IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0033 OF 2001S
(High Court Civil Action No. JR 14 of 2000S)

BETWEEN:

AIR PACIFIC LIMITED

Applicant

AND:

FIJI AVIATION WORKER'S ASSOCIATION

First Respondent

THE ARBITRATION TRIBUNAL

Second Respondent

Coram: Eichelbaum, JA
Tompkins, JA
Penlington, JA

Hearing: Tuesday 19 August 2003, Suva

Counsel: Mr. Stephen Kós with Ms. G. Philips for the Applicant
Mr. H. Nagin for the First Respondent
Ms N. Basawaiya for the Second Respondent (leave to withdraw)

Date of Judgment: Tuesday 26 August 2003

JUDGMENT OF THE COURT

In early 1998 Air Pacific took steps designed to improve its financial position. These included a staffing review. As a result 19 redundancies were tentatively identified; 12 were senior staff, members of the Fiji Airline Worker's Association which had a collective agreement with Air Pacific. A trade dispute arose which was referred to the Arbitration Tribunal. After a hearing the tribunal in a detailed interim award found that in terminating the employment of the 12 staff for redundancy Air Pacific had breached clause 29(1) of the collective agreement, and had acted in a manner which was substantively unjustified and procedurally unfair. The question of remedy was left open for -further decision.

In judicial review proceedings the High Court (Scott J.) set the award aside, holding that the tribunal had adopted an incorrect legal approach and had wrongly evaluated the facts. On appeal this Court (Reddy P, Kapi and Sheppard JJA) allowed the appeal, quashed the judgment of the High Court, restored the decision of the tribunal and remitted the matter back to the tribunal to deal with the outstanding issue. The application now before us is for leave to appeal to the Supreme Court.

Under s.122 of the Constitution, to grant leave this Court must certify that leave is given on a question of significant public importance. This requires the applicant to demonstrate the existence of a question of public importance, and that it is a significant one: Lal v. The State, Criminal Appeal No. AAU0004/2001S, 22 November 2001. It is implicit that the applicant for leave must also satisfy the Court it has a tenable argument that the question will be resolved in its favour.

The applicant has submitted 4 questions which we shall address in turn, in accordance with these principles.

Question 1

Whether the Court of Appeal was correct in finding that the Permanent Arbitrator did not exceed his jurisdiction by relying on the concept of "substantive justification", the Court having concluded that such references by the Arbitrator to "substantive justification" were "not necessarily" to the statutory concept of "substantive justification" but were "in essence" to the contractual provision in clause 29.1 of the relevant Collective Agreement between the parties.

According to the High Court the tribunal accepted that the broad principles to be applied in redundancy situations were those set out in three leading New Zealand cases which had been cited to the tribunal by counsel for the applicant, namely G.N. Hale & Sons Ltd. v. Wellington Caretakers IUOW [1991] 1 NZLR 151, Brighouse Ltd. v. Bilderbeck [1994] 2 ERNZ 243 and Aoraki Corporation v. McGavin [1998] 1 ERNZ 601.

In the view of the High Court, having regard to the absence in Fiji of legislation existing in New Zealand, the New Zealand approach was not the correct starting point at all.

On an application such this, generally it is neither appropriate nor necessary for the Court to rehearse at length the arguments that will be before the Supreme Court should leave be granted. Here it is sufficient to say that the essence of the High Court's conclusion was that the tribunal erred in approaching the reference from the point of view of the concept of "substantive justification", which the High Court regarded as a statutory construct not a part of the common law of Fiji.

Undoubtedly, as this Court noted in its judgment (at 18) the tribunal made frequent reference to substantive justification. This Court concluded however this did not necessarily amount to an adoption of the principles of law applicable in leading New Zealand authorities, saying (at 18): "where the tribunal has used this terminology, it has been stated within the context of non-compliance with clause 29.1 of the [collective agreement] ".

By way of contrast counsel for the applicant drew attention to the following passage in the award (at 41) as encapsulating the tribunal's actual approach:

> *Although the Tribunal has already distinguished the Aoraki case, as involving a situation in which no agreement was in issue, it must state that it generally favours the approach of Thomas J's minority decision. As such, as part of its substantive justification burden, the employer must show not just commercial reasons for making a particular position redundant but also that it has attempted to make a just choice among positions.*
>
> *Furthermore, the Tribunal considers that since substantive justification is concerned with why a particular individual has been selected, in cases where an agreement sets out criteria for selecting individuals, the employer has the further burden of showing that even if a position has been fairly selected, the employer must show that that criteria has been applied in selecting a particular individual as part of its proof of substantive justification ie. in the words of Thomas J, that it has made " a just choice" not just of the position but of the individual as well.*
>
> *The Association's actual claim as set out in the Terms of Reference was that Company did not show that it had followed the "required selection procedure" under clause 29.1. The clause required attributes such as skill, experience, abilities, performance, length of service to be considered, in the event of redundancy, and where these are equal to discharge on the basis of last-in-first out.....*

> *Subject to the good faith conduct of discussions with the Association, (which is dealt with below), the Company had the right both to identify positions and individuals, but it was required to show that it had fairly identified the positions and once it had identified positions, it had applied the criteria set out in clause 29.1. On that basis, it was required to show that it had looked at the possibility of transferring or "bumping" employees from the positions to be affected to other positions and making less senior employees redundant.*

Clause 29.1, which according to submissions, was the only clause of the collective agreement directly relevant to this issue, states:

> *29.1 In the event of redundancy, attributes such as skill, experience, abilities, performance, length of service, shall be considered by the Company when revised manpower levels are being determined. Where these attributes are equal, employees shall be discharged on the basis of last in, first out. The Company shall advise the Association at least two months prior to implementation of redundancy to allow for time for discussions.*

Although, as noted, the tribunal found the termination of the employment of the staff in question was substantively unjustified, this Court (at 18) took the view that the references to "substantively unjustified" related to non-compliance with the requirements of clause 29.1, adding that it would be advisable to avoid confusion by not using this terminology. We are satisfied there is a tenable argument that the Court placed an over generous interpretation on the tribunal's approach. Passages in the award (we have quoted one) are capable of showing that the tribunal used a two step approach, first addressing whether the employer had demonstrated substantive justification for abolishing the employment positions, then secondly addressing the requirements of clause 29.1. That argument can be supported not only from a consideration of the award in issue, but also by reference to other awards on which the tribunal relied in reaching its conclusion in the present case.

There was evidence before us that redundancy clauses in other collective agreements were to similar effect as clause 29.1. This was contested but the redundancy clauses in other awards put before us in the course of submissions arguably are capable of giving rise to the same issues. As matters stand following this Court's judgment, unless the redundancies clauses in other agreements specifically exclude "substantive justification" it appears that in future redundancies disputes, there may be confusion as to the true standing of that

concept in Fiji. Arguably, while the judgment of this Court (confirming the opinion of the High Court) agreed that the concept was inapplicable in Fiji, this Court may seem to have approved the tribunal's application of a similar concept as part of the obligations arising under clause 29.1, presumably either by implication, or a process of construction of that provision.

On the issue of the precedential impact of these proceedings on future cases, we particularly draw attention to the award of the Tribunal in the Housing Authority dispute, No. 27 of 1999, 30 July 1999 being one of the awards relied on by the tribunal in the instant case. Stating it would first canvass the principles that "the tribunal considers should apply generally in respect of redundancies" the tribunal said (at 20):

> ...it is the employer who bears the onus of justifying before the tribunal the substantive reason for the termination as well as the fairness of the procedure adopted...

It may fairly be argued, following this Court's earlier decision, that it is unclear whether this reasoning has been approved or not.

Thus in respect of question 1 we are satisfied it raises a matter of public importance, that the matter is significant, and that the applicant has shown a tenable argument that may enable the question to be answered in its favour.

Question 2:

> ***Whether the Court of Appeal erred in not taking account [of] clause 4.6 of the Collective Agreement as "[not dealing] with redundancies" (at 19) when clause 4.6 forms part of and gives context to employees' rights of tenure and notice.***
>
> Clause 4.6 is a standard provision for termination of employment by one month's notice, or the payment of one month's salary. The applicant's argument is that the concept of substantive justification is inconsistent with the presence of such a provision. While that may be arguable, it is really no more than an argument buttressing the applicant's case on question 1. It cannot be elevated to a matter of public importance.

Question 3:

Whether the Court of Appeal erred in its construction of clause 29.1 of the Collective Agreement when it found that clause 29.1 is not restricted to situations where a common class is being partially retrenched, the Court concluding instead that it is applicable even "where the positions the subject of redundancy are different, such as in the present case."

In the present case none of the positions came from a common class. The Court of Appeal judgment, while accepting that the clause may apply where there was a common class of position and some only of the positions were being made redundant, did not agree the provision was limited to such circumstances. The judgment continued:

We cannot find any words in clause 29.1 capable of such limitation. Where the positions, the subject of redundancy are different, such as in the present case, there is no reason why the Company cannot consider all or some of the attributes set out in clause 29.1 in considering redundancy. We consider that the first sentence in clause 29.1 is capable of this meaning. The "tie-breaker" is relevant where the attributes are equal.

The applicant argued that redundancy was the disestablishment of a *position:*

If that position is that of a storeman, the employer is not at liberty to, on a "last in, first out" (or "LIFO") basis make a caterer redundant. The caterer's role has not been disestablished.

Only if there is a common occupational class, from within which a selection of individuals for a lesser number of redundancies must be made, do LIFO and like considerations play a part.

The respondent supported the approach taken in the judgment. Although the passage quoted from the judgment may prevail, we are not prepared to say the contrary argument is frivolous or hopeless. Further, for the reasons given under Question 1, it involves a matter of significant public importance. It may arise under other awards and the final decision in this case will be of precedential significance. For these reasons we give leave in respect of question 3.

Question 4:

Whether the Court of Appeal correctly concluded that there was no reviewable error of fact by the Arbitrator given that the Arbitrator had:

(a) *misdirected himself, in law, particularly as regards clauses 29.1 and 4.6 of the CA; and*

(b) incorrectly concluded as to a "lack of genuineness" on the part of the Appellant in entering discussions under clause 29.1, both:

(i) as a matter of law (because no discussions were required given that no selection from within a common class of position had to be made).

The applicant argued:

The tribunal misdirected itself on two crucial legal questions:

(a) whether an employer has a general burden of substantive justification; and

(b) when the "LIFO" (etc) attributes in the redundancy clause applied.

As to (a), this has been covered adequately by question 1. Regarding (b), to the extent that this is a question of law, it is covered by question 3. To the extent (as developed in the applicant's subsequent submissions) there are factual issues involved, these cannot be said to raise issues of public importance. Accordingly, we are not persuaded to certify this question.

Other questions

The notice of motion contained a number of other grounds which however the applicant elected not to pursue.

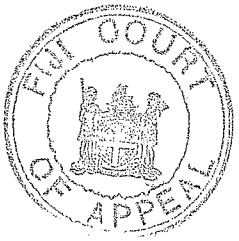
Conclusion

To the extent indicated therefore the application succeeds. We allow the applicant costs of $750, plus disbursements as approved by the Registrar.

Result

Leave to appeal to the Supreme Court in respect of questions 1 and 3, which we certify to be of significant public importance. Costs to applicant $750, plus disbursements as approved by the Registrar.

Eichelbaum, JA



Tompkins, JA

Penlington, JA

Solicitors:

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