IN THE TRADE DISPUTES PANEL)
OF SOLOMON ISLANDS) **CASE NO: L9/7/96**

IN THE MATTER of the Trade Disputes Act 1981.

AND IN THE MATTER of a Referral of a Trade Disputes

BETWEEN: SOLOMON ISLANDS NATIONAL UNION OF WORKERS
Applicant

AND: SOLOMON TELEKOM COMPANY LIMITED
Respondent

Pre-hearing: 19th April 1996

Decision: 2nd August 1996

Panel: B. Titiulu - Deputy Chairman
N. Pule - Employer Member
D. Bale - Employee Member

Appearances: James Ilifanoa, Legal Officer, for the Applicant
Gabriel Suri, Counsel for the Respondent.

RULING

THE REFERRAL

On the 18th of March 1996, the Solomon Islands National Union of Workers (hereinafter referred to as the Applicant) gave notice to the Panel pursuant to section 4(1) and 6(1) of the **TRADE DISPUTES ACT 1981**, of a trade dispute arising between itself and Solomon Telekom Company Limited (hereinafter referred to as the Respondent). The Applicant appeared on behalf of its members who are employees of the Respondent. The Panel Secretary accepted the referral and informed the parties of the pre-hearing date set for the 19th of April 1996.

FACTS

For purposes of clarity, the events leading up to the date of referral are briefly outlined below, which are undisputed. On 1st of April 1993, the Applicant and the Respondent entered into a Recognition Agreement (hereinafter referred to as the Agreement).

The Agreement was binding on the parties for a period of 36 months from the date of signing. The objective of the Agreement is to provide for a basic framework for negotiations and consultations which will facilitate sound and constructive relations between the company and its employees.

On the 13th of December 1995 the Respondent received a twenty eight (28) days strike notice which was back dated to 22nd of November 1995. On the 15th of December 1995, the Respondent made a referral to the Panel in response to the 28 day's strike notice.

On the 21st of February 1996 the Applicant (SINUW) filed a referral with the Trade Disputes Panel. On the 18th of March 1996, the Panel dismissed the referral, on the grounds that the issues in that referral were academic. The issues referred then were based mainly on the company's intention to withdraw its recognition of the Applicant as a representative of its employees. The Respondent denied any knowledge of such an intention to withdraw its recognition of the Agreement. On the 18th of March 1996 after the referral was dismissed, the Respondent through its representative handed up to the Panel a copy of a letter addressed to the Applicants General Secretary. The letter was dated 18th of March 1996 and headed "Withdrawal of Recognition".

It was as a consequence of that letter that the Applicant then lodged the current referral to the Panel.

THE WITHDRAWAL OF RECOGNITION

The Respondent's grounds of withdrawal are set out clearly in the letter of 18th March 1996. These grounds are set out below:

"1. That the Solomon Islands National Union of Workers (SINUW) failed to abide by the terms of its own Constitution and rules when it issued strike notices and organised industrial actions contrary to the requirement of its constitution and rules. Such a notice was back dated 12th November 1995 and was served on the Company on 13th December 1995.

2. That the SINUW failed to comply with Clause 12 of Recognition Agreement of the Collective Agreement when it issued strike notices and organised industrial actions prematurely without completing and exhausting all negotiations as required by Clause 12 of the Agreement.

3. That the SINUW failed to comply with the provisions of the Essential Services Act".

THE ISSUES

On the 19th of April 1996 at the pre-hearing both parties confirmed the issues in dispute, as contained in the Applicant's referral. There are five (5) issues, and these are set out below:

"1. Whether or not the Withdrawal of Recognition of the Applicant Union by the Respondent is valid when a substantial majority of the Respondent's employees are still members of the Applicant Union.

2. Whether or not the Respondent's action in withdrawing its recognition contravenes clauses 3 and 4.1 of the Recognition Agreement.

3. Whether or not the withdrawal of Recognition by the Respondent of the Applicant contravenes section 5 of the Trade Disputes Act 1981 and is within the meaning of the above-mentioned provision with special reference to the meaning of the word "RECOGNITION" under the Act and as provided under the schedule of the said Act.

4. Whether or not by its letter of withdrawal of recognition dated 18/08/96, the Respondent is entitled to deprive its employees who are members of the Applicant Union their rights provided under section 13 of the constitution of Solomon Islands.

5. Whether or not, (considering all the circumstances and the laws applicable to the issue of recognition in the country, and the constitutional guaranteed rights of the employees of the Respondent who are members of the Applicant Union) the Respondent is entitled to withdraw its recognition based on the grounds stated in its letter of withdrawal of Recognition dated 18/03/96.

PRE-LIMINARY ISSUES RAISED

After the introduction of the issues by the Applicant, the Respondent then raised an important preliminary issue and that is whether the Panel should entertain the referral and allow the issues to proceed to a full hearing.

THE RESPONDENT'S SUBMISSION

The Respondent submitted that the referral contained issues of law and not fact. Because of the nature of the issues, the Panel has no jurisdiction to hear and determine the issues. The Respondent submitted that the nature of the referral is similar to that of seeking a declaratory ruling from the High Court on questions of law. The Respondent further submitted that the Panel has no power to enforce the Recognition Agreement as it is not a court of law.

The Respondent then drew the Panel's attention to section 5 (1) of the **Trade Disputes Act 1981** arguing that section 5(1) applies to circumstances where if recognition is in issue, then recognition issue means an issue arising from a request by a trade union for recognition by an employer, including (where recognition is already given to some extent) a request for further recognition. It is the Respondent's submission that section 5 of the Act does not provide for the withdrawal of recognition. It is also the Respondents Submission that the referral does not constitute recognition issues within the meaning of section 5(1) of the Act.

THE APPLICANTS SUBMISSION

The Applicant submitted that some of the issues in the referral are issues of fact and not law. The fundamental question is that of recognition, and therefore the issues referred fall within the meaning of section 5(1) **of the Trade Dispute Panels Act 1981**. The panel was referred to the definition of a "Trade Dispute" as defined in the schedule to the Act. Since the referral involves a dispute between the employer and the employees, the issues are recognition issues, therefore constitutes a trade dispute.

The Panel therefore has jurisdiction to hear the case, and to determine the issue in the manner sought.

In support of its contention the Applicant submitted that the Respondent's first grounds of withdrawal (see Respondents letter of 18th March 1996) contained allegations of facts, and evidence must be adduced under oath to ascertain the truth of that ground.

Before considering the submissions together with the issues in the referral, the grounds of withdrawal of the recognition agreement will be briefly discussed.

On the 22nd of November 1995, the Applicant Union issued a 28 days strike notice to the Respondent's General Manager. The strike notice was to be effective as of the 22nd of November 1995.

The notice was not served on the Respondent until the 13th of December 1995. A referral was made to the Panel on the 15th of December 1995. From the date of issue of the notice to the date the notice was served on the Respondent is a period of about twenty two (22) days. Clearly there is insufficient notice to the Respondent.

Either the notice was backdated, or the Union did not serve the notice on the Respondent on the 22nd of November 1995. It is clear however that the Respondent only received the notice on the 13th of December 1995. One of the purposes of giving twenty-eight (28)

days notice is to notify the Respondent in good time of any industrial actions to be taken by the Applicant Union. There was no compliance with the provisions of the **Essential Services Ordinance Cap. 22** as amended, in terms of complying with the relevant notice period. The service of the notice of industrial action in this case is short of the relevant period required under law.

Clause 12 of the Recognition Agreement provides that no parties shall resort to strike or lockout or other direct action until all negotiation have been completely exhausted. Clause 12 also provides that where applicable the parties must comply with the provision of the Essential Services Act. The history of this dispute shows that the Applicant Union had earlier issued 28 days strike notice to the Respondent on the 19th of July 1995. On the 18th of August 1995, the strike notice was withdrawn and a memorandum of understanding was signed between the parties on the 22nd of August 1995.

The union has demonstrated that it can establish negotiation despite the fact that a strike notice was previously issued.

The Panel is of the view that the parties have not completely exhausted all negotiations. The objective of the Recognition Agreement (which is now withdrawn) was to provide for a good framework for negotiation and consultation with the aim of encouraging sound and constructive relations between the company and its employees. There was no evidence or submission by the Applicant that a meeting was convened by the employees and a resolution was reached by the employees for a twenty eight days notice to be issued.

Trade disputes involve important and sensitive issues, more so if the dispute involves employees of an essential service. Telecommunication is an essential service, as provided under the Essential Services Ordinance as amended. Where industrial actions are taken, then it is of paramount importance that the provisions in the Essential Services Ordinance are complied with.

The Constitution of the Solomon Islands National Union of workers, part 14 provides as follows:-

PART 14: TRADE DISPUTES

"Where a trade dispute arise between an employer and members of the Union who are employed by that employer the members affected may convene a meeting amongst themselves and decide on appropriate industrial actions, provided that any decisions reached by the said employees shall be immediately conveyed to the Secretary who shall forthwith report the dispute to the National Council-

56.1 When the National Council receives a report of a pending trade dispute under the preceding sub-clause, it may either intervene to carry one negotiations on behalf of the employees or assist the said employees to organise an appropriate industrial action;

56.2 in the event that employees have decided by secret ballot to stage a strike, the National Council shall forthwith declare a strike;

56.3 if a strike is declared under sub-clause 56.2 the National Council shall take active steps towards mediation between the employer and employees and shall assist employees in any legally constituted trade dispute tribunals".

It is clear from clause 56.2 that the procedure provided therein have not been followed. It is the Panel's finding that the provisions of the Applicant Unions **Constitution, the Recognition Agreement** and the **Essential Services Ordinances** have not been complied with by the Applicant.

It is not open to the Panel to interfere with the decision of the Respondent party regarding the withdrawal of the recognition. The reason being that the Recognition Agreement does provide for withdrawal of recognition if the Applicant breaches its own constitution and rules. The Panel cannot dictate how the parties should run their affairs.

The Panel was not informed, apart from the content of the letter of 12th November 1995, that all negotiations have been completed and exhausted. Even if all negotiations have been exhausted, the notice sent to the Respondent would not be sufficient notice.

Under the **Essential Services Ordinance Cap. 22** telecommunication services is categorised as an essential service.

Proper notice is therefore required to be given to the Respondent. As mentioned earlier, it is not for the Panel to dictate whether or not the Respondent should have taken an alternative approach than withdrawing the recognition agreement. The legallity of the Respondent's action can be challenged in court by the Applicant if it so wishes. The Panel note however, that the Respondent withdrew its recognition on the fact that provisions of the Essential Services Ordinance and clause 12 of the Recognition have been breached.

The Panel has jurisdiction to hear the referral in so far as the issues involve a trade dispute between the parties and the Applicant is indirectly seeking recognition. In that respect, the main issue is that of recognition.

ISSUE ONE

1. The Recognition Agreement which the parties entered into on 1st April 1993 is a contract, legally binding upon the parties. The Employer by its letter of 18th March 1996, withdraw its recognition of the Applicant as the proper body representing its members. The Applicant contends that a substantial majority of the Respondent's employees were still members of the Applicant Union when the withdrawal was made.

No evidence (other than the Recognition Agreement) was submitted to the Panel to support the contention that the Applicant still enjoy the 50% "substantial majority".

Whether or not the withdrawal was valid is in the Panel's view a matter that can be dealt with by the Panel when the background of the dispute is considered.

It is important to note that the Respondent terminated the Recognition Agreement on three grounds, none of which involved the issue of substantial majority. The three grounds which the Respondent relied on are ;

(1) that the Applicant was in breach of the Essential Services Act Cap 22,
(2) that the Applicant failed to comply with clause 12 of Recognition Agreement,
(3) that the Applicant failed to abide by terms of its Constitution and rules.

Clause 3. of the Agreement is as follows:

"The company will withdraw its recognition of the Union should the Union at any time cease to be registered or should it fail to abide by the terms of its own constitution and rules".

From this provision in the Agreement, there are clearly two situations in which the Respondent can withdraw its recognition.

The first situation arises where the Union (Applicant) is deregisted That is not the situation in this case. The Respondent relied on the second arm of Clause 3.

The second arm of Clause 3 also gives the right to the Respondent to withdraw its recognition if the Union fails to abide by its

own constitution and rules. It is this second arm of clause 3 that the Respondent relied on in its first ground in withdrawing its recognition. There is no requirement under clause 3 of the Agreement that both events (ie deregistration and non-compliance with the constitution and rules) must occur before the Respondent can withdraw its recognition. The Respondent relied on the second arm of clause 3 to withdraw its recognition, and is perfectly entitled to do so.

Clause 4.1 of the Agreement provides for the withdrawal of negotiation if the number of union members change and the employees of the company fall to a number which is less than 50% of employees eligible for membership.

The Applicant argues that it still enjoyed the 50% majority, and therefore the Respondents action in withdrawing its recognition was not in compliance with Clause 4.1.

The Panel is of the view that clause 4.1 and 3 provide for three (3) distinct grounds on which the Respondent may rely on to withdraw its recognition. The Respondent need only to rely on one of the grounds for withdrawal of recognition. There is no requirement in the Recognition Agreement which states that all three grounds must arise before the Respondent can withdraw its recognition.

Thus, if the employees membership amounts to 50% or more with the Applicant Union, but the Applicant is deregistered, the Respondent according to clause 3, has the right to withdraw its recognition.

Similarly, if the applicant Union enjoys a membership of 50% or more but the applicant has failed to abide by the terms of its own constitution and rules thus amounting to a breach, the Respondent is perfectly entitled to withdraw its recognition of the Applicant.

Such withdrawal would be in compliance with clause 3 of the Agreement. That is exactly what has transpired in the present case. Thus, where the Respondent withdrew recognition under clause 3 of the Agreement on the basis that the Applicant has failed to abide by the Constitution and rules, then the question of 50% or more membership with the Applicant union becomes irrelevant.

Inrespect of issue one(1) of the referral, the Panel has ruled that the withdrawal of recognition by the Respondent is in accordance with the second arm of clause 3 of the Agreement, and is valid.

ISSUE TWO

This issue has been partly covered under issue one. The withdrawal of recognition was made pursuant to the second arm of clause 3,

not under clause 4.1 of the Agreement. There is no provision in the Agreement which prohibits the Respondents relying on clause 3 of the Agreement to withdraw its recognition. The Panel rules that the withdrawal of the recognition pursuant to clause 3, does not contravene clause 4.1 of the Agreement.

ISSUE THREE

The Trade Dispute Act 1981 defines Recognition as:

"In relation to a trade union, means the recognition of the union to any extent by an employer for the purpose of collective bargaining".

Section 5(1) of the Act defines recognition issue as follows:

"In this act, "recognition issue" means an issue arising from a request by a trade union for recognition by an employer, including (where recognition is already given to some extent) a request for further recognition".

The Panel is of the view that section (5) (1) and (5)(2) of the **Trade Dispute Act 1981** gives the Panel the power to hear and determine issues arising out of or connected to requests by a trade union for recognition by an employer. This includes a further request for recognition where there is already a Recognition Agreement in place.

Section 5 (1) of the Act does not provide for the withdrawal of recognition by either party. The withdrawal of recognition is specially catered for in the Recognition Agreement, in particular at clauses 3 and 4.1.

The Respondent has utilised clause 3, in conjunction with clause 12 of the Agreement to withdraw its recognition.

It is the Panel's view that section 5 caters for requests for recognition and the manner in which recognition could be granted. It is clearly not the function of the panel to interpret section 5 of the Act so as to include withdrawal of recognition. That function is for the courts to perform. The Panel is not a court of law. The Panel finds that the Respondent's withdrawal was made pursuant to clause 3 of the recognition agreement and not under section 5 of the Act.

ISSUE FOUR

Issue four raises a constitutional point of law, which the Panel has no jurisdiction to determine. It is worthwhile to note however, that clauses 3 and 4.1 were both agreed to by the Parties. The withdrawal was made pursuant to clauses 3 and 12 of the Recognition Agreement. The Applicant cannot now argue that a reliance on clause 3 and 12 of the Agreement and the Respondents withdrawal of recognition is a deprivation of the Applicant members right under section 13 of the Constitution. The Applicant cannot have it both ways. The Respondent has the right to withdraw its recognition of the Applicant if any event in clause 3 and 4.1 of the Recognition Agreement arises.

ISSUE FIVE

This issue as with issue four, raises points of law, with emphasis on the constitutional right of the employees under section 13 of the constitution. Such issues are best argued before the courts to determine the legality of the Respondents action.

However, the Panel is of the view that the actions of the Respondent are covered under clause 3 of the Recognition Agreement. The Respondent would of course, be acting outside that provision if for no reason at all withdraw its recognition of the Applicant union. That is not the case here. From the evidence available to the Respondent, and produced before the Panel, the Respondent had reason to believe that a breach of the Applicants own Constitution and rules had been committed by the Applicant. The Respondent acted in accordance with provisions in the Recognition Agreement. The Panel see no reason to interfere with the Respondents action.

It is worthwhile to note that the Recognition Agreement was due to expire on the 31st of March 1996. The Respondent however, withdrew its recognition thirteen days (13) earlier. The Panel is of the view that fresh negotiation for a new recognition agreement between the parties should be seriously considered by the parties, to be initiated by the Applicant. The question of "majority" will then play on important role in deciding whether or not the Respondent would grant recognition. Employees of the Respondent who wish to join the Applicant Union, may seek recognition from the company.

It may be true that the majority of Telekom employees are members of the Applicant Union. The withdrawal was made pursuant to clause

3 of the Recognition Agreement, and not on the fact that Applicant no longer enjoy majority membership. Because of the nature of the grounds for withdrawal, it is open for the union to proceed to negotiate for a new Recognition Agreement to be in place between the parties. The normal procedure seeking recognition will of course apply when seeking recognition.

In view of the Panel's findings, the matter shall not proceed to a full hearing.

On behalf of the Panel

B. Titiulu
DEPUTY CHAIRMAN/TRADE DISPUTES PANEL