility and the presumption of constitutionality which would permit the use of these Conventions when construing constitutional provisions such as section 33(3).

It is noted that Article 1 clause 2(b) of Convention No.98 states:

***"Such protection (against acts of anti-union discrimination) shall apply more particularly in respect of acts calculated to:***

***(a) .....***

***(b) cause the dismissal of or otherwise prejudice a worker by reason of Union membership or because of participation in***

***Union activities outside working hours or, with the consent of no employer, within working hours".***

The Tribunal notes the recommendations of the Freedom of Association Committee of the Government Body of the ILO that clause 2(b) protects persons from dismissal on account of legitimate trade union activities. The same Committee has also stated that the principle that a trade union official should not suffer prejudice by reason of his trade union activities does not necessarily imply that the fact that a person holds a trade union office confers immunity against dismissal irrespective of the circumstances. The Committee also acknowledged that trade union officials may be dismissed for serious misconduct.

The Tribunal considers that a distinction needs to be drawn between the performance by trade unions of their specific functions, ie. the defence and promotion of the occupational interests of workers, and the possible pursuit by certain of their members of other activities that are unconnected with trade union functions (Committee's 1985 Digest at paragraph 357).

The Tribunal is satisfied that the Grievor's comments about mahogany and financial returns to landowners were matters which were unconnected with his trade unions functions. As a result the Tribunal does not consider the Company's decision to summarily dismiss the Grievor to be in breach section 33(3) of the Constitution.

**AWARD**

The decision by the Company to summarily dismiss the Grievor was reasonable. The Company did not discuss the suspension in good faith with the Union prior to the Grievor's suspension as required by clause 6 of the Agreement.

The Company has not otherwise breached the Agreement nor its Rules. The Grievor was otherwise afforded procedural fairness.

There has not been any breach of the Constitution in relation to freedom of association, collective bargaining or fair labour practices. There has not been any breach of the Grievor's right to freedom of expression.

The Grievor is entitled to one months' wages in respect of the Company's failure to discuss in good faith the Grievor's suspension.

**DATED** at Suva this 20<sup>th</sup> day of January 2006

  
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**ARBITRATION TRIBUNAL**