AWARD

OF

THE ARBITRATION TRIBUNAL

OF

THE REPUBLIC OF THE FIJI ISLANDS

NO.7 OF 2006

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In the Dispute Between

NATIONAL UNION OF HOSPITALITY, CATERING AND TOURISM INDUSTRY EMPLOYEES

and

SHERATON RESORTS DENARAU ISLAND

NUHCTIE: Mr F Anthony

Sheraton: Ms R Singh

DECISION

This is a dispute between the National Union of Hospitality, Catering and Tourism Industry Employees (the **"Union"**) and Sheraton Resorts Denarau Island (the **"Employer"**) concerning the termination of employment of Mr Kamal Kanan (the **"Grievor"**).

A dispute was reported by the Union on 15 March 2004. The report was accepted on 15 April 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 11 August 2004 with the following terms of reference:

> ***".... for settlement over the termination of employment of Mr Kamal Kanan with effect from 28 May 2003. The Union submits that the actions of the management were unjust and unfair and therefore the Grievor should be re-instated without loss of benefits".***

The Dispute was listed for a preliminary hearing on 15 September 2004. On that day the parties were directed to file preliminary submissions by 15 October 2004 and the Dispute was listed for mention on 19 November 2004 , at the request of the parties.

The Employer filed its preliminary submissions on 14 October and the Union did so on 17 November 2004.

On 19 November 2004, the dispute was listed for a two day hearing commencing on 28 March 2005. However, as that date was a gazetted public holiday (Easter Monday) it was necessary to relist the Dispute for mention on 26 January 2005. On that day the Dispute was relisted for a two day hearing commencing on 26 May 2005.

The hearing of the Dispute commenced in Suva on 26 May 2004. The Dispute was adjourned part heard and eventually resumed on 12 July 2005. The delay in resuming the hearing was primarily due to the non-availability of the Union's advocate. During the hearing the Employer called two witnesses to give evidence. The Union called the Grievor to give evidence. At the conclusion of the evidence the parties sought and were granted leave to file written final submissions.

The Employer filed its final submissions on 16 September 2005. The Union served, but omitted to file answering submissions on about 4 November 2005. The Employer filed a reply submission on 16 December 2005.

As the Tribunal had not received a copy of the Union's answering submissions, the Dispute was listed for mention on 27 January 2006. On that day the Employer's representative agreed to provide to the Tribunal a copy of the Union's submission which was received by the Tribunal on 3 February 2006.

The Grievor commenced employment with the Employer in September 1992 as an electrician and continued to be employed in that capacity until the termination of employment which took effect on 28 May 2003.

There is an issue raised by the Union in its final submissions which concerns the type of contract the Grievor entered into with the Employer.

Section 15(1) of the Employment Act Cap 92 provides that contracts of service may be oral or written contracts. Section 21 provides that all contracts of service other than contracts which are required by the Employment Act or any other law to be made in writing, may be made orally.

It is clear that the Grievor's contract of service with the Employer was not a contract which was required to be made in writing under section 32(1) of the Employment Act. The question is whether the Grievor's contract was one which was required to be made in writing by any other law.

It is noted that section 34(2) of the Trade Disputes Act does stipulate that the terms of every collective agreement are to be set out in writing. In addition, section 34(7) provides that the provisions of a collective agreement shall be an implied condition of contract between an employee and employer to whom the agreement applies.

The Tribunal does not consider that section 34 requires a contract of service such as that between the Grievor and the Employer to be made in writing. Its effect is simply to require that the implied condition setting and the provisions of the collective agreement be evidenced in writing. The Tribunal considers this to be the correct approach when the definition of "oral contract" in section 2 of the Employment Act is taken into account. That definition states:

> ***" 'oral contract' means a contract of service which, under the provisions of Part V, is not required to be made in writing, but which may nevertheless be subsequently evidenced in writing".***

As a result the Tribunal has concluded that the Grievor's contract of service with the Employer was an oral contract as defined by the Employment Act, some terms and conditions of which, including the implied condition being the Collective Agreement, were subsequently evidenced by writing.

As a result the provisions of section 28 of the Employment Act dealing with summary dismissal applied to the Grievor, as it is one of the provisions in Part V which applies to oral contracts pursuant to section 20 of the Act.

Section 28 of the Employment Act has the effect of limiting the Employer's common law contractual right to dismiss an employee summarily to the circumstances set out in the section. This is significant because section 13 of the Act provides that "no person shall employ an employee under any contract of service except in accordance with the provisions of the Act".

This means that the provisions of the Collective Agreement and the Employer's Handbook must be in consistent with the provisions of the Employment Act in order to form part of the Grievor's contract of service. In particular the provisions in the Collective Agreement relating to discipline and those in the Handbook relating to Disciplinary Action must be construed in a manner which is consistent with the provisions relating to summary dismissal in section 28 of the Employment Act.

By implication the Collective Agreement relies on section 28 of the Employment Act for the purpose of determining when an employee may be summarily dismissed. Clause 12.3(a) of the Agreement states:

> ***"An employee who is discharged in accordance with this Agreement but who is not summarily dismissed in accordance with the provisions of section 28 of the Employment Ordinance will be given not less than one normal pay period in Notice or ...."***

However the Employer's Handbook on pages 22 and 23 provides a list of some 41 acts of misconduct which are described as "serious offences" and for which

"instant dismissal may take place". It is the Tribunal's view that summary dismissal may only be considered by the Employer if two conditions are satisfied. First, the misconduct must be of the type listed in section 28 and secondly must be sufficiently serious as to have been available as an option to the Employer at common law.

Turning now briefly to the facts of the Dispute. The incident occurred on 3 May 2003. Some time after 8.00am the Grievor received a paged message to attend to villa 867 to attend to a leaking water problem. He was at the time at the Denarau Royal and made his way to the Villas on the company bus. On his way to villa 867 he passed villa 853.

The Grievor did not deny entering 853. There was a great deal of conflicting evidence (some of it circumstantial) concerning whether the door to 853 was open, the number of times the Grievor entered 853, the number of calls he made on the telephone in 853 to Star Service what was said by the Grievor on the telephone and the presence of luggage in 853.

The undisputed fact is that the Grievor did enter 853 and he did so without authorization. However it was apparent to the Tribunal that the matter would probably not have been taken any further if that was all there was to the incident. The Employer's witness Mr Leweniqila said in evidence that it was too time consuming to follow up every unauthorized staff entry into rooms.

However, the Employer claimed that the guest who had occupied 853 and who had "checked out" in the early hours of the morning on 3 May 2003, subsequently reported that he left his shaver in 853. It should be noted that the shaver was never located.

Having considered the evidence and the submissions, the Tribunal has concluded on balance that the Grievor did enter 853 after observing that the door was open. The Tribunal notes that 853 was unoccupied at the time. The Tribunal accepts that the Grievor closed the door and then re-entered the room using his key card and made a second call to Star Service. In view of the evidence the Tribunal has concluded that the second call may not have been answered by the same person who took the first call. It is noted that the Star Service log did not record any call made by the Grievor from 853.

In reaching these conclusions the Tribunal has attached less weight to the evidence adduced by the Employer than would otherwise have been the case for two reasons.

First, the security manager who conducted the initial investigation was not available to give evidence as he was working overseas. Secondly, the evidence of Ms Makutu left the Tribunal with the impression that she had been unduly influenced by the security manager when she made her written statements. As a result the Tribunal considered her evidence to be to some extent unreliable. The Tribunal found the Grievor's evidence in respect of the more important facts to be more reliable and believable.

It would appear that the security manager was required to investigate the incident on account of the shaver which had been reported as having been left in 853. The Grievor gave evidence that the security manager did not mention anything about a shaver having been left in 853 until about 8 May 2003. On 8 May 2003 a written statement was obtained from the Grievor together with handwrirtten notes of further questions and answers. On 9 May 2003 a written statement was made by Ms M Makutu who was at Star Service on the day in

question. There was also handwritten notes of further questions and answers with her.

By letter dated 9 May 2003 from Manager Human Resources the Grievor was informed that he was to be suspended. Omitting formal and irrelevant parts, the letter stated:

> ***"I refer to the incident on 03 May 2003 whereby you are alleged to have entered a guest room No.853 without authority. On the day in question the guest occupying that particular room reported that some items (electric shaver) went missing from the room. During questioning by Security Manager, Aminiasi Marau, and the undersigned you did not put forward any good reasons for entering the said room.***
>
> ***Please note that this is a very serious allegation. As such you are hereby suspended from employment without pay with effect from tomorrow, Saturday 10 May 2003. You are to report in my office at 2.30pm on Friday 16 May 2003. You are welcomed to have representation from the Union on the day"***

It is noted that cc copies were marked for the In-House Committee and the Union's General Secretary.

The Tribunal notes that the contents of the suspension letter are misleading. The evidence before the Tribunal was that the guest had already vacated the room when he called the resort. He did not report that the shaver had gone missing. The evidence was that he had reported that he left the shaver in 853.

The meeting did take place on 16 May 2003 with two union representatives present, the Grievor, the Security Manager and the Human Resources Manager. Copies of the statements were made available to the Union. The facts were

discussed. The Union presented some mitigating material on behalf of the Grievor. The Union did not dispute that the Grievor had entered 853 without authorization. The Manager Human Resources did not discuss with the Union what his recommendation would be.

It should be noted that although the Security Manager investigated the incident he did not present a written report. The matter was not reported to the Police.

After the meeting it would appear that the Security Manager approached Ms Makutu for another written statement. Ms Makutu stated that the Security Manager told her what to write in the statement which was dated 19 May 2003.

By letter dated 28 May 2003 from the Human Resources Manager, the Grievor was informed that he was to be summarily dismissed. Again, omitting formal and irrelevant parts, the letter stated:

> ***"I refer to the incident on 03 May 2003 whereby it is alleged that you entered a guest room no.853 unlawfully. Also, the guest who had occupied Room No.853 reported that he had forgotten his electric shaver in the room on the same morning when he checked out. The shaver was never recovered.***
>
> ***Upon investigation, it was noted that your key was used as the first entry into Room 853 after the guest had left that morning. When questioned, you admitted entering the room but did not have any acceptable reasons for entering as you had no business to do there. Please note that this is a serious breach of company policy. In view of the above, you are hereby dismissed from your employment with Sheraton Resorts Denarau Island with effect from today 28 May 2003".***

In his evidence the Grievor admitted entering 853 but denied seeing or removing any shaver. On the balance of probabilities the Tribunal has concluded that if there was a shaver left in 853 there is insufficient evidence to conclude that the Grievor removed the shaver from the room. His evidence was that he proceeded directly to 867 after closing the door to 853. In any event it would appear that his dismissal was related to entering 853 without authorization. The report of the shaver being left in 853 was the impetus for conducting the investigation.

The Tribunal is of the view that a reasonable employer would have concluded that the appropriate course of action was to formally warn the Grievor for entering 853. The Tribunal has concluded that the decision to summarily dismiss the Grievor was unreasonable in view of the circumstances of this Dispute.

The Tribunal considers that the Employer has failed to sufficiently take into account the following matters. First, it cannot be disputed that 853 was in fact unoccupied at the time. The concern of the Employer as stated in its final submissions is the privacy of guests and their families. This concern is somewhat alleviated when the unauthorized entry is into an unoccupied room.

Secondly, the Tribunal has concluded that the sworn evidence of the Grievor that the door to 853 was open when he passed by has not been sufficiently negated by the circumstantial evidence given by either of the two witnesses for the Employer.

Thirdly, the Tribunal has concluded that there was insufficient evidence to determine on the balance of probabilities that it was the Grievor who removed the shaver from 853. The Tribunal notes that the information concerning the

shaver was so lacking in detail as to cast some doubt on its very existence. At no time was there any evidence as to the name of the guest nor the type or make of shaver which was allegedly left in 853. The shaver was never located and the theft was not reported to Police.

Finally, the Grievor had been employed for some eleven years by the Employer at the resort and had up until this incident an unblemished work record. This was his first disciplinary incident.

So far as the question of procedural fairness is concerned, the Tribunal is satisfied that the employer did not consult the union in the manner which is required by clause 12.1(c) (iii) in that it did not meet and discuss with the Union the possible action that was going to be taken to resolve the matter.

In view of the evidence and the Tribunal's conclusions, there does not appear to be any sound reason whey re-instatement should not be considered as the appropriate remedy in this dispute. In all the circumstances of this Dispute the Grievor should be allowed one relatively minor indiscretion without being penalised by summary dismissal. He should be give a formal warning. He should be paid six months arrears of wages with the balance of the period to be regarded as leave without pay.

AWARD

The decision by the Employer to summarily dismiss the Grievor was unreasonable and unfair.

The Grievor's procedural rights were not strictly observed in that the Employer has not complied with clause 12.1 (c) (iii) of the Collective Agreement.

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

The Grievor is to receive a formal warning for entering an unoccupied room without authorization.

DATED at Suva this 16th day of February 2006.

ARBITRATION TRIBUNAL