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

CIVIL APPEAL NO. ABU0008 OF 2004S
(High Court Civil Action No. 19 of 2004S)

BETWEEN:

CORAL SUN LIMITED

Appellant

AND:

FIJI SUGAR AND GENERAL WORKERS UNION

Respondent

Coram: Sheppard, JA
Gallen, JA
Scott, JA

Hearing: Friday, 9 July 2004, Suva

Counsel: Ms R . S. Devan] for the Appellant

Mr. K. Vuataki]
Mr. V. Naidu] for the Respondent
Mr. A. Jungworth]

Date of Judgment: Friday, 16 July 2004

JUDGMENT OF THE COURT

The Court:

This appeal is from a judgment of the High Court (Connors J.) delivered extempore on 11 February 2004. By it his Lordship granted a mandatory interlocutory injunction which, so far as material, made the following orders:-

"b) *Until further Order of the Court, the defendant by its servants or its agents is restrained from failing and/or refusing to comply with the Minister for Labour & Industrial Relations and Productivity's Order of 24th of December 2003.*

"c) *Until further Order of the Court, the defendant by its servants or its agents is restrained from failing and/or refusing to pay to the 41 employees referred to in the order of the Minister for Labour & Industrial Relations and Productivity of 24th of December 2003 the wages and benefits due to them from the 18th of November 2003."*

As the orders indicate, the orders were made in relation to an industrial dispute. The facts of the matter appear in an earlier judgment of the High Court (Jitoko J.) delivered on 14 January 2004. On 17 November 2004 the appellant ("Coral Sun") "made redundant" three of its employee drivers who were "purported members" of the respondent ("the union"). The General Secretary of the union wrote to Coral Sun's general manager saying that its action was illegal and in breach of the Compulsory Recognition Order later to be referred to.

On 17 November 2003, 41 employees failed to report for work at Coral Sun. On 19 November 2003, Coral Sun purported to dismiss the 41 employees. The remaining employees continued to work as normal. The contract of employment between Coral Sun and its employees provides that absence from work for 24 hours without approval of management "can" result in termination of employment.

We next refer to some provisions of the Trade Unions (Recognition) Act 1998 and the Trade Disputes Act Cap.97. The Compulsory Recognition Order was made pursuant to s.8(1) of the former Act ("the Recognition Act"). Section 8 is as follows:-

"8- (1) The Permanent Secretary, on receipt of an application under section 3(4), must consider the application, taking into account all the facts and circumstances appearing to be relevant and may, subject to section 11, make a compulsory recognition order –

(a) declaring that a registered trade union is entitled to recognition; and

(b) specifying the manner in which the employer is to accord recognition to the trade union

(2) A compulsory recognition order made under subsection (1) is effective from the date it is made or as otherwise specified in the order."

Section 3(4) referred to therein provides:-

"3(4) A registered trade union which has applied for recognition by an employer under subsection (1) but –

(a) has been refused recognition by the employer; or

(b) has not been accorded recognition by the employer within 1 month of the application,

may apply to the Permanent Secretary for the issue of a compulsory recognition order under section 8."

Section 11 also referred to in s.8 of the Recognition Act is not relevant to the circumstances of this case.

The Compulsory Recognition Order purportedly made under s.8 defines the word "employer" as Coral Sun and the union as the union which is the respondent to this appeal. Paragraphs 3 and 4 of the Order are as follows:

Recognition

3. *The Union is entitled to recognition by the employer under section 8 of the Trade Unions (Recognition) Act 1998.*

Manner of Recognition

4. *The employer must accord recognition to the union for the purposes of collective bargaining and, without affecting the general nature of paragraph 3, 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.*

Section 6 of the Trade Disputes Act is as follows:

"6. – (1) Where the Permanent Secretary or any person appointed by him or by the Minister is unable to effect a settlement the Permanent Secretary shall report the trade dispute to the Minister who may, subject as hereinafter provided, if he thinks fit, and if both parties consent, and agree in writing to accept the award of the Tribunal, authorize the Permanent Secretary to refer such trade dispute to a Tribunal for settlement.

(2) The Minister may authorize the Permanent Secretary, whether or not the parties consent, to refer a dispute to a Tribunal where –

(a) a strike or lock out arising out of a trade dispute, whether reported or not, has been declared by order of the Minister to be unlawful as provided for under section 8; or

(b) a trade dispute, whether reported or not, involves an essential service; or

(c) the Minister is satisfied that a trade dispute, whether reported or not, has jeopardized or may jeopardize the essentials of life or livelihood of the nation as a whole or of a significant section of the nation or may endanger the public safety or the life of the community.

(3) The Tribunal after hearing the parties to a trade dispute shall make an award and such award shall be binding on the parties to the dispute.

(4) Where a trade dispute has been referred to a Tribunal or to conciliation under this Act, the Minister may by order prohibit the continuance of and declare unlawful any strike or lock out in connection with such dispute which may be in existence on the date of the reference."

Section 2 of the Disputes Act defines "Tribunal" as an Arbitration Tribunal constituted under the provisions of that Act; see s.20.

The essence of industrial dispute handling is speed. Otherwise direct industrial action may continue for an unduly long time, wages may be lost, employer's earnings may be reduced thus affecting profits and cash flow, members of the public may be inconvenienced, and, in some cases, there may be a detrimental effect on the economy. Speed has been the last thing that has been present in the way this case has been dealt with. An arbitration is pending but is not due to be heard until September.

Prima facie Coral Sun's action in locking out 41 employees was both precipitate and provocative. And such evidence as there is indicates, at least on a prima facie basis, that Coral Sun is quite unwilling to negotiate with the union, the terms of the order notwithstanding. Furthermore, two orders dated respectively, 4 December 2003 and 24 December 2003 made by the Minister for Labour pursuant to s.6(4) of the Disputes Act earlier quoted have not been observed. The first of these concerned the original 3 employees and the second the 41 employees claimed by the union to have been locked out. The operative part of each order declared the two lockouts unlawful and prohibited the continuance of each lockout after the time specified in each notice. The order dated 24 December is the order referred to by Connors J. in para. (c) of his orders of 11 February 2004 earlier quoted. The orders made by Connors J. were stayed by Ellis J.A. of this Court on 19 March 2004. The stay remains in force.

No steps have been taken by Coral Sun in these proceedings to challenge the validity of the compulsory recognition order or the two orders of 3 and 24 December 2003. We were informed, however, that the validity of the recognition order - we are not sure about the other orders – is challenged in separate proceedings brought by Coral Sun in the High Court. These are said to fixed for hearing next Monday, 19 July. Those proceedings should have been consolidated with these proceedings or the two proceedings ordered to be heard at the same time. That is another indication of the snail's pace at which this dispute is being dealt with.

What then should this Court do? Subject to questions of validity, Coral Sun is plainly in breach of the law. Should the stay of Connors J.'s order simply be lifted? After all no part of these proceedings is presently concerned with the validity of the Compulsory Recognition Order or the two orders declaring the lockouts unlawful, so there is little difficulty in concluding that there is an arguable case. Indeed, looking at these proceedings in isolation, this is a case where Coral Sun is shown to be in breach of the 3 ministerial orders which have been made. What does the balance of convenience require? The trouble is that there is no evidence which discloses what the current situation is. As it is there is little enough evidence of the effect of the lockout on the employees. There is no

evidence from any of the locked out employees. There is some evidence from the union contained in an affidavit sworn by the Assistant General Secretary of the union which is as follows:-

> ***"The 41 workers have been out of work since 18th day of November, 2003. Since then they have been standing outside the Appellant's office, and have been subjected to humiliation and ridicule. Their self-esteem and self-respect have been seriously undermined. Their families have also been substantially affected, children's and families needs have been compromised. They are currently living off handouts from the Respondent."***

The affidavit was sworn on 13 February 2004 in opposition to the application for a stay of the order made by Connors J. There is no evidence of the position since then, a period of 5 months. It would nevertheless be open to us simply to lift the stay imposed by Ellis JA. But if we were to do that, we would lift it without any knowledge of the current position of the employees or, for that matter, of Coral Sun. The lifting of the stay without further evidence may therefore cause injustice to the employees or Coral Sun or to both.

Strong submissions were made by counsel for Coral Sun about the inappropriateness of making interlocutory mandatory order in any case but particularly in relation to employment disputes. We shall mention some of these in a moment. But we should first make it clear that the fact that a party should be found to be at least on a prima facie basis, in breach of the law does not of itself warrant the grant of an injunction. Thus it is said in Snell's Equity (30th Ed, 2000) at para. 45-10 (P.7,8) that an injunction will not be granted merely to compel the performance of positive statutory duties. So the principles that guide us are the ones that apply generally to the grant of interlocutory injunctive relief.

The cases relied upon by counsel for Coral Sun must be considered. Of most relevance is ***Arnold Stephen and Co. Ltd. v. Post Office*** [1977] 1 W.L.R. 1172, Geoffrey Lane L.J. there said (at 1180):

> *"Finally, and most seriously as I see it, the ground on which I would primarily base my decision would be this. It can only be in very rare circumstances and in the most extreme circumstances that this court should interfere by way of mandatory injunction in the delicate mechanism of industrial disputes and industrial negotiations. It is likely, if mandatory injunctions are imposed in these circumstances, that more damage will be done than good, and the results are both unforeseeable and may be grave."*

In NWL Ltd. v. Woods [1979] 1 WLR 1294 Lord Diplock said (at 1307):

> *"Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been caused to the losing party by its grant or refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by weighing the risks that injustice may result from his deciding the application one way rather than the other."*

Despite these authorities it remains clear that each case will depend on its own facts and circumstances. Provisionally the evidence in this case shows that Coral Sun engaged in a studied course of conduct which has involved it in refusing to recognize the union, in refusing to engage in negotiation with the union or the employees and in disobeying (really flouting) the orders of 3 and 24 December 2003.

While this behaviour is a factor in determining the inappropriateness or otherwise of the issue of mandatory injunctive relief it must be considered in context and the evidence is inadequate to enable this to be done. As we have already noted we are not aware of the present effect on the employees or the company. If the evidence were sufficiently strong it might be appropriate to make an order as was done in Parker *v. Camden London Borough Council* [1986] 1 Ch 162 but no such evidence is before us.

On the evidence as it stands at the moment we have little choice but to allow this appeal. But it remains open to the union to make such further application for interlocutory relief as it may be advised. Any such application should desirably be supported by clear and concise evidence from at least some of the employees affected by Coral Sun's conduct.

The orders we make are as follows:-

1. The appeal be allowed.

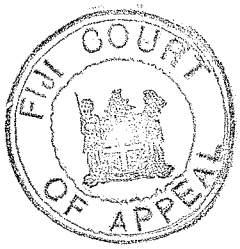
2. The orders made by the High Court on 11 February 2004 be set aside and in lieu thereof there be an order dismissing the union's notice of motion of 29 January 2004.

3. The costs of this appeal, the proceedings before Ellis JA and the proceedings before Connors J. abide the outcome of the principal proceedings.

Sheppard, JA

Gallen, JA

Scott, JA



Solicitors:

Messrs. G.P. Lala and Associates, Suva for the Appellant
Messrs. Vijay Naidu and Associates, Lautoka for the Respondent

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