Fiji Law Reports

State v Permanent Secretary for Labour and Industrial Relations, ex parte National MBF Finance (Fiji) Ltd [2000] FJLawRp 23; [2000] 1 FLR 39 (25 February 2000)

[2000] 1 FLR 39

IN THE HIGH COURT OF FIJI

STATE

v

PERMANENT SECRETARY FOR LABOUR AND INDUSTRIAL RELATIONS
& FIJI BANK EMPLOYEES UNION
ex-parte National Mbf Finance (Fiji) Limited

High Court Judicial Review
Fatiaki, J
25 February, 2000
HBJ 0001/99

Trade dispute -whether Permanent Secretary for Labour and Industrial Relations exceeded jurisdiction to refer trade dispute to Permanent Arbitrator-distinction between 'dispute of interest' and 'dispute of right'- costs to the applicant - Trade Disputes Act (Amendment) Decree 1992 s5A(2)(b), Trade Disputes Act ss 4(1)(d), 6(1), 6(2)(a), (b) & (c) and 34, Compulsory Recognition Order 3/98

The Bank retrenched 18 employees prior to conclusion of a comprehensive collective agreement pursuant to Compulsory Recognition Order No. 3/98 and a redundancy package. The applicant sought judicial review of the Permanent Secretary for Labour and Industrial Relations' decision to accept the dispute as a dispute of right and to refer the trade dispute to the permanent arbitrator.

Held - (1) the distinguishing element between a 'dispute of interest' and a 'dispute of right' is the existence or non existence of a collective agreement. A dispute of interest is necessarily narrower in its ambit than a dispute of right.

(2) a collective agreement need not contain all the terms and conditions of employment of the employees covered, but use of the word 'prescribes' in the Trade Disputes Act (Amendment) Decree and read together with the Trade Disputes Act suggest that the agreement must be in written form, endorsed by or on behalf of the parties, lodged with the Permanent economic for registration and stamping.

(3) In the absence of a written collective agreement, and in view of on-going negotiations, the decision of the permanent secretary to accept as a 'dispute of right' and refer trade dispute was plainly erroneous.

Decision by Permanent Secretary for Labour and Industrial Relations to refer dispute to permanent arbitrator*ultra vires* and quashed. Declaration that dispute is 'dispute of interest' granted.

No cases referred to in judgment

Haroon Lateef for the applicant
Ropate Cabealawa for the respondent Permanent Secretary for Labour and Industrial Relations
Sir Vijay R Singh for the respondent Fiji Bank Employees Union

25 February 2000.

JUDGMENT

Fatiaki, J.

This application concerns the exercise by the Permanent Secretary for Labour and Industrial Relations (PSL) of his powers under Section 5A of the Trade Disputes Act (Amendment) Decree 1992 ['the (Amendment) Decree'] and arises in the following context:

(1) By Order of PSL dated 30th April 1998 the applicant company was compulsorily required to:

'(to) ... accord recognition to the (respondent) Union for the purposes of collective bargaining and, ... must when requested to do so by the Union, negotiate with the Union on any specific matter relating to the terms and conditions of employment of any person who is a voting member of the Union';

(2) Pursuant to the above Order various correspondence and discussions took place over several months, between the respondent Union and the applicant on the terms and conditions of its employees and in particular, the redundancy package to be offered to employees whose services were to be terminated due to the applicant downsizing its operations in Fiji;

(3) Prior to a final redundancy package being agreed, the applicant made redundant eighteen (18) employees on 24th June 1998 and gave each a company redundancy package which was then in existence prior to the order in (1) above;

(4) By letter dated 30th June 1998 the respondent Union reported the existence of a 'trade dispute' to PSL who, despite receiving a letter in opposition from the applicant dated 1st July 1998, accepted the report and referred the same to '... to a Disputes Committee ... for a decision';

(5) Failing a decision by the Disputes Committee, PSL with the authorisation of the Minister, by notice dated 28th October 1998 referred the dispute 'to the permanent Arbitrator for settlement ...' pursuant to Sub-Section 5(a) of Section 5A of 'the (Amendment) Decree';

(6) On 5th January 1999 the applicant sought leave to issue judicial review of PSL's referral in (5) above on the basis that: 'the (PSL) exceeded his jurisdiction and/or made an error of law in accepting the dispute as a dispute of rights';

(7) On 12th January 1999 leave was granted to the applicant and on 28th January 1999 the application was duly served on the respondents.

There are before the Court the following three (3) affidavits:

(a) The primary affidavit of Krishna Goundar General Manager of the applicant dated 4th January 1999;

(b) The affidavit in opposition of Diwan Shankar National Secretary of the respondent Union dated 22nd February 1999; and

(c) The affidavit in opposition of PSL dated 23rd February 1999;

In addition the Court has been assisted by the comprehensive written submissions of counsel for the applicant and a joint submission from counsels for the respondents.

The sole issue for determination conveniently identified in the submission of Counsel for the applicant is as follows:

'Whether (PSL) exceeded his jurisdiction in referring the trade dispute to the Permanent Arbitrator pursuant to Section (sic) 5(a) of Section 5A of the Trade Disputes Act (Amendment) Decree No. 27 of 1992?'

Before seeking to answer this question it is convenient to refer at the outset to the several matters that are common and undisputed between the parties. These are:

(1) That the dispute between the parties as set out in PSL's acceptance letter of 13th August 1998 namely, '... the decision (of the applicant) to retrench 18 employees ... while the parties were still negotiating a Collective Agreement pursuant to Compulsory Recognition Order No.3 of 1998 ...' amounts to and is, by definition, a 'trade dispute' capable of being accepted and acted upon by PSL;

(2) That the Trade Disputes Act (Amendment) Decree No. 27 of 1992 clearly differentiates between a 'dispute of interest' and a 'dispute of rights' not only as to what particular disputes are comprised within the meaning of each term but, more particularly, in the statutory procedure by which each is to be resolved.

In the case of a 'dispute of rights' Section 5A requires PSL to first refer it to a Disputes Committee and, failing a resolution, thereafter with the Minister's authorisation, to refer the dispute to a tribunal for settlement;

(3) A 'dispute of rights' is defined in 'the (Amendment) Decree' as meaning:

'(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';

and a 'dispute of interest' is defined as:

'a dispute created with intent to procure a collective agreement ... and includes a dispute created with intent to procure a collective agreement or amendment to settle a new matter as defined ...';

If I may say so a cursory comparison of the definitions suggests that a distinguishing element between them is the existence or non-existence of a 'collective agreement'. Furthermore a 'dispute of interest' is necessarily narrower in its ambit than a 'dispute of right'.

(4) It is common ground that PSL determined at the outset that the particular dispute in this instance was a 'dispute of rights' which ought to be referred 'to a Disputes Committee constituted ... under the provisions of Section 5A(1) of ['the (Amendment) Decree'] for

a decision'.

It is the latter decision that counsel for the applicant submits '... is where the Permanent Secretary erred' insofar as, in the absence of any collective agreement there can be no dispute as to its 'interpretation, application or operation' [the 1st limb (a) of the definition of a 'dispute of rights'], nor can the present dispute between the parties be described as one that '... arises during the currency of a collective agreement' [the 2nd limb (b)]. In short, the applicant maintains that this dispute is a 'dispute of interest' and hence PSL exceeded his jurisdiction.

In this latter regard it should be noted that the applicant reserved its rights in its letter of 25th August 1998 recommending the appointment of a member of the Disputes Committee [See: Section 5A(2)(b) of 'the Amendment Decree'].

Counsel for the respondents in their joint submission forcefully argues 'there was a collective agreement, ..., that forbade any redundancies until a mutually agreed redundancy package had been concluded' and further, a 'disputes of rights' is not confined to a 'trade dispute' arising out of a collective agreement and includes 'any dispute that is not a dispute of interest'.

Whatsmore the dispute referred by the PSL for settlement is not, and cannot be, a 'dispute of interest' because the reported dispute is not grounded on the applicant's failure to negotiate a comprehensive collective agreement. Instead, it is founded on the applicant's failure to abide by an agreement already reached, albeit an interim agreement on the way to a comprehensive collective agreement and seemingly evidenced in the undisputed correspondence exchanged between the parties before the eighteen (18) employees were made redundant.

Finally counsel writes:

'Acceptance of the applicant's proposition would lead to a dangerous lacuna in the workings of the legislation. It will allow a determined anti-union employer ... to victimise at will any number of employees, particularly union members, while he postpones and frustrates the conclusion of a collective agreement, as in this case. All the while, according to the applicants argument the legislation will afford no protection to the workers for, there being no collective agreement, no 'dispute of rights' may be entertained.'

From the foregoing it is plain that the parties differ fundamentally on what can or cannot be a 'collective agreement' for the purposes of 'the (Amendment) Decree'.

On the one hand, counsel for the applicant says:

'While negotiations were taking place there was/is no collective agreement between the parties which has been registered with (PSL) pursuant to Section 34 of the Trade Disputes Act. There is no such thing as an 'interim collective agreement'. Either there is a collective agreement or not and here there was/is no collective agreement.'

On the other hand, the respondents' counsel claim:

'that there was a collective agreement between the Applicant and the Union, interim in nature though it might be. The effect of that agreement was that while the parties were negotiating a comprehensive collective agreement (a) 'no one will be made redundant' and (b) that all staff 'will continue to receive their current levels of remuneration and benefits'.'

A 'collective agreement' is defined in 'the (Amendment) Decree' as being:

'any agreement:

(a) that is made by a trade union of employees recognised under the Trade Unions (Recognition) Act and an employer ...; and

(b) prescribes (wholly or in part) the terms and conditions of employment of employees of one or more description, or a procedure agreement or both.'

If I may say so whilst the above definition makes it clear that a 'collective agreement' need not contain or set-out all the terms and conditions of employment of the employees covered thereunder, the use of the word 'prescribes' in the second limb (b) suggests to my mind that the agreement must be in written form.

This view is reinforced by the provisions of Section 34 of the Trade Disputes Act (Cap. 97) which clearly anticipates an agreement 'in writing' which is 'endorsed (or signed) by or on behalf of the parties' and is capable of being copied and 'lodged with the Permanent Secretary' for registration by stamping. Needless to say these requirements would necessarily exclude oral or unsigned unilateral confirmations of the kind sought to be extracted by the respondent's counsels from the correspondence exchanged between the parties.

Given the above reading of the meaning of a 'collective agreement', and given PSL's sworn admission that

'... there is no Collective Agreement between the Applicant and the Union and further ... that the Union attempted to negotiate a Collective Agreement ... but was impeded by the applicant's decision to terminate the employment of eighteen of its staff on grounds of redundancy...',

I am firmly of the opinion that Counsel for the applicant is correct in his submissions that in the absence of a 'collective agreement' the decision of PSL that the reported dispute was a 'dispute of rights' was plainly erroneous.

Needless to say I cannot accept that the mere fact that a 'trade dispute' exists between the parties is a sufficient answer to an erroneous determination as to the particular type of dispute it is, nor does there appear to be any factual basis whatsoever for counsel's claim that the particular dispute 'is founded on the applicant's failure to abide by an agreement already reached ...'

The Union's original and amended reports to PSL nowhere refers to any such agreement or failure on the applicant's part to abide by an agreement already reached and indeed PSL's acceptance letter clearly notes '... that the dispute is over the decision of NMBF to retrench 18 employees ... while the parties were still negotiating a Collective Agreement pursuant to Compulsory Recognition Order under No: 3 of 1998'. In my view the reference to on-going negotiations is crucial in identifying the nature of the trade dispute between the parties rather than the redundancies per se.

Further the relevant correspondence that passed between the Union and the applicant prior to the redundancies plainly accepted that the parties were still in the process of negotiating a collective agreement and in particular a redundancy package.

Any agreement in the interim between the applicant and the Union 'to maintain the status quo' pending the finalisation of a collective agreement would not, in my view, be enforceable by the employees and its breach could not give rise to a reportable 'trade dispute' in so far as such an agreement although entered into between a recognised trade union and an employer is not one 'connected with the employment or with the terms of employment or with the condition of employment of any employee' nor would it give rise to a 'collective agreement' in so far as it does not 'prescribe (wholly or in part) the terms and conditions of employment of employees of one or more description...'

Needless to say in my view the retrenchment of the applicant's eighteen (18) employees is merely the triggering event for the reported dispute which had as its ultimate purpose, the procurement of a collective agreement which would have included provision for a redundancy package for all employees as at the date of the Compulsory Recognition Order.

As for counsels 'dangerous lacuna' argument, having carefully considered the scheme of the Trade Disputes legislation I am satisfied that the argument is more imagined than real, especially, when one considers that a 'dispute of interest' plainly covers the situation where a 'collective agreement' does not yet exist and a dispute has arisen between the negotiating union and the employer as occurred

in this case.

In such a situation the legislation (Section 4) provides PSL with various avenues for resolving the dispute including in particular, the appointment of a suitable person 'to act as a mediator and conciliator where the trade dispute is a 'dispute of interest' (See: Section 4(1)(d) as amended by 'The (Amendment) Decree'). It does not however empower him to refer a 'dispute of interest' to a Disputes Committee as occurred in this instance.

The legislation also recognises that failing a successful conciliation of a 'dispute of interest', the parties may still agree to go to voluntary arbitration [See: Section 6(l)] and, in the absence of such agreement, the Minister may authorise the referral of the dispute to compulsory arbitration in the particular circumstances outlined in Sections 6(2)(a); (b) & (c) and, if neither voluntary or compulsory arbitration is resorted to, then, the workers are at liberty to resort to industrial action.

For the foregoing reasons the application must succeed, but mindful that the statutory procedure for the resolution of a 'dispute of rights' has been advanced beyond the Disputes Committee, I grant the applicant a declaration that the trade dispute reported and accepted by PSL in his letter of 13th August 1998 is a 'dispute of interest' in terms of the Trade Disputes Act (Cap. 97).

It necessarily follows that PSL's referral notice dated 28th October 1998 is ultra vires and is accordingly quashed.

There will be costs awarded to the applicant summarily assessed at $400.00.

Application for Judicial Review granted. Declaration granted.

Marie Chan
