Fiji Law Reports

State v Arbitration Tribunal, ex parte Suva City Council Staff Association [2000] FJLawRp 25; [2000] 2 FLR 12 (30 March 2000)

[2000] 2 FLR 12

IN THE HIGH COURT OF FIJI

STATE

v

ARBITRATION TRIBUNAL
ex parte **SUVA CITY COUNCIL STAFF ASSOCIATION**

High Court Judicial Review Jurisdiction
Scott, J
30 March, 2000
HBJ14/99S

Judicial review - whether Permanent Arbitrator's award overlooked equality provisions of the 1997 Constitution - Constitution section 33(2); Trade Disputes Act (Cap 97) s 6

The question for determination before the Permanent Arbitrator was whether 6 months notice of termination of 8 staff under collective agreement who had reached age 50 was unjustified and wrong and should be withdrawn. The applicant argued in Court that clause 19(ii) of the collective agreement was unlawful by virtue of Constitution section 38 but this point was not advanced before the Permanent Arbitrator. The Court found no fault in the Permanent Arbitrator's reasons and conclusion in the award, which were open to him on the submissions.

Held - (1) It is a reasonable view that a collective agreement is capable of removing the element of unfairness from an age differentiation in Fiji.

(2) As the Constitution section 38 argument was not placed before the Permanent Arbitrator, it is too late to raise it in judicial review proceedings.

Judicial Review proceedings fail.

Cases referred to in judgment
dist ***Dickason v University of Alberta*** [1992] 2 SCR
cons ***Praveen Prakash Palani v FEA*** - FCA Reps 97/271
ref ***SCC v Suva City Council Staff Association*** JR 3/89

Joseph K Maharaj for the applicant
Subhas Parshotam for the respondent

30 March, 2000.

JUDGMENT

Scott, J

Pursuant to leave granted by Pathik J on 14 May 1999 the Applicant moves for Judicial Review of an award of the Permanent Arbitrator made on 18 February 1999.

The award (7/1999) was but one of a series of awards arising out of decisions of the Suva City Council (SCC) to terminate the employment of members of its workforce Four other awards of the Arbitrator involving similar or related subject matter and dated 24 November 1988, 18 February 1999, 14 March 1999 and 16 September 1999 were drawn to my attention.

At its meeting in November 1997 the SCC, finding itself in serious financial difficulties decided to reduce the number of its staff by invoking clause 19(ii) of its collective agreement with the Applicant. It gave six months notice of termination of employment to eight of its staff who had by then reached the age of 50. Clause 19 is set out in full on pages 73 and 74 of the proceedings before the Permanent Arbitrator. The Applicant was unhappy with the SCC's decision and in due course a trade dispute was referred to the Arbitration Tribunal for settlement. As appears from pages 72 and 73 of the record the sole question before the Tribunal was whether the SCC:

"In giving 6 months notice to retire the above named officers (was) wrong and unjustified and the notices should be withdrawn."

The applicant advanced a number of arguments before the Permanent Arbitrator. The main questions raised were whether the SCC had a right under the collective agreement unilaterally and without prior consultation to invoke clause 19(ii) and whether an agreement reached between the SCC and the Applicant in 1990 affected the terms of the clause.

The Permanent Arbitrator noted that there had been a previous award by the former Permanent Arbitrator interpreting clause 19(ii) in favour of the SCC and that that award had been left undisturbed by the High Court (see ***Suva City Council v Suva City Council Staff Association*** - JR 3/89). The Permanent Arbitrator also ruled that the 1990 Agreement did not qualify clause 19(ii) but was a specific agreement exclusive to the eight employees which it covered. The Permanent Arbitrator's reasons for reaching his conclusions are clearly set out on pages 76 and 77 of the record. I can find no fault with them.

The main thrust of Mr Maharaj's submissions before this Court (written copies of which were filed on 29 October and 22 November) was that the Permanent Arbitrator's award overlooked Section 38 of the Constitution of the Fiji Islands 1997. This is the equality section the relevant parts of which read as follows:

"*Equality*

38 - (1) Every person has the right to equality before the law.

(2) A person must not be unfairly discriminated against, directly or indirectly on the ground of his or her:

(a) age..."

Mr Maharaj's argument was simply that clause 19(ii) of the collective agreement between the SCC and the Applicant is unlawful by virtue of Section 38.

On 28 July 1999 when the matter first came before me I called for written submissions on this ground. Mr Maharaj filed on 22 November and Mr Parshotam filed his answer on 17 March. Mr Maharaj argued his case with considerable skill and conviction while the very complicated possible consequences of introducing section 38 into the argument are set out with admirable clarity on pages 11 to 26 of Mr Parshotam's paper.

At this stage some essential aspects of the law of employment in Fiji as it presently exists must be remembered.

First, there is no statutory law of unfair dismissal in Fiji as such. There is, for example, no equivalent to the English Trade Unions and Labour Relations Act 1974. The primary legislation is still the Employment Act (Cap 92) although section 33(2) of the Constitution guarantees the *"right to fair labour practices"*. Whether the two are in any way in conflict has not been judicially considered.

Secondly, the procedure for referring trade disputes such as the present dispute to the Arbitration Tribunal is that set out in section 6 of the Trade Disputes Act (Cap 97) and is not at all the same as the procedure for establishing whether a dismissal is unfair such as is contained in the 1974 English Act.

Thirdly, the procedural rules of natural justice do not generally apply to the private employer/employee relationship and Judicial Review is not available to review decisions taken in that context (see e.g. ***Praveen Prakash Palani v FEA*** - FCA Reps 97/271).

The Arbitrator's terms of reference which were presumably either drafted by the Applicant or the Permanent Secretary for Labour have already been noted. They are somewhat imprecise but seem to advance a breach of the collective agreement rather than a general allegation of unfairness. Section 38 of the 1997 Constitution is not mentioned and was not invoked before the Permanent Arbitrator at any stage. Whether or not the collective agreement between the SCC and the Applicant is "a law" for the purposes of section 38 was neither raised nor considered. No inquiry, as would be essential to determine whether this particular age delimitation was an unfair form of discrimination, was called for from the Arbitrator or held. Whether in Fiji's circumstances a collective agreement is capable of removing the element of unfairness from an age differentiation, as has been held to be the case in Canada (see e.g. ***Dickason v University of Alberta*** [1992] 2 SCR) was not a question upon which in this reference the Permanent Arbitrator was called to rule. It is however, clear from previously published awards including two of those already referred to namely 10 and 36 of 1999 that the Permanent Arbitrator's view is that it may. That view is in my opinion entirely reasonable.

The question of section 38 was never specifically placed before the Permanent Arbitrator for his ruling and it seems to me that it is much too late to raise it now in Judicial Review proceedings. The Permanent Arbitrator reached a conclusion as to whether the Suva City Council had breached the terms of the collective agreement which was the question before him for decision. In my view the conclusion which he reached was reasonably open to him I can find no fault in his approach. In my respectful opinion he handled the arbitration impeccably. The motion for Judicial Review fails and is dismissed.

Application dismissed.

Marie Chan