

IN THE FIJI COURT OF APPEAL
(AT SUVA)

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CIVIL JURISDICTION

CIVIL APPEAL NO. 32 OF 1990
(Civil Action No. 19 of 1987)

BETWEEN:

FIJI PUBLIC SERVICE ASSOCIATION

APPELLANT

-and-

THE REGISTRAR OF TRADE UNIONS
VITI CIVIL SERVANTS ASSOCIATION

1ST RESPONDENT
2ND RESPONDENT

Mr. V. Kapadia for the Appellant
Mr. V. Nathan and Mr. J. Udit for the 1st Respondent
Mr. R. Matebalavu for the 2nd Respondent

Date of Hearing : 17th November, 1992
Date of Delivery of Judgment : 27th November, 1992

JUDGMENT OF THE COURT

On 10th August 1987, the Registrar of Trade Union published a notice in the Gazette stating the Viti Civil Servants Association (VCSA) had applied for registration and inviting objections from registered unions. On 20th August, the appellant union, the Fiji Public Service Association (FPSA), wrote objecting to the registration on five grounds. The Registrar acknowledged the objection but, on 8th October 1987, he registered the VCSA.

The FPSA moved for an order of certiorari and declarations that the Registrar breached the rules of natural justice, abused

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his discretion and exceeded his jurisdiction. The hearing of the motion was on affidavits and written submissions and it was refused.

The FPSA originally filed five grounds of appeal but now pursues only two:-

4. That the learned trial judge erred in law and in fact in holding that the Registrar of Trade Unions did not abuse his discretion.
5. That the learned trial judge erred in law and in fact in holding that the Registrar of Trade Unions was not guilty of any breach of the rules of natural justice.

Both grounds relate to the Registrar's decision in relation to the adequacy or otherwise of the representation of the appellant and three other Public Service Unions in terms of section 13(1)(b) of the Trade Unions Act, Cap. 96. Section 9 of the Act directs the Registrar to register a union subject to sections 11, 12, and 13. Section 11 allows him to call for more information in order to satisfy himself the application complies with the provisions of the Act or that the union is entitled to registration and Section 12 allows him to require a different name and to refuse registration pending that change.

Section 13 provides, inter alia: -

"13-(1) The Registrar may refuse to register any trade union if he is satisfied that:-

.....

(e) any other trade union already registered is adequately representative of the whole or of a substantial proportion of the interests in respect of which the applicants seek registration: Provided that the registrar shall, by notice in the Gazette or otherwise, notify any registered trade union which appears to him to represent the same interests as the applicants of the receipt of such application, and shall invite the registered trade union concerned to submit in writing within a period of twenty-one days any objections which any such trade union may wish to make against registration."

It was under the proviso that the notice and written objection already described were made.

It should also be mentioned that, under section 3, the Minister shall appoint an Advisory Committee and, whenever the Registrar performs any duties or functions under the provisions of certain sections, including 9, 12 & 13, he must consult the Committee. They may tender advice in writing to him but he is not obliged to follow their advice. In this case, the Committee was consulted and was split 2:1 against registration (the fourth member was absent) and their advice was before the Court. That advice was: "The members left the matter with the Registrar to make a decision" (record p 94).

The Registrar explained in his affidavit of 16th August 1989 made for the purpose of the judicial review proceedings, that he had consulted the Committee and he exhibits his note made at the time referring to that fact and giving his reasons for allowing the VCSA to be registered. It is only necessary to refer to the first of two paragraphs in that note each numbered (iv).

"(iv) The ones who have signed the application have no intention of belonging to the FPSA and they have been out of that union for some time. Their feeling in the matter appears to be genuine."

However, in the Registrar's affidavit just referred to, he repeats the grounds of his decision but, at 4(g), states:

"(g) After having considered all the material before me, I was firmly of the view that unless the union was registered the interests of the applicants (particularly when the facts revealed that the applicants will not be accepted as members of the appellants's union) will not be served by any registered trade unions including those which objected to the registration."

This appeal relates to the passage in parentheses which is in addition to and differs from paragraph (iv) of his earlier note. It is submitted that there was nothing to support the additional contention, that it clearly was a matter that bore directly on the question of representation in section 13(1)(e) and, in taking it into account, the Registrar abused his discretion (ground 4). Similarly, once it came to his notice, he should have investigated it and given the appellant an opportunity to answer it (ground 5).

The point was canvassed before the learned trial Judge and the appellant cited the case of Seafarers Union of Fiji -v- The Registrar of Trade Unions and another, Judicial Review No. 5 of 1987, a case that turned in the end on the number of members and the proof of that number. The learned Judge distinguished that case on that basis and continued at p.21:-

"Very little material has been placed before me as to the case put forward by the VCSA. I note what the Registrar said in paragraph 3 (iv) of his Note. What is said there, and the inference of some split and/or hostility between the VCSA applicants and the FPSA receives some support from what the General Secretary of the FPSA, Mr Chaudhary said in the objection to registration:

"The applicant Association has been initiated by a splinter group in the FPSA and their intention, as stated in the membership clause, is to poach members from all four registered Civil Service Unions."

This tends to support the registrar's acceptance of the VCSA applicants' unhappiness with the FPSA.

I do not think the Registrar needed to resolve whether the VCSA members were unable to belong to the FPSA or whether they were unwilling. That was not the decisive factor on the question of adequacy of representation. I have carefully considered whether the Registrar should have put this matter to the FPSA with an opportunity to respond. But what would it have contributed to his deliberations? The FPSA have not placed before me what their response would have been. But assuming the highest point in their favour it could only have been to the effect that the VCSA applicants were welcome to remain in or return to the FPSA. That would not have advanced the position. Nor would it have assisted the Registrar in determining whether the particular interests of the VCSA applicants were being adequately represented by the FPSA. There was no need to make an enquiry if the outcome was not likely to affect the result of the application. The decisive point lay elsewhere."

With respect to the Judge's line of reasoning, we consider the ground was rather more. The Registrar has to decide whether he is satisfied any registered union is adequately representative of the whole or a substantial proportion of the applicants' interests. The Registrar has a discretion and an appellate court will be reluctant to interfere with its exercise. Thus, had the Registrar based his conclusion solely on the fact that the applicant union members did not want to join the FPSA, we would simply have applied the "Wednesbury

Test" and decided whether it was a decision a reasonable man could have made on that evidence. However, the position is that we do not know how he would have decided that because, as his affidavit shows, he also considered the suggestion that the FPSA would not represent them. Despite the learned Judge's dismissal of the point, we feel that if it did reflect the true position it is a far more persuasive reason for a conclusion that the FPSA is not adequately representative.

It is impossible to see, on the material before the Court, from where that information came. As it had not been raised, the FPSA had no idea it was being considered. It is no good for the learned Judge to dismiss it on the basis, as he did, that the onus was on the objector when, as here, the objector had no means of knowing this was being considered by the Registrar.

It has been urged by counsel for the first respondent that the FPSA had no right to reply. That is correct once it had filed its objections to the Gazette notice; but the Registrar has to act properly and judicially. Where he considers a fact may be decisive, he must ensure it is correct. If he had received evidence of the passage in parentheses from the VCSA, and we can only speculate as to its source, he should have verified it before taking it into account. He has the power under section 11 to call for further information. He failed to do so and, in that, we consider he went wrong. By allowing that unsubstantiated matter to form part of the basis of his decision

that the FPSA was not adequately representative, the whole decision is tainted.

sent

intra costis

We allow the appeal, make an order of certiorari that the decision of the Registrar of Trade Unions be removed into this Court and quashed. We further add a direction that the Registrar consider the application afresh.

Michael M. Helsham

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Mr. Justice Michael M. Helsham
President, Fiji Court of Appeal

Mari Kapi

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Sir Mari Kapi
Judge of Appeal

Gordon Ward

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Mr. Justice Gordon Ward
Judge of Appeal