

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

HBJ Action No. 31 of 2007

BETWEEN : **FIJI TRADE AND INVESTMENT BUREAU**

APPLICANT

AND : **ARBITRATION TRIBUNAL**
PS LABOUR, INDUSTRIAL RELATIONS
THE HON. MINISTER OF LABOUR

RESPONDENT

BEFORE : **His Lordship Hon. Justice Kamal Kumar**

COUNSEL : Mr. C. Ngamoki for the Applicant
Mr. N. Chand for the Respondent

DATE OF JUDGMENT : 13 May 2016

JUDGMENT

Introduction

1. On 17 September 2007, the Applicant filed Application for Leave to Apply for Judicial Review in respect to Respondent's Decision and Award dated 19 June, 2007 (Award No. 8 of 2007) (hereinafter referred to as "**the Decision**") together with Statement and Affidavit of Viliame Volavola sworn on 17 September 2007, which Leave was granted by the Court.
2. On 19 September 2007, Applicant filed Summons for Judicial Review and sought following orders:-
 - "A. *An Order of Certiorari to remove into this Honorable Court, including a full copy of the record of the Arbitration Tribunal, and quash a decision No. 08 of 2007 of the Arbitration Tribunal delivered on the 19th of June 2007 ("**the Decision**") by which the Tribunal held the following:*
 - [1] *That, the Applicant re-employ Ravin Swamy ("**the Grievor**") in a suitable comparable position held by the Grievor prior to the Grievor's secondment to the Ministry of Commerce Business Development & Investment ("**the Ministry**") such re-employment is to take place within 28 days of the publication of the Decision; and*
 - [2] *That, the Grievor is entitled to one half of the salary equivalent to his new position for the period from the date of expiration of his secondment to the date of his re-employment; and*
 - [3] *That, in the event the Applicant is unable or unwilling to offer such a position then in that event:*
 - (i) *The Grievor is entitled to be paid the equivalent of the contractual salary that the Grievor was entitled to at the time of his secondment; calculated from the date of the expiration of his secondment to the date of publication of the Decision.*
 - (ii) *Such payments are to be made within 28 days of the publication of the Decision.*
 - B. *An Order Prohibiting the Respondent from enforcing the Decision.*

- C. *An Order that all proceedings on the said dispute be stayed until further order of the Court.*
- D. *Costs of and incidental to these proceedings.”*

(“The Application”)

3. The Application was called on 2nd October 2007, before Master J. Udit, who directed Respondent to file and serve Affidavit annexing Tribunal Records with time given to the Applicant to file Affidavit in Reply.

The Application was adjourned to 23 November 2007, for further directions.

4. On 1 November 2007, Respondent filed Affidavit of Shalini Chand sworn on the same day annexing record of the Tribunal in respect to Award No. 8 of 2007 of the Tribunal in respect to the dispute between Fiji Public Service Association (“**FPSA**”) and Fiji Islands Trade and Investment Bureau (“**FTIB**”).
5. The Application was next called on 31 January 2008, before the said Master who directed parties to file Submissions by 3 March 2008, and adjourned the Application to 8 April 2008, to refer it to a Judge.
6. On 3 March 2008, Applicant by his Counsel filed Submissions.
7. On 30 April 2008, the Application was adjourned to 30 April 2008, to refer file to a Judge and thereafter was adjourned to 10 June 2008.
8. On 10 June 2008, Respondent was directed to file and serve Submissions by 14 July 2008, and the Application was adjourned to 19 July 2008, to refer it to a Judge.
9. The Application was next called on 25 August 2008, before the same Master who directed Respondent to file and serve Submissions by 30 September 2008, and adjourned the Application to 6 October 2008.
10. On 6 October 2008, Respondent was directed to file Submissions by 22 October 2008, and was ordered to pay costs assessed in the sum of \$200.00 for non-compliance with earlier directions. The Application was adjourned to 30 October 2008.
11. On 30 October 2008, the Application was called before her Ladyship Justice Scutt (as she then was) who directed Respondent to file Submission by 6

November 2008, with liberty for Applicant to file Submissions in Reply by 13 November 2008, and adjourned the Application to 17 November 2008, for mention.

12. On 4 November 2008, Respondent filed Submissions.
13. On 17 November 2008, the Application was adjourned to 13 January 2009, for mention when it was adjourned to 16 February 2009, for hearing at 9.30 am before her Ladyship Justice Scutt (as she then was).
14. On 16 February 2009, the Applicant by its Counsel handed in Opening Submissions of the Applicant whereupon the Court granted leave for Respondent to file Submissions in Reply and adjourned the Application to 31 March 2009, for hearing.
15. On 31 March 2009, the Application was heard by her Ladyship Justice Scutt (as she then was) and adjourned for Judgment on notice.
16. Her Ladyship departed the Judiciary without delivering the Judgment and as a result the Application was called on 20 February 2012, before His Lordship Justice Balapatabendi (as he then was).
17. On 20 February 2012, his Lordship adjourned this matter to 14 March 2012, for mention with the direction that notice of adjourned hearing is served on the parties.
18. On 14 March 2012, this matter was adjourned to 2 July 2012, for Applicant's Counsel to seek instructions from Applicant as to whether Applicant intends to proceed with this matter.
19. On 2 July 2012, Counsel for the Applicant sought further time to obtain instructions from Applicant and as such this matter was adjourned to 21 September 2012.
20. On 21 September 2012, this matter was adjourned for hearing on 10 May 2013, which hearing date was vacated due to Court of Appeal sitting. This matter was adjourned to 29 August 2013, for hearing by His Lordship Justice Balapatabendi (as he then was).
21. This matter was then referred to this Court.

22. On 29 August 2013, this matter was first called before this Court when parties made oral Submissions with Applicant handing in Submission dated 29 August 2013. This matter was then adjourned for ruling on notice.

Background Facts

23. The Applicant is a statutory body.
24. Pursuant to contract dated 28 April 1999, Mr. Ravin Swamy (“**the Grievor**”) was employed by the Applicant as Deputy Chief Executive for a period of three years.
25. In or about July 2000, the Grievor applied to the Applicant for secondment to the Ministry of Commerce Business Development and Investment (“**the Ministry**”) which application was granted.
26. The Grievor was seconded to the Ministry and the Ministry appointed him as Fiji’s Trade Commissioner to Los Angeles, USA with effect from 1 August 2000.
27. By letter dated 11 December 2000, the Applicant confirmed the transfer and stated conditions of transfer.
28. On 4 December 2002, the Grievor wrote to the Applicant seeking an extension of his secondment for further three (3) years.
29. On 31 January 2013, the Applicant informed the Grievor that the Applicant granted the Grievor extension for a period of one (1) year which extension was valid up to 31 July 2004.
30. The Grievor’s position as Fiji’s Trade Commissioner was extended by the Ministry for one (1) year from 1st August 2004 to 31 July 2005, and again from 1st August 2005 to 1st January 2006.
31. On or about 3 August 2005, the Grievor advised the Applicant of his intention to return to the Applicant in the former post or equivalent position.
32. By letter dated 22 December 2005, the Applicant informed Grievor that it is “no longer obliged to accept” him back as an employee as he has deemed to be no longer on FTIB staff after the expiry of “his secondment period on 1st August 2003”.

33. On 18 October 2006, the FPSA on behalf of Grievor referred the dispute to the then Chief Executive Officer (“**Ministry CEO**”) of Ministry of Labour, Industrial Relations and Productivity who then, referred the dispute to Dispute Committee.
34. Dispute Committee could not be appointed due to the Applicant not appointing a representative.
35. On 9 November 2007, the Ministry CEO referred the dispute to the Tribunal.
36. The Dispute was heard by the Tribunal on 15 May 2007, who then delivered his decision on 19 June 2007.

Law

37. Order 53 Rules 1 to 3(1) of the High Court Rules provide:-

“1.(1) An application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that having regard to:-

- a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari.***
- b) the nature of the persons and bodies against whom relief may be granted by way of such an order, and***
- c) all the circumstances of the case, it would be just and convenient for the declaration for injunction to be granted on an application for judicial review.***

2. On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

3.-(1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.”

38. It is well settled that this Court’s function in dealing with Application for Judicial Review is to determine the process and manner in which the decision maker has

reached the decision and whether the decision was ultra vires, unreasonable and there was procedural impropriety.

39. The grounds for judicial review as stated in the Application are:-

- “1. *The Respondent failed to adequately consider whether it had been properly constituted in accordance with the Trade Disputes Act, and improperly held that it did not have any power inherent or otherwise to do so under its relevant terms of reference and that only the High Court had the power to do so.*

2. *The Respondent erred in fact and law by holding:-*
 - (a) *That, “the TOR did not permit it to review the Decision of the PSL” [para 8];*
 - (b) *That, the “Tribunal had limited powers as prescribed by the Trade Disputes Act” [para 8];*
 - (c) *That, the “Tribunal could not properly exercise the powers reserved for the High Court of Fiji” [para 8];*
 - (d) *That, “the Tribunal is a creature of the Trade Disputes Act and is not empowered to embark on a review outside its TOR, and [if] it did, it does not have the power of review as vested in the High Court of Fiji and further it does not have the power to grant any appropriate remedy to FTIB” [para 8]; and,*
 - (e) *That, the “Tribunal is seized of the TOR and intends to proceed to deal with the matter in terms thereof” [para 8].*

3. *The Respondent erred in fact and in law in holding that the Fiji Public Service Association (the “Union”) “is a registered trade union in conformity with the Trade Union Recognition Act and is recognized by FTIB...the union has a constitutional and statutory right to represent the Grievor in these proceedings” [para 9], when the Union is not entitled to be a party or represent the Grievor under the Trade Disputes Act and further holding that there was a trade dispute as defined within the Trade Disputes Act.*

4. *The Respondent in his Decision directly and implicitly misinterpreted the proper construction of the relevant terms of reference:*
- (a) *That, effectively referred to the secondment of the Grievor by the Applicant on certain terms, particularly those contained in a letter dated 11 December 2000, to the Ministry so that the Ministry could appoint him to the post of Trade Commissioner to Los Angeles and that at the conclusion of his secondment he was to resume his responsibility with the Applicant and be reinstated to a similar position to that which he occupied prior to his secondment.*
 - (b) *That did not include the Grievor being seconded by the Ministry and accepted and ratified by the FTIB.*
 - (c) *That, did not include verbal representations from unnamed individuals “that the job was there for him” or repeated representations from the CEO and Chairman of the Applicant in November 2004 “that he would get a job with FTIB on his return” or a representations from the CEO of the Applicant “that he should go back to LA and wind-up his work there. On his return he would have a job with the FTIB”.*
5. *The Respondent erred in fact and law in holding:-*
- (a) *“That in the first instance the Decision to second the Grievor made by the Ministry and the Decision of the Ministry was subsequently accepted and ratified by the FTIB. It was regularized several months later after the actual posting” [para 24];*
 - (b) *“That the Grievor was seconded to Los Angeles by a Decision of the Ministry. There is no evidence that any conditions were attached thereto by the Ministry. The secondment must necessarily imply that on the termination of the period of secondment that status quo existing prior to the secondment is to be reverted to” [para 25];*
 - (c) *That, the Applicant agreed to the secondment of the Grievor by the Ministry [para 25];*

- (d) *That, the Grievor was seconded by the Ministry without any conditions being attached to his secondment [para 25];*
- (e) *That, the “FTIB is bound by the Decision of the Ministry and is therefore obliged to re-employ the Grievor at the conclusion of the period of secondment” [para 25];*

For the following reasons:-

- (i) *The Grievor was employed by the Applicant;*
- (ii) *The Ministry is a separate body constituted by government;*
- (iii) *The Applicant is a separate body constituted by statute;*
- (iv) *If the Grievor was seconded by the Applicant his employment would continue and there be no requirement for him to be re-employed;*
- (v) *It is not logical for the Applicant to responsibly hold a senior position open for an unlimited period and without any conditions of secondment.*

6. *The Respondent erred in fact and in law in holding that if it erred in its above finding and the Applicant did approve the secondment in accordance with the terms and conditions contained in the relevant letter dated 11 December 2000:-*

- (a) *That “FTIB had actual or constructive knowledge of the appointment and the extension of the contract of appointment of the Grievor as trade commissioner” [para 27];*
- (b) *That “FTIB has been guilty of not dealing expeditiously with the issue of the Grievor’s secondment initially” [para 30], when this is not part of the relevant terms of reference;*
- (c) *That “the Chairman and CEO of FTIB made representations to the Grievor as late as November 2005 that on the expiration of his secondment: the Grievor would be offered a suitable position with the FTIB on his return to Fiji” [para 31], when this is not part of the relevant terms of reference;*

- (d) That “the FTIB through its Chairman and CEO had made representations to the Grievor that he will be re-employed by FTIB on his return to Fiji. These representations were made before the Grievor returned to Fiji. The FTIB has therefore waived any or all antecedent breach that the Grievor may allegedly be guilty of prior to his return to Fiji. The Tribunal finds that the laxity with which the FTIB had previously conducted itself; and notwithstanding the Grievor’s own conduct that may be wanting; the FTIB had effectively waived the strict compliance with the terms and conditions of secondment. The waiver extended to and included the failure of the Grievor to apply for approval for the full term of his secondment” [para 32], when this is not part of the relevant terms of reference nor was this confirmed formally in writing by the board of the Applicant;
- (e) That “FTIB had actual and constructive notice of the Grievor’s movements. FTIB knew or ought to have known that the Grievor was on secondment and would return eventually to Fiji” [para 33], which is not reasonable or logical in the circumstance that the Ministry assumed employment of the Grievor and there was insufficient evidence to come to this conclusion.
7. The Respondent erred in fact and law in holding that the Applicant “refused to re-employ the Grievor” [para 34] because of budgetary allocation rather than strict reliance on its legal rights.
8. The Respondent erred in fact and law in holding that the Applicant’s “refusal to re-employ is unfair, unjustified and without a rightful cause” [para 35], for the reasons contained herein.
9. The Respondent erred in fact and in law by considering the matters outside the scope of the terms of reference, without rebuttal evidence being given, including evidence as to the Grievor being allegedly offered further employment with the Applicant. The terms of reference specifically refer to the alleged failure of the Applicant to re-employ the Grievor after the completion of the Grievor’s secondment. There was no reference in the terms of reference to the Grievor being offered employment/re-employment as

secondment, if established, by its nature means the employment relationship was never terminated. By the Respondent considering these matters the Applicant was not afforded prior notice or the opportunity to natural justice and be heard on these matters nor lead any evidence to rebut these allegations to re-employ the Grievor.

10. *In carrying out its functions and exercising its statutory powers and duties the Respondent is required to act in accordance with the rules and principles of law.*
11. *The Decision was void and invalid as:-*
 - (a) *The Decision was unreasonable in terms of the award in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223; and/or*
 - (b) *The Respondent was acting ultra vires and in excess of its powers and its terms of reference by not acting fairly; and/or*
 - (c) *The Decision was made on the basis of irrelevant or extraneous considerations or failing to take into account relevant considerations;*
12. *The Respondent failed to consider or record in the Decision relevant material facts, such as evidence given by the Grievor that he was employed as a director with the Ministry of Agriculture and further receives an income from the rental of his flat and is further supported financially by his wife.*
13. *The Respondent erred in fact and in law in holding that the relevant of secondment letter dated 11 December 2000 was invalid.*
14. *The Respondent failed to consider or record certain documentary evidence before it that contradicted the evidence of the Grievor to the effect that the Grievor was employed by the Ministry of Agriculture and further receives an income from the rental of his flat and is further supported financially by his wife.*
15. *The Respondent's Decision demonstrates bias and is manifestly unfair."*

Grounds 1 and 2

40. At paragraph 8 of the Decision the tribunal stated as follows:-

“8. *The Union submitted that the Tribunal was bound by its Terms of Reference (TOR). The TOR did not permit it to review the decision of the PSL. The Tribunal had limited powers as prescribed by the Trade Disputes Act and that the Tribunal could not properly exercise the powers reserved for the High Court of Fiji. The Tribunal accepts the submission in its entirety and notes that the Tribunal is a creature of the Trade Disputes Act and is not empowered to embark on a review outside its TOR, and even it did, it does not have the power of review as vested in the High Court of Fiji and further it does not have the power to grant any appropriate remedy to FTIB. Indeed, this was and is an option available to FTIB to pursue the matter by way of judicial review in the High Court of Fiji. The Tribunal is seized of the TOR and intends to proceed to deal with the matter in terms thereof.*”

41. The above statement was in respect to the preliminary issue “as to whether the tribunal has been properly constituted?”
42. With all due respect I **do not** agree with the Tribunals view.
43. Once a party objects to the appointment of the Tribunal or Arbitrator, the Tribunal or Arbitrator must deal with the issue and if any party insists that the Tribunal has not been properly constituted and as such has no jurisdiction to deal with the dispute the Tribunal or Arbitrator must consider the preliminary issue.
44. If the Tribunal/Arbitrator holds that Tribunal has been properly constituted and that Tribunal has jurisdiction, then Tribunal can proceed with hearing the dispute.
45. After that, if the party raising the issue is not happy with Tribunal/Arbitrator dealing with the dispute because the party is of the view that it is not properly constituted then that party can seek declaration or injunction orders from High Court.
46. Whilst I agree with the Tribunal that he could not deal with matters other than what is referred to in the Terms of Reference (TOR) he should have dealt with the issue as to whether Tribunal is properly constituted or not for the sole reason that this issue will never be part of any TOR referred to by the Labour Ministry.

47. Furthermore, if Tribunal finds that it has not been properly constituted then it should not deal with what is stated in the TOR.
48. Since, the Tribunal failed to consider as to whether the Tribunal was properly constituted I think it is appropriate for this Court to deal with that issue and whether there was a trade dispute as is stated in grounds 1 and 2.
49. Section 3 of the Trade Dispute Act Cap 96A ("**TDA**") provides as follows:-

"3(1) Any trade dispute, whether existing or apprehended may be reported to the Permanent Secretary by:-

- (a) an employer who is a party to the dispute or a trade union of employers representing him in the dispute;*
- (b) a trade union of employees recognised under the Trade Unions (Recognition) Act which is a party to the dispute;*
- (c) a trade union of employees that has applied for recognition under the Trade Unions (Recognition) Act and which is a party to the dispute; or*
- (d) an employee who is a member of a trade union that has applied for recognition under the Trade Unions (Recognition) Act and which is a party to the dispute.*

(2) A report of a trade dispute shall be made in writing and shall sufficiently specify:

- (a) the employers and employees, or classes and categories thereof, who are parties to the dispute, and the place where the dispute exists or is apprehended;*
- (b) the party by whom the report is made;*
- (c) each and every matter over which the dispute has arisen or is apprehended; and*
- (d) 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 to it.*

(3) *the party reporting a trade dispute shall without delay furnish by hand or by registered post a copy of the report of the dispute to each party to the dispute.”*

50. Trade Dispute in Section 2 of TDA is defined as follows:-

“trade dispute means any dispute or difference-

(a) *between any employer and a registered trade union recognised under the Trade Unions (Recognition) Act (Cap. 96A) and connected with the employment or with the terms of employment or the conditions of labour of any employee;*

(b) *between an employer and a registered trade union that has applied for recognition under the Trade Unions (Recognition) Act and connected with the termination of employment of that employee during the time when the application for recognition of the trade union is being processed; or*

(c) *between an employer and an employee who is a member of a registered trade union that has applied for recognition under the Trade Unions (Recognition) Act and connected with the termination of employment of that employee during the time when the application for recognition of the trade union is being processed.*”

51. The dispute before the Tribunal was regarding the Grievor’s employment with FTIB after he completed serving as Fiji’s Trade Commissioner in Los Angeles, USA.

52. I wish to clarify the point that I have not used the words after completion of secondment as Fiji’s Trade Commissioner as it is an issue as to whether Grievor was still on secondment immediately prior to completing his term as Fiji’s Trade Commissioner.

53. It is not disputed, that the Grievor was an employee of FTIB and a member of FPSA which is a recognised Trade Union and the dispute as stated earlier was regarding Grievor’s employment.

54. Therefore, the dispute that was before the Tribunal fits the definition of trade dispute.
55. I note that FPSA has complied with the provision of Section 3 subsection (2) of TDA by specifying in its report dated 18 October 2006 (Page 6 of Record of the Tribunal):-
- (i) The names of employer and employee concerned;
 - (ii) The party by who report is made;
 - (iii) Each and every matter over which the dispute has arisen;
 - (iv) The steps taken by it to resolve the dispute.
56. The FPSA also provided copy of the Report to FTIB, as required by Section 3(3) of TDA.
57. Section 4(h) of TDA, empowers the Permanent Secretary to refer dispute of right to a Disputes Committee.
58. "Dispute of rights" is defined in TDA to mean:-
- (a) a dispute concerning the interpretation; application; or operation of a collective agreement; or**
 - (b) any dispute that is not a dispute of interest, including any dispute that arises during the currency of a collective agreement."**
- "Dispute of interest" is defined in TDA to mean:-
- "a dispute created with intent to procure a collective agreement defined under this Act and includes a dispute created with intent to procure a collective agreement or amendment to settle a new matter as defined under this Act."**
59. Dispute reported by FPSA falls within the definition dispute of rights in (b) in paragraph 58 hereof above and as such the Permanent Secretary attempted to appoint a Dispute Committee to hear the charges.
60. Section 5A-(1), (2) and (5) of the TDA provides as follows:-
- "5A-(1) The Permanent Secretary shall refer a dispute of rights to a Dispute Committee for settlement.**

(2) There shall be constituted a Dispute Committee consisting of three persons as follows:-

(a) a Chairman who is not party to or concerned with the dispute appointed by the Permanent Secretary;

(b) a member appointed by the Permanent Secretary on the recommendation of the party affected by the dispute;

(c) a member approved and appointed by the Permanent Secretary on the recommendation of the employer or the trade union of employers affected by the dispute of rights;

Provided that the recommendations for membership under paragraphs (b) and (c) shall be submitted to the Permanent Secretary within fourteen days from the date of acceptance of the trade dispute.”

“s.59A(5) if one or both parties fail to comply with subsection (2) or where the Disputes Committee is unable to arrive at a decision by consensus or where the Disputes Committee fails to comply with subsection (3) of this Section:

(a) the Permanent Secretary shall refer dispute to the Minister who shall authorise the Permanent Secretary to refer the dispute to a Tribunal for settlement; and

(b) the Tribunal after hearing the parties to the dispute shall make an award which shall be binding on the parties to the dispute.”

61. The undisputed evidence is that FTIB failed to recommend a member for Permanent Secretary’s approval and appointment as required by Section 5A-(2)(c).

62. The Permanent Secretary then referred the Trade Dispute to the Tribunal pursuant to provision of s5A(5)(a) of TDA.

Ground 3

63. There is no evidence that FPSA at the material time was not a recognised Trade Union. The Grievor was a member of FPSA which had the right to report the

dispute and represent the Grievor in the proceedings before the Tribunal, s32(1)(c) of TDA.

Grounds 4 to 15

64. Grounds 4 to 15 can be dealt together because of the fact that these grounds raise issues that the Tribunal dealt with certain matters that were not subject to the terms of reference and that Tribunal's decision was unreasonable, biased and unfair.

Terms of Reference

65. The Terms of Reference from the Permanent Secretary to the Tribunal read as follows:-

“NOW THEREFORE, I do hereby refer the said trade dispute to the Tribunal over the refusal by the Bureau to re-employ Mr. Swami on completion of his secondment as a Trade Commissioner in Los Angeles, USA. This decision by the Bureau is unfair, unjustified and without a rightful cause.”

66. The Applicant submits that the Terms of Reference was vague and ambiguous.
67. The Grievor and FPSA's position has been that the FTIB upon completion of Grievor's secondment as Fiji Trade Commissioner, Grievor was entitled to go back and work for FTIB.
68. FTIB's position however, is that Grievor by failing to return to FTIB upon completion of his secondment in Los Angeles had lost his employment with FTIB.
69. The TOR even though is quite general and not specific it nonetheless deals with the dispute that had arisen between the Grievor and FTIB and therefore is not ambiguous and vague.
70. Both parties clearly knew what TOR was and what was required of them.

Unreasonable; Unfairness

71. In Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 K.B.223 Lord Greene M.R. at page 229 on “unreasonable” stated as follows:-

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of

statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.”

This principle has been adopted and applied by Courts in Fiji.

72. The Applicant submits that it was unreasonable for Tribunal to hold that the Grievor was still on secondment when he completed serving as Fiji’s Trade Commissioner in Los Angeles, USA.

73. The Tribunal in respect to letter dated 11 December 2000, (Secondment letter) from FTIB to the Grievor stated as follows:-

“24. The Tribunal takes particular notice of the usage of the words “this decision” in the letter. After the hearing had concluded the Tribunal invited the parties to clarify to it what this decision was and who had made this decision referred to in the letter. The Counsel for FTIB submitted that FTIB did not have any evidence to offer on the subject. He submitted that the proper inference to be drawn there from it is that it is referring to “the decision by the Ministry of Commerce to appoint Ravin Swami to the post of Trade Commissioner.” Accepting that inference, The Tribunal concludes that even in the first instance the decision to second the Grievor was made by the Ministry and the decision of the Ministry was subsequently accepted and ratified by the FTIB. It was regularized several months later after the actual posting.

25. *The letter says that the FTIB “agreed to this arrangement taking into account.” The Tribunal makes the following further inferences from the above:*

- *That the decision to second was made by the Ministry*

- *FTIB agreed to this arrangement.*

It therefore follows that the Grievor was seconded to Los Angeles by a decision of the Ministry. There is no evidence that any conditions were attached thereto by the Ministry. The secondment must necessarily imply that on the termination of the period of secondment the status quo existing prior to the secondment is to be reverted to.

The FTIB had formally agreed to the arrangement to second some six months later. The Tribunal therefore concludes that the FTIB is bound by the initial arrangement that was made between the Grievor and the Ministry. The imposition of the conditions has come considerably later and did not form part of the arrangement entered into by the Ministry and the Grievor. Therefore FTIB cannot at this stage impose conditions as there were none at the time the Ministry decided to second the Grievor as a trade commissioner.

The FTIB is bound by the decision of the Ministry and is therefore obliged to re-employ the Grievor at the conclusion of the period of secondment.

In making the above conclusions the Tribunal takes into account that the Ministry is a line ministry for the FTIB. The minister is empowered to give such directions as he considers necessary for the proper implementation of his policies to the FTIB. The Tribunal has taken into account the various correspondences to suggest that the establishment of the trade commission was a new initiative that was undertaken by the Ministry in collaboration with the FTIB. The Ministry and the FTIB were jointly implementing the minister's policy of encouraging and enhancing US investment in Fiji. FTIB was also pleased at the Grievor's appointment as it considered that the experience gained by the Grievor in the USA will be invaluable to the FTIB.

Part of the responsibility was delegated to FTIB including the responsibility of advertising and recruitment of proper personnel. The FTIB oversaw the day to day responsibility of the trade commissioner."

74. I agree that "the decision" referred to in letter dated 11 December 2000 is the decision by the Ministry to appoint the Grievor as Fiji's Trade Commissioner.

75. However, I do not agree with the Tribunal's inference that the decision for secondment was made by the Ministry and the finding that Grievor was seconded to Los Angeles by the Ministry. The Grievor, at that point in time was employed by FTIB and not the Ministry and as such Ministry could not make the secondment decision. Only FTIB as Grievor's employer could do that.
76. It appears that the Tribunal did not understand or appreciate what secondment is?
77. The decision for secondment must be made by the employer which in this case was FTIB and not the Ministry.
78. Furthermore, the Ministry did not second the Grievor as Fiji's Trade Commissioner to Los Angeles but appointed the Grievor as Trade Commissioner.
79. I do not agree with Tribunal's finding that FTIB is bound by decision of the Ministry and is therefore obliged to re-employ the Grievor at the conclusion of the period of secondment.
80. FTIB is a statutory body and its functions and powers are provided for in the Fiji Trade and Investment Bureau Act Cap 221 ("**FTIBA**").
81. There is nothing in the FTIBA that says that the Ministry has the power to direct FTIB to employ any person in a particular post.
82. In order to determine whether the Tribunal's decision was reasonable or fair I think it is prudent to consider the correspondence between the Grievor and FTIB from the time he was seconded upto his return to Fiji.
83. On 11 December 2000, FITB wrote the Grievor in the following terms:-

"The secondment is approved subject to the following conditions:-

1. *The secondment is for a period of three (3) years with effect from 1 August 2000. You will need to reapply if you wish to extend this time period.*
2. *Upon your return to the FTIB you will be appointed to a suitable management position commensurate with your qualifications and experience. Whilst the Board will endeavor to appoint you to a*

position equivalent to the post you held, FTIB is not obliged to appoint you to the same post.

3. *You are required to give FTIB at least 12 months notice of your intention to return to FTIB. This notice is required to assist accommodate you in the FTIB structure upon the expiration of your contract.*
4. *The period of secondment will not count for the determination of benefits that you are eligible for and which are based on years of service such as long service leave entitlements and retirement benefits.”*

84. There has been much said about this letter being written late.

85. This letter confirmed the Grievor being seconded to the Ministry from 1 August 2000, which decision was made on 27 July 2000.

This letter only confirms the secondment, and sets out terms and conditions and therefore, does not prejudice the Grievor or anyone else in any respect.

Therefore, I do not agree with Tribunals finding that this letter is invalid (Ground 13).

86. On 4 December 2002, approximately eight (8) months before the Grievor's term as Fiji's Trade Commissioner was to expire **he applied to FTIB for extension of his secondment for further three (3) years** for following reasons:-

- (i) To successfully complete various projects he was working on;
- (ii) To take part in trade shows in later part of 2003 and 2004;
- (iii) For him to do research and preparatory work for the trade shows;
- (iv) On personal note a full term extension will allow his elder son to complete high school and avoid disruption of his studies at crucial time.

87. On 31 January 2003, six months before the expiry of initial term FTIB responded to Grievor's request for extension in following terms:-

“I refer to your letter of December 4, 2002 requesting extension of your appointment as Trade Commissioner - Los Angeles for 3 years w.e.f. 1 August 2003.

The matter was discussed at the last board meeting. After careful consideration the Board decided based on your good performance to grant you a one year extension as provided in your letter of appointment.

To give others the opportunity to also serve and contribute in that position the post will be advertised in mid-2004.

You may also apply and your candidacy will be considered along with other applicants.

The Board believes this is the best and fair way to address the matter.

Whilst the decision may not entirely please you I am sure it will spur you to further improve your performance to raise your chances of a reappointment.

Kind regards

Yours sincerely

[Jesoni Vitusagavulu]

CHIEF EXECUTIVE”

According to this letter the secondment was to expire on 31 July 2004.

88. By letter dated 22 October 2003, the Ministry extended Grievor’s term as Fiji’s Trade Commissioner for another year to 1 August 2004, (in fact extension for one year should be to 31 July 2004, because appointment commenced on 1 August 2003).
89. By letter dated 13 May 2004, the Ministry extended Grievor’s term as Trade Commissioner for another year to 1st August 2005 (should be 31 July 2005).
90. On 15 July 2004, the Ministry wrote to the Grievor in respect to extension granted by letters dated 22 October 2003 and 15 May 2004. In first four paragraphs Ministry stated as follows:-

“At the end of your first three years as Trade Commissioner based in Los Angeles on August 2003 I had approved another extension to August 1st 2004 as conveyed to you in my letter 2/21/42 dated October 22nd 2003.

However, I again approved another extension to August 1st 2005, due to an administrative oversight as it was not my intention to allow for two (2) extensions of contract.

You were verbally informed that this will be withdrawn and you will need to return home in August 2004.

However, I have not thoroughly considered the circumstances regarding this issue and agreed that you retain the post for another year to 1st August, 2005. In return you were to give your total commitment to providing and lifting the level of investment and trade from your end for the benefit of Fiji.”

91. On 12 July 2005, the Ministry wrote to the Grievor extending his term as Trade Commissioner to 1 October 2005 (two months).
92. On 13 July 2005, the Ministry wrote the Grievor advising him to disregard letter dated 12 July 2005, and that his term has been extended to 1 January 2006.
93. On 3 August 2005, the Grievor wrote to FTIB confirming his discussion with FTIB during his recent visit to Fiji that his term at Fiji Trade Commission finishes at end of 2005; he was on secondment from FTIB; and was writing to request his return to FTIB at a position equal to that which he had left in 2000. The rest of the letter highlighted the work and promotions he had carried out as Fiji’s Trade Commissioner in Los Angeles, USA.
94. On 22 December 2005, FTIB responded to Grievor’s letter and informed him as follows:-
 - (i) His secondment was approved by FTIB subject to following:-
 - (a) secondment was for three (3) years from 1 August 2003;
 - (b) he had to apply to FTIB for extension of secondment;
 - (c) he had to notify FTIB of his intention to return and re-commence employment within 12 months of the secondment period ending.

- (ii) Upon completion of first three year period Grievor sought extension of contract as Trade Commission from Ministry and did not seek extension of secondment from FTIB or notified FTIB Board otherwise;
 - (iii) In view of his failure to comply with conditions stated in letter dated 11 December 2000, FTIB is not legally obliged to accept him back as an employee;
 - (iv) However, based on his wide experience in promoting Trade and Investment he could be considered for re-employment by FTIB if he wished and could apply for the position of General Manager Corporate Services when it was advertised by FTIB.
95. It appears that when the then Chief Executive Officer of FTIB wrote this letter she was not aware about the one (1) year extension granted by her predecessor by letter dated 31 January 2003.
96. On 28 December 2005, the Grievor wrote to FTIB in following terms:-
- “Thank you for your letter of December 22nd 2004 regarding my employment with FTIB. I look forward to applying for the post of General Manager Corporate Services and to working again for the FTIB.*
- On a related matter, I wish to advise that on December 4th 2002, I had written to the previous CEO and had numerous conversations with him, regarding the extensions of both my contract and secondment. I was advised that this matter would be discussed at the FTIB Board meeting. Unfortunately I did not receive anything in writing from FTIB as to the outcome of the Board discussion. I only received a contract extension letter from the Ministry of Commerce. Due to short staffing and work load here, I did not follow this up.*
- I take this opportunity to record my thanks and appreciation for the support that I have always received from you personally and from FTIB. This has enabled me to successfully carry out my duties here.” (emphasis added)*
97. On 1 March 2006, the Grievor again wrote to FTIB. At paragraph 3 and last paragraph of the letter Grievor stated as follows:-

Paragraph 3

“In the third paragraph of your letter, you state that “Upon completion of your first three-year period you sought and secured an extension to your contract as Trade Commissioner with the Ministry of Commerce, Business Development & Investment without simultaneously either applying to the FTIB for extension to your secondment period or notifying the Board otherwise.” This is not so. The fact of the matter is that I had written to the FTIB only - my letter of December 4th, 2002 refers. At no time had I written directly to the Ministry for an extension to my contract, as you state in your letter. The FTIB gave me approval (FTIB letter dated 31 January 2003) - I took this approval for my secondment; as FTIB can only approve the secondment. The appointing authority for the Trade Commissioner’s position is the Ministry of Commerce, Business Development & Investment. The Ministry extended my contract as Trade Commissioner via their letter dated 22 October 2003. I am sure the FTIB will be aware of this, as this is the FTIB’s line Ministry.” (emphasis added)

Last paragraph

“I am writing this letter because it is over six weeks since my return and I am not getting any clear indications from you as to where I stand, apart from what you mentioned in your last letter to me. I am prepared to meet to discuss this so that this matter may be resolved amicably and as soon as possible.”

98. It is noted that the Grievor in his letter dated 28 December 2005, denied having received letter dated 31 January 2003 from FTIB and also in his evidence during hearing before the Tribunal he did not mention receiving the letter of extension from FTIB.

However, at paragraph 3 of his letter dated 1 March 2006, the Grievor stated as follows:-

“The FTIB gave me approval (FTIB letter dated 31 January 2003) - my secondment, as FTIB can only approve the secondment.”

Also at paragraph 2.4 of Submissions filed by FPSA it is stated as follows:

“The bureau approved an extension of only one (1) year per its letter of 31.01.2003 (Exhibit RKS09).”

99. It is then quite clear that the Grievor did receive letter of extension dated 31 January 2003, from FTIB.
100. Grievor on 15 and 25 May 2006, wrote follow-up letters to FTIB.
101. On 8 June 2006, FTIB wrote to the Grievor in response to his letters dated 1 March 2006 and 15 May 2006 advising him that:-
- (i) FTIB had earlier advised him that had he applied for extension of secondment after its first extension, then FTIB would be obliged to absorb him in its current establishment;
 - (ii) For him to be re-employed he has to follow normal process;
 - (iii) When funds are available General Manager Corporate Services post will be advertised and then he can register his interest for the post.
102. Thereafter FPSA became involved and represented the Grievor.
103. After perusing the Tribunal decision, I find that the Tribunal placed lot of weight on Grievor's oral evidence rather than analyzing the documentary evidence in the form of correspondence between FTIB, Ministry and the Grievor.
104. It appears that the Tribunal failed to appreciate the Grievor's position as Fiji's Trade Commissioner and the secondment approved by FTIB.
105. FTIB was the only body that could extend the Grievor's secondment and not the Ministry.
106. The Grievor very well knew about this and that is the reason he wrote to FTIB seeking three year extension but FTIB only granted him one year extension to expire on 31 July 2004.
107. Thereafter, Grievor only obtained extension of his position as Fiji's Trade Commissioner from the Ministry.
108. The Grievor managed to stay in USA for almost the term he wanted to stay as per his request for extension to FTIB via letter dated 4 December 2002, and mentioned at paragraph 86 of this Judgment.
109. Ministry could only extend Grievor's term as Fiji's Trade Commissioner and not his secondment which could have been only done by FTIB. **This is accepted and**

acknowledged by the Grievor at paragraph 3 of his letter dated 1 March 2006, quoted at paragraph 97 of this Judgment.

110. The Tribunal held that FTIB had actual or constructive knowledge of Grievor's term for position of Trade Commission had been extended by the Ministry.
111. Obviously, FTIB would have actual knowledge that the Grievor was Fiji's Trade Commissioner because FTIB's function was to promote Fiji and look after foreign investment.
112. This does not mean that FTIB had agreed to extend Grievor's secondment.
113. The Grievor in fact knew and accepted his employment with FTIB has lapsed. This is evident in first paragraph of letter dated 28 December 2005, from Grievor to FTIB where Grievor stated as follows:-

*"Thank you for your letter of December 22nd 2004 regarding my employment with FTIB. **I look forward to applying for the post of General Manager Corporate Services and to working again for the FTIB.**" (emphasis added)*

FTIB letter referred to should be one dated 22 December 2005.

114. The Tribunal in third sentence of paragraph 36 of the decision stated as follows:-

"In any event, the Grievor has been unemployed since his return from USA."

However, the Grievor in his evidence before the Tribunal stated that since his return in March 2004 (should be 2006) he has been Chairman of Agricultural Marketing Authority and that he could not disclose his remuneration.
115. After analyzing the documentary evidence in the form of correspondence between FTIB, the Ministry and Grievor and Grievor's evidence before the Tribunal I find that Decision was unreasonable and unfair. I find hard to understand as to how the Tribunal could make the Decision he made on the face of letters dated 28 December 2005, and 1 March 2006, from the Grievor to FTIB.
116. I also note that the Tribunal only quoted parts of correspondence between the Grievor and FTIB which supported Grievor's case and this supports Applicant's claim of bias on Tribunal's part. This view of mine is also supported by the fact that Grievor in his letter dated 1 March 2006, acknowledged that it was FTIB who

could only approve his secondment and that when Grievor returned to Fiji he knew he was not employed by FTIB as stated in his letter dated 28 December 2005 to FTIB.

117. I have no alternative, but to set aside and quash the Decision on the ground that it is unreasonable, unfair and the Tribunal to some extent was biased.

Costs


118. I take into consideration that parties filed Submissions; this matter has been pending since 2007; and the nature of the proceedings.

Orders

119. I make following Orders:-

- (i) Decision/Award of the Tribunal made on 19 June 2007, in the matter between Fiji Public Service Association and Fiji Trade and Investment Bureau being Dispute No. 08 of 2007 is wholly set aside;
- (ii) Each party to bear their own legal costs of this action.




K. Kumar
JUDGE

At Suva

13 May 2016

Ngamoki Cameron Law for the Applicant

Office of the Attorney-General for the Respondents