IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 30 of 1977

Between:

1. THE PERMANENT SECRETARY FOR LABOUR
2. THE ATTORNEY GENERAL

Appellants

- and -

LEES TRADING COMPANY LIMITED

Respondent

B. Suttil for Appellants
M.S. Sahu Khan for Respondent

Date of Hearing: 6th March, 1978.
Date of Judgment: 22nd March, 1978.

JUDGMENT OF THE COURT

HENRY J.A.

The decision in this appeal turns on the true construction of section 7 of the Trade Unions (Recognition) Act 1976 (hereinafter called "the Act"). The intention of the Act is to provide for the recognition of trade unions by employers for the purpose of collective bargaining and

incidental matters.

This appeal is concerned with Part II of the Act which provides for recognition of a union to represent those of its members in the employment of an employer for the purpose of collective bargaining and for subsequently determining when such recognition shall cease upon the application of the employer. Such recognition is attained by the making of orders by the Permanent Secretary of Labour. They are called "compulsory recognition orders" in the Act and we shall refer to them simply as "an order" or "orders".

Section 3 deals with the case where only one union has employees in the employment of a particular employer, that is, as the section says when there is no rival union. It provides for a condition precedent which must exist at the time when a union may claim to be recognised under the Act. It is that the union has more than fifty percent of persons eligible for membership, and entitled to vote, in the employment of an employer. If this condition is fulfilled the union and the employer may voluntarily sign an agreement to the effect that the union be so recognised. In default of agreement the Permanent Secretary may, after due inquiry, make an order binding the parties. Section 4 deals with the situation where a rival union later appears on the scene. This section does not require any special notice on the present question.

Section 5 provides for recognition where there is already a rival union. The condition precedent is similar to that set out in section 3 except that it requires the selection of a particular union which fulfills the condition. The importance is that the condition is in the same terms and the condition applies to circumstances which exist at the time of claim as is the case under section 3. Again a voluntary agreement may be signed, or, under section 6, after due inquiry, the Permanent Secretary may make an order.

Section 8 provides that, for the purposes of section 3 and section 5, the Permanent Secretary has the final decision whether or not the condition precedent to an application for recognition has been fulfilled. This refers back to the duty of the Permanent Secretary to be satisfied that an order should be made. The Permanent Secretary must be satisfied that the condition has been fulfilled and he may also take other matters into consideration.

Section 7 makes provision for the Permanent Secretary to determine when the union shall cease to be entitled to recognition. The short facts may now be stated. On March 22, 1977 the Permanent Secretary made an order under section 3 which order, so it is conceded, bound respondent to recognise the National Union of Factory and Commercial Workers for the purposes of the Act. On

March 28, 1977 respondent made an application to the Permanent Secretary under section 7 for a determination by him that the said union shall cease to be entitled to recognition. The Permanent Secretary refused to consider such application on the ground that respondent was not entitled to make an application until the expiry of a period of not less than six months after the making of the order. The contention of respondent was, and still is, that section 7 authorises the making of such an application at any time. Stuart J. held that respondent's contention was correct and made an appropriate declaration to that effect and awarded costs. From this decision the present appeal has been brought.

Section 7 reads:

> "A trade union which has become entitled to recognition by an employer under the provisions of section 3 or section 5 of this Act shall continue to be so entitled until such time as the Permanent Secretary on an application by the employer, determines that over a period of six months ending not more than two months before the date of application, the average number of persons in his employment who were voting members of the recognised trade union was less than fifty per cent of the average number of persons who were eligible for membership thereof, in which case from the date of the Permanent Secretary so determining the trade union in question shall cease to be entitled to recognition:"

There is a proviso which is not relevant.

Section 7 refers to a union which has become entitled to recognition under the Act so it deals only with unions after an order has been made. A union not in that category is not included. Sections 3 and 5 on the other hand apply to any union not recognised. The difference is important. Conversely, of course, section 7 refers to an employer who also is a party to an order. Section 7 goes on to say that the order shall continue, thus it refers to the beginning of and the continuation of an order. It has, at this point, no reference either to a union or an employer not bound by an order. Section 7 then goes on to say in effect that the order shall continue <u>until</u> such time as the Permanent Secretary shall make a decision upon the application of the employer. The time is fixed by an examination over a period and the earliest moment when such a period can commence is when entitlement to recognition arose. Thus the period is one which commences when entitlement to recognition arose by reason of the making of an order and it continues thereafter over a period of six months (ending not more than two months) before the date of the application. The condition upon which the Permanent Secretary may act is exactly the same as the condition prescribed for recognition under sections 3 and 5 except that the number is stated to be below fifty percent instead of above that figure. The figure is ascertained by taking

an average of the same persons as those defined in sections 3 and 5. The average is of persons "in his employment". These words refer back to an employer referred to in the opening words of section 7, namely, an employer in respect of whom a trade union has become entitled to recognition under sections 3 and 5. Section 7 has no concern with employment not subject to an order. The whole tenor of section 7 is that it is dealing with a union and an employer in respect of employment after an order has been made.

We find no justification for reading section 7 as if it deals with either a union, or an employer, or any employment, which does not come within a period commencing when recognition results from the making of an order and continuing thereafter until the average number in employment for the stated period falls below the minimum number. The position before an order is made is determined under section 3 or section 5 and section 7 operates in respect of periods thereafter. That, we think, is the meaning to be ascertained from the words of section 7 used in the general context of the Act.

If section 7 is read, as counsel for respondent contended, anomalous results may follows. A union may fulfill the condition on application for recognition yet at the same time an employer could be

immediately entitled to a dissolution of the order because an average over the prior six months did not comply with the condition required for recognition. A statutory condition for recognition and immediate dissolution would co-exist because the condition contained in section 3 or 5 would exist yet the average over a prior period of six months might be below that figure. Further in the cases of members of a union and an employer first entering into employment there would be no prior period of six months of employment to strike an average so in such cases the order would run until a period of six months employment had expired whilst no such period would apply where employment had already continued for six months. If there is a construction of section 7 consonant with the intention of the Act which avoids such anomalies that construction is to be preferred. We do not base this judgment on these matters but they re-inforce the opinion that section 7 applies to a period after recognition, that is to say, the employment during the currency of an order.

We find it unnecessary to deal with the authorities cited since the case has been decided on well-settled principles of construction. Counsel for respondent said that the words of the statute must spell out its intention and if the words are clear and unambiguous that must be the meaning given, and that the Courts cannot speculate on what the Legislature intended or correct mistakes.

We respectfully agree with all his contentions on the law but, in our opinion, the intention can be found in the words used in section 7 considered in the context of the Act.

The relevant union ought to have been joined as a party, but, since the decision in this case does not alter the status quo we can see no reason to consider what steps ought to be taken to remedy the omission.

We would allow the appeal and set aside the order of the Supreme Court and give judgment for appellant together with costs in this Court and the Court below.

The appeal is allowed and the order made in the Supreme Court is set aside and judgment is given for appellants together with costs in this Court and the Court below.

(Sgd.) T.J. Gould
VICE PRESIDENT

(Sgd.) Charles C. Marsack
JUDGE OF APPEAL

(Sgd.) T. Henry
JUDGE OF APPEAL