IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

JUDICIAL REVIEW ACTION NO.: HBJ 06 OF 2008

BETWEEN:

THE STATE v. THE ARBITRATION TRIBUNAL

Respondent

EX-PARTE: LIFE INSURANCE CORPORATION OF INDIA

Applicant

FIJI BANK AND FINANCE SECTOR EMPLOYEES

Interested Party

Mr. V. Maharaj for Applicant

Ms S. Serulagilagi for Respondent

Mr. R.P. Singh for Interested Party

Date of Hearing: 28th May 2008

Date of Ruling: 19th June 2008

DECISION

[1] Nitendra Prasad was employed as a messenger by the applicant from 21st October 2003. He was a member of the Fiji Bank and Finance Sector Employees Union which is the interested party in these proceedings. His annual increments to salary were due on 1st November of each year

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

[2] There is no dispute that Nitendra Prasad 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 eight months later the applicant received a complaint of a different sort against Nitendra Prasad. It was a complaint made by one Ranita Kumar, wife of an employee of the applicant. Nitendra had apparently rung and told her that her husband was having an affair with another staff of LICI namely Meenal. Ranita Kumar wrote to the manager of the applicant insurance company and had complained.

[4] Nitendra was asked 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 applicant informed him that his conduct warranted a dismissal but taking a lenient view his annual increment granted on 1st November 2004 was withdrawn and increment due on 1st November 2006 would be withdrawn. This was done on 19th July 2006.

[5] Eight months later the Union complained to the applicant about withholding of two increments and seeking its restoration. No restoration was made to the salary by the applicant. The Union accordingly registered a trade dispute which ultimately led to the matter reaching 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 applicant's decision to withdraw and withhold Annual increments were as a result of findings of misconduct. Withholding increments the Tribunal concluded were financial penalties. He reasoned that Clause 7A of the Collective Agreement only allowed variation of salary scales and grades by agreement. He also reasoned that the penalties which the applicant could impose under Clause 16 of the agreement which deals with Disciplinary Procedure are warnings, suspension or dismissal but not an imposition of a monetary penalty or a fine. He also concluded that the withdrawal of increments breached Section 51 of the Employment Act.

[7] Therefore he concluded that the withdrawal breached both the collective agreement and general principles. He ordered reinstatement of the increments.

[8] It is this conclusion of the Arbitrator which the applicant is trying to judicially review.

[9] The grounds which were argued before me are that the tribunal –

(a) failed to direct himself properly in law

(b) failed to consider relevant matters.

Error of law:

[10] The first error of law the Tribunal is alleged to have made was in concluding that the time limit for the grievor to exercise his right to appeal under Clause 16(g) of the agreement does not apply to the Union for reporting the existence of a trade dispute. Clause 16(g) of the collective agreement is headed Disciplinary Procedure. 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."***

[11] The Tribunal made a finding that the grievor did not lodge an appeal with the manager within seven days of imposition of disciplinary action. Clause 16(g) does not make an appeal to the management a pre-requisite for exercising the rights under the Trade Dispute Act. Clause 16(g) gives the employee ***"a right to appeal against such disciplinary action"***. An employee can waive that right. He can also exercise this right and if dissatisfied with the outcome can still exercise the right under Trade Dispute Act.

[12] The grievor was informed on 15th December 2005 about withholding of increments. The Union did not complain to the applicant about this withholding until 9th March 2007 some fifteen months later. The second increment was withheld on 19th July 2006. So the lapse of time here was eight months.

[13] Section 4(1)(a)(i) of the Trade Disputes Act states that ***"no trade disputes 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 time was occasioned by mistake or good cause"***.

[14] In the present case one trade dispute, the first withholding of increment, was not reported within the twelve months so it is caught by the one year provision. However, the tribunal concluded that once a trade dispute is referred to it, the reference is ***"presumed to be proper and regular"*** unless the High Court directs it otherwise. He stated that if the applicant was dissatisfied about the Permanent Secretary's acceptance of trade dispute, it should have applied to the High Court by way of judicial review.

[15] The Tribunal was correct in its approach above. In the present case two disputes were referred one within time and one outside it. But Mr. Maharaj submits that delay was a relevant factor for the Tribunal to consider because both the Union and grievor were aware of the decision and the time lapse showed that both the grievor and the Union had accepted the penalty imposed and the complaint was an afterthought. He also submits that the lesser penalty had been imposed at the request of the Union. By acceding to the Union's plea for lesser penalty the applicant was prejudiced as it lost out on opportunity to summarily dismiss the grievor.

[16] Mr. Maharaj also submitted that the Tribunal committed an error of law when he held that the withholding of salary increment was in breach of Clause 7(A) of the Collective Agreement because withholding was not done by agreement. He submits the imposition of penalty was done at the suggestion of the Union. Therefore it was variation by agreements. Clause 7(A) of the Collective Agreement provides :

"The Salary Scale and grades as set out in Schedule 1 hereto may only be varied as agreed between the Employer and the Union."

[17] The applicant could have listened to the Union's plea in mitigation and still dismissed the grievor. The final say lay with the applicant not the Union as to the penalty to be imposed. The penalty imposed was a monetary penalty, that is, withdrawal of annual increments for three years.

[18] At common law an employer has no right to suspend an employee without pay: Re: Building Workers Industrial Union of Australia – (1979) 41 FLR 192 at 194. This is so even if the misconduct is such as to justify instant dismissal: Hanley v. Pease & Partners Ltd (1915) 1 KB 698; Gregory v. Phillip Morris Ltd (1988) 80 ALR 455 at 472. Such rights however may be granted by collective agreement or statute. Common law does not permit suspension of contractual rights and obligations except by express or implied agreement. The employer is in an all or nothing situation. Faced with serious misconduct an employer must either dismiss the employee or retain him without loss of contractual rights.

[19] The passage from Halsbury's 4th Edition Volume 16B cited in applicant's submissions also supports the above proposition. It reads :

"If the employee's conduct or performance still fails to improve, the final stage in disciplinary process might be dismissal, or if the employees contract allows it, or it is mutually agreed, some other penalty, such as demotion, disciplinary transfer, loss of seniority or loss of pay."

[20] Was there an agreement – expressed or implied? What actually transpired during mitigation at the end of the disciplinary hearing is not minuted. An agreement denotes a consensus. Did the Union official or the grievor agree that if a penalty lesser than dismissal was imposed, they

would then forego their right to proceed to the Tribunal and the matter would rest there. One would need very clear and unequivocal evidence of such agreement before divesting the grievor of his statutory right to proceed to the Tribunal.

Failing to consider relevant factors:

[21] Delay would be a factor to show that they may have agreed but it is not a conclusive factor. It would be for the Permanent Arbitrator to decide whatever weight he attached necessary to the fact of delay. He was of the view quite correctly that if there was a reference before him he was bound to assume that it was proper reference. He could not consider whether the reference had been properly made to him. However, one of the issues was acquiescence or agreement by the Union and grievor to the penalty imposed. Delay, therefore, viewed objectively would be a relevant factor in considering whether there was acquiescence or penalty imposed by agreement. This relevant factor was not taken into account. Normally failure to consider a material relevant factor would result in quashing of an award and it being referred back to the Tribunal for reconsideration with the relevant factors being taken into account. However, I am not minded to do that as Mr. Maharaj told me at the end of his submissions that Nitendra is no longer employed by the applicant so not only this judgment but also any future reference to the Tribunal would be an academic exercise.

[22] The conclusion I reach is 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 of an agreement that the employee agreed to it. Absent that the Tribunal would be entitled to rely on the common law principles as stated in paragraph 18, 19 and 20 above.

[23] The Judicial Review fails. It is dismissed with costs summarily fixed in the sum of $500.00 each to be paid by the applicant to the respondent and the interested party in fourteen (14) days.

[Jiten Singh]
JUDGE

At Suva
19th June 2008