

IN THE COURT OF APPEAL, FIJI ISLANDS
(APPELLATE JURISDICTION)

CIVIL APPEAL NO:ABU 0045 OF 2008

(On Appeal from the High Court (Judicial Review Action No. HBJ 06 of 08))

BETWEEN: **LIFE INSURANCE CORPORATION OF INDIA** (a Company duly incorporated in accordance with the Laws of Fiji and having its registered office at Butt street, Suva

APPELLANT

AND: **THE ARBITRATION TRIBUNAL**, a statutory body created pursuant to the Trade Disputes Act

RESPONDENT

FIJI BANK AND FINANCE SECTOR EMPLOYEES UNION
(A Trade Union registered under the Trade Unions Act Cap 96)

INTERESTED PARTY

Coram: Byrne JA
Pathik JA
Khan JA

Hearing : 10th March 2009

Counsel: V. Maharaj for the Appellant
R. Singh for the Interested Party

Date of Judgment: 8th April, 2009

JUDGMENT OF THE COURT

1. The appellant was the employer of Nitendra Prasad, a messenger, from the 21st October 2003. He was a member of the Fiji Bank and Finance Sector Employees Union which is the Interested Party to this Appeal. He was entitled to annual increments to salary on the 1st of November each year subject to satisfactory

performance. His increment which was due on 1st November 2005 was withheld on the grounds of misconduct. The reasons for withholding the increment were given to him on 15th December 2005. These were the unauthorized use of office telephone for personal work, playing soccer during sick leave and negligently carrying out his duties. He had been given an earlier written warning to be careful on 30th June 2005.

2. There is no dispute Nitendra received these warning letters. There is no dispute that he did not appeal to the Management against the decision to withhold his increment.
3. About 8 months later the appellant received a complaint of a different kind against Nitendra Prasad. It was a complaint made by one Ranita Kumar the wife of an employee of the appellant. Nitendra had apparently rung her and told her that her husband was having an affair with another staff member of the appellant namely Meenal. Ranita Kumar wrote to the manager of the appellant complaining about this.
4. The appellant asked Nitendra to comment on Ranita Kumar's allegation. He admitted ringing her but denied saying anything about an affair between her husband and Meenal. After enquiry the appellant informed him that his conduct warranted a dismissal but, taking a lenient view, his annual increment granted on 1st November 2004 was withdrawn and he was told that the increment due on the 1st of November 2006 would be withdrawn. This was done on 19th July 2006.
5. Eight months later the Union (the interested party) complained to the appellant about withholding the two increments and seeking their restoration. The appellant refused to make any restoration of salary. The union accordingly registered a trade dispute under the Trade Disputes Act Cap 97 and this ultimately led to the matter being referred to the Arbitration Tribunal. The terms of reference were to consider :

"the Corporation's failure to grant annual increments to Nitendra Prasad due on 1/11/2005 and 1/11/2006 in breach of Clause 7(D) of the Collective Agreement and the unilateral reduction of his annual salary in breach of the Collective Agreement and Section 51 of the Employment Act. The Union views the Corporation's action as unfair and unjustified and seeks that Life Insurance Corporation of India remedies the said breach by paying all

increments due on 1/11/2004, 1/11/2005 and 1/11/2006 that has been withheld or withdrawn to date to the Grievor and restoring his salary to the correct level.”

6. After hearing the evidence and submissions presented by the parties, the Tribunal concluded that the appellant's decision to withdraw and withhold annual increments were as a result of findings of misconduct against Nitendra. The Tribunal concluded that such withholding amounted to financial penalties. He reasoned that Clause 7A of the Collective Agreement only allowed variation of salaries scales and grades by agreement. He also reasoned that the penalties which the appellant could impose under Clause 16 of the Agreement which deals with Disciplinary Procedure are warnings, suspension or dismissal but there was no explicit authorization in Clause 16 or in any other Clause which authorized the imposition of a monetary penalty or a fine. He also concluded that the withdrawal of increment breached Section 51 of the Employment Act Cap 92 on the ground that the withdrawals amounted to a deduction in each pay period from Mr Prasad's wages and was not an authorized deduction under Section 51.
7. The Tribunal also concluded that the withdrawals were in breach of the Collective Agreement and contrary to accepted to employment relations and could not be permitted to stand. He ordered re-instatement of the increments.
8. From this decision the appellant applied for Judicial Review and the application was heard by Singh J who gave his decision on the 19th of June 2008. The two grounds which the appellant argued before Singh J were that the Tribunal –
 - (a) failed to direct himself properly in law
 - (b) failed to consider relevant matters.

ERROR OF LAW

9. The first error of law the Tribunal was alleged to have made was in concluding that the time limit for Nitendra Prasad to exercise his right to appeal under Clause 16 (g) of the

Agreement did not apply to the respondent for reporting the existence of a Trade Dispute. Clause 16 (g) so far as relevant provides:

“An employee upon whom the employer has imposed disciplinary action shall have the right to appeal against such disciplinary action. The employee shall advise the Manager, and if he so wishes the National Secretary of the Union in writing within seven days of the disciplinary action being imposed, of his desire to appeal”.

10. The Tribunal found as a fact that Mr Prasad did not lodge an appeal with the Manager within seven days of imposition of disciplinary action but held that this did not prevent Mr Prasad's Union making such an appeal instead.
11. Singh J agreed with the Tribunal.
12. In paragraph 11 of his decision he said that Clause 16 (g) does not make an appeal to the Management a pre-requisite for exercising rights under the Trade Disputes Act as he held that although Clause 16(g) gave an employee a right to appeal against disciplinary action, an employee could waive that right. He said that an employee could also exercise this right and, if dissatisfied with the outcome could still exercise his rights under the Trade Dispute Act. This Court does not agree.
13. In our judgment the Collective Agreement binds all employees of the appellant except service workers such as watchmen, security guards, cleaners and drivers and employees whose duties do not require them to work in any clerical or administrative position.
14. In our judgment such an interpretation of Clause 16(g) ignores the fact that the employee failed to exhaust his internal agreed remedy under the Collective Agreement before invoking the Trade Disputes Act.
15. In our judgment Clause 16(g) is clearly mandatory. The word “**shall**” appears five times in the first part of sub paragraph (g). Furthermore there is no provision in the Agreement whereby the employee could waive his right of appeal to the Chief Manager. In our view therefore the learned judge was wrong in holding the employee could waive

his right. It is important for any employer to be able to run his business as efficiently as possible and it is desirable that disputes which arise in the course of any employer-employee relationship be resolved as quickly as possible. Failing this both sides suffer.

16. The appellant complains that as a result of the decision of the Permanent Arbitrator and Singh J it has been denied natural justice in that it has been deprived of allowing its Chief Manager to exercise his discretion and powers conferred upon him, under Clause 16(g).

17. The case law on natural justice is voluminous and well known. We were referred to some remarks allegedly made by Lord Wright in the Judgment of the House of Lords in *Wiseman v Borneman* (1971) A.C.297 at p.308. This is incorrect because Lord Wright retired from the House of Lords in about 1950 and Lord Reid in a short judgment did not make the statement attributed to Lord Wright in his judgment. He did say,

“Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard and fast rules.”

18. In similar vein Lord Morris of Borth-y-Gest said

“We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only “fair play in action.” Nor do we wait for directions from Parliament. The common law has abundant riches: there may we find what Byles J. called “the justice of the common law” (Cooper v. Wandsworth Board of Works (1863) 14 C.B.N.S. 180, 194).

We respectfully agree.

19. The appellant also submits on Clause 16(g) that Mr Justice Singh overlooked Section 3(2)(d) of the Trade Disputes Act which requires the Permanent Secretary for Labour and Industrial Relations before accepting the report of the Trade Dispute to be given in the report sufficient information about the steps which have been taken by the parties to obtain a settlement under any arrangements for the settlement of disputes which may exist by virtue of any registered agreement between the parties thereto.
20. This section was not cited to Mr Justice Singh nor was Section 5 which states that in endeavouring to secure, by means of conciliation of the parties, the settlement of a trade dispute reported to him, under section 3, the Permanent Secretary shall, if and in so far as he considers it appropriate to do so, make use of any machinery or arrangements for the settlement of disputes which exist by virtue of any agreement between the parties to the dispute, or between organisations representing respectively a substantial proportion of the employers and employees engaged in or in any branch of the particular trade, industry, service or occupation in which the dispute arose.
21. Had these two Sections been drawn to the notice of the Judge he may have come to a different conclusion. In our judgment these two sections of the Trade Disputes Act are decisive in the interpretation which should be given to Clause 16(g). On that ground alone, therefore we are of the opinion that the appeal must be upheld.

22. **GROUND 2**

This ground of appeal claims that the Learned Judge, having found as a fact that withholding of the first increment was not reported within 12 months and therefore caught by the one year reporting condition required by Section 4 (1)(a)(i) of the Trade Dispute Act erred in law in holding:

- a) that the permanent arbitrator was precluded from determining the issue on the basis that any reference to him was presumed to be proper and regular.
- b) failed to exercise its supervising and inherent jurisdiction conferred upon the High Court to correct an error of law.

23. Section 4(1)(a)(i) states that :

“no trade dispute which arose more than one year from the date it is reported under Section 3 shall be accepted by the Permanent Secretary except in cases where the delay or failure to report the trade dispute within the specified period was occasioned by mistake or other good cause”.

24. We accept this submission. Once having found that the first withholding of increment was not reported within 12 months and so was caught by Section 4, in our judgment the learned judge should have exercised the supervisory and inherent jurisdiction conferred upon the High Court to correct an error of law and quash the award. We think that the Permanent Arbitrator was too cautious in refusing to hold that the reference to him of the dispute was out of time and such a decision could only be made by the High Court. Whilst the Arbitrator held that he was entitled to presume that the reference to him was proper and regular, in our view he was then entitled to consider the submissions of the parties on the time limit question and then make his finding on those submissions. Certainly in our view Mr Justice Singh erred in not quashing the award once he was satisfied the reference contravened Section 4(1)(a)(i). For these reasons we uphold the second ground of appeal.

25. GROUND 3

This ground alleges that the learned judge erred in law in failing to hold that there was an implied acceptance by conduct or acquiescence by the respondent of the appellant's decision to withhold salary increment and the appellant acted to its detriment.

26. In our judgment, there is much force in the appellant's submission on this ground but we agree also with the learned judge that an employer who wishes to impose a monetary penalty in the form of some reduction of wages or annual increments must produce compelling unequivocal evidence that the employee agreed to it. In our view the evidence in favour of the appellant on this ground is strong but not conclusive at best and we prefer to make no finding on this ground in view of the conclusions that we have reached on the other grounds of appeal.

27. **GROUND 4**

Concerns delay and we have already covered this extensively in our earlier reasons.

28. **GROUND 5**

The last ground of appeal is that the learned judge erred awarding costs of \$500 each to be paid by the appellant to the respondent and to the interested party because the respondent took no part in the Judicial Review proceedings besides filing the record of proceedings in the Arbitration Tribunal. We uphold this ground because it is clear from the record p295 that the Arbitration Tribunal represented by Counsel from the Attorney-General's Chambers took no part in the hearing of the Judicial Review proceedings.

29. We have been informed that Nitendra Prasad was terminated from his employment with the appellant and that he and his union had accepted this. To a large extent therefore this appeal has been academic but we realize that the appellant wanted this Court's judgment on the decision of the High Court. Accordingly, the orders we make that the appeal is upheld and the judgment of the High Court set aside. There will be no order for costs.

Hon Justice John E. Byrne

Judge of Appeal

Hon Justice Pathik.

Judge of Appeal

Hon Justice Khan

Judge of Appeal