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

CIVIL APPEAL NO. ABU 0084 OF 2004
(High Court Judicial Review HBJ 5/2004S)

BETWEEN:

THE CHIEF EXECUTIVE OFFICER FOR LABOUR, INDUSTRIAL RELATIONS AND PRODUCTIVITY

AND

MINISTER OF LABOUR, INDUSTRIAL RELATIONS AND PRODUCTIVITY

Appellants

AND:

FIJI PUBLIC SERVICE ASSOCIATION
FIJI NURSING ASSOCIATION
FIJI TEACHERS ASSOCIATION

Respondents

Coram: Scott, JA
Wood, JA
Ford, JA

Date of Hearing: 3 November 2005

Counsel: Mr. S. Sharma for the Appellants
Mr. V.I. Kapadia for the Respondent

Date of Judgment: 11 November 2005

JUDGMENT OF THE COURT

INTRODUCTION

[1] The Respondents are three major public sector unions who make up the Confederation of Public Sector Unions (CPSU). Every year the unions

collectively bargain with the Public Service Commission for Cost of Living Adjustment (COLA) payments and Merit Payments based on members' Annual Confidential Reports. In August/September 2003 the unions submitted their log of claims. They sought 5% COLA. The Public Service Commission (PSC) rejected the claim and instead offered 1% COLA and 1% merit payment. That offer was rejected.

[2] During November and December 2003 the unions and the PSC met on a number of occasions in an attempt to resolve their differences. The talks were not successful. The unions then each reported the existence of a trade dispute between them and the PSC. Upon receipt of these reports the Chief Executive Officer for Labour Industrial Relations and Productivity (the first Appellant – the CEO), invoking the provisions of Section 4 (1) (c) of the Trade Disputes Act (Cap. 97 – the Act) referred the matter back to the unions and the PSC "to find an amicable solution". They failed to do so.

[3] On 21 January 2004, the CEO, taking note of the failure to resolve the dispute, formally accepted the existence of trade disputes between each union and the PSC and referred the disputes to an appointed conciliator under the provisions of Section 4 (1) (d) of the Act.

[4] As explained by the CEO in his affidavit, the issues for determination between the three unions and the PSC were identical. On 22 January 2004 the three unions and the PSC met the conciliator, Surendra Shiudin, Senior Labour Officer, Industrial Relations at the Labour Department Conference Room. According to Mr. Shiudin (whose affidavit exhibited copies of notes taken by him at conciliation meetings): " the unions' representatives unanimously agreed to collectively conciliate on all the disputes together."

[5] Conciliation talks took place on 22, 26 and 30 January 2004. Although some initial progress was made the talks broke down on 30 January. The PSC was

not prepared to increase its offer. Instead, it was apparently proposing to introduce a Performance Management System to take the place of COLA. According to Mr. Shiudin the unions made it clear that they refused to cooperate with this plan. The atmosphere at the conciliation talks deteriorated and the union representatives began to pack their bags in preparation for a walk out. In reply to Mr. Shiudin's suggestion that the conciliation talks should continue or that the matter should be referred to voluntary arbitration:

> "... the union representatives emphatically stated that the conciliation process would not resolve the dispute. Further they were not interested in proceeding to voluntary arbitration."

[6] As recorded by Mr. Shiudin in his notes of this last conciliation meeting he was informed by the General Secretary of the Fiji Public Service Association that he had already obtained a mandate to take strike action.

[7] In view of the unions' position Mr. Shiudin then asked the PSC whether it was willing to move from its own stance; it was not.

[8] On 2 February 2004 Mr. Shiudin reported to the CEO that the conciliation talks had ended "in deadlock". In a press release dated 30 January 2004 the CPSU accepted that this was the position.

[9] According to the CEO's affidavit, when he received Mr. Shiudin's report he discussed the situation with the second Appellant (the Minister). The Minister, perused the files, reports and other documents presented to him by the CEO and then, in exercise of the powers vested in him by Section 6 (2) (b) of the Act, authorised the CEO to refer the dispute to compulsory arbitration by the Arbitration Tribunal. The CEO referred the Trade Dispute involving the Fiji Public Service Association and the Fiji Nursing Association on 2 February

2004. He referred the dispute involving the Fiji Teachers Union to the Permanent Arbitrator on 5 February 2004.

THE STATUTORY FRAMEWORK

[10] The Act has been amended on several occasions. It will be convenient to set out the relevant provisions.

[11] Section 3 (ii) of the Trade Disputes Act (Amendment) Decree 27/1992 (the Decree) divided "Trade Disputes" into two categories. They were either "disputes of interest" or they were "disputes of rights". Importantly, it is accepted that the trade disputes with which this case is concerned were "disputes of interest".

[12] The term "trade dispute' was itself re-defined by Section 2 of the Trade Disputes (Amendment) Act 54/1998. The applicable definition in this case is:

> "[a] dispute or difference –
>
> (a) between any employer and a registered Trade Union recognised under the Trade Unions (Recognition) Act (Cap. 96A) and connected with the employment or with the terms of employment or the conditions of labour of any employees;"

[13] Section 3 of the Act, as amended by the Decree now reads as follows:

> "*Reporting of Trade disputes*
>
> 3(1) Any trade dispute, whether existing or apprehended may be reported to the Permanent Secretary by:
>
> (a) an employer who is a party to the dispute or a trade union of employers representing him in the dispute; or

(b) a trade union of employees recognised under the Trade Unions (Recognition) Act which is a party to the dispute.

(2) A report of a trade dispute shall be made in writing and shall sufficiently specify:

(a) the employers and employees, or the classes and categories thereof, who are parties to the dispute, and the place where the dispute exists or is apprehended;

(b) the party by whom the report is made;

(c) each and every matter over which the dispute has arisen or is apprehended; and

(d) the steps which have been taken by the parties to obtain a settlement under any arrangements for the settlement of disputes which may exist by virtue of any registered agreement between the parties to it.

(3) The party reporting a trade dispute shall without delay furnish by hand or by registered post a copy of the report of the dispute to each party to the dispute."

[14] Section 4 of the Act as amended by the Decree now reads as follows:

"*Steps to be taken by the Permanent Secretary*

4(1) The Permanent Secretary shall consider any trade dispute of which he has taken cognizance and may take any one or more of the following steps as seem to him expedient for promoting a settlement:-

(a) inform the parties that he accepts or rejects the report of the trade dispute, having regard to the sufficiency or otherwise of the particulars set out in the report, to the nature of the report, or to the endeavours made by any of the parties to achieve a settlement

of the dispute, or having regard to any other matter which he considers to be relevant in the circumstances:

Provided that:

(i) no trade dispute which arose more than one year from the date it is reported under Section 3 shall be accepted by the Permanent Secretary except in cases where the delay or failure to report the trade dispute within the specified period was occasioned by mistake or other good cause.

(ii) a report which has been rejected by the Permanent Secretary shall be deemed not to have been made under the provisions of this Act.

(b) inform the parties that any of the matters over which the trade dispute has arisen or is apprehended is not a trade dispute under this Act;

(c) refer the matter back to the parties and, if he thinks fit, make proposals to the parties or to any of them upon which a settlement of the trade dispute may be negotiated;

(d) appoint any person (who may be a public officer or any other person considered by him to be suitable) to act as a mediator and conciliator where the trade dispute is a dispute of interest;

(e) endeavour to conciliate the parties by all reasonable means at his disposal;

(f) cause an investigation of the trade dispute, or any matter connected therewith, to be made by any person who appears to the Permanent Secretary to be independent and who may or may not be a public officer;

(g) report the trade dispute to the Minister, who may, if he thinks fit, authorise the Permanent Secretary to refer it to a conciliation committee appointed by the Minister for mediation and conciliation;

(h) refer the trade dispute to a Disputes Committee, where such dispute is a dispute of rights.

(2) The decision of the Permanent Secretary under this section shall be in writing and shall as soon as practicable be communicated in writing by hand or by registered post to the parties to the dispute or to their representatives."

[15] Section 5 of the Act has not been amended but a new Section 5A has been inserted by the Decree and has since been amended by the Amendment Act. It now reads as follows:

"Settlement of disputes of rights

5A-(1) The Permanent Secretary shall refer a dispute of rights to a Disputes Committee for settlement.

(2) There shall be constituted a Disputes Committee consisting of three persons as follows:

(a) a Chairman who is not a party to or concerned with the dispute appointed by the Permanent Secretary;

(b) a member appointed by the Permanent Secretary on the recommendation of the party affected by the dispute of rights;

(c) a member approved and appointed by the Permanent Secretary on the recommendation of the employer or the trade union of employers affected by the dispute of rights;

Provided that the recommendations for membership under paragraph (b) and (c) shall be submitted to the Permanent Secretary within fourteen days from the date of acceptance of the trade dispute.

(3) The Disputes Committee shall hear the parties to the dispute and make its decision without delay and in any case within fourteen days from the date the trade dispute was referred to it;

Provided that the Permanent Secretary may extend the period within which a decision is to be made if in his opinion the circumstances of a case require that the extension be given.

(4) A decision of the Disputes Committee that is arrived at by consensus shall be binding on the parties and be deemed an award.

(5) If one or both parties fail to comply with subsection (2) or where the Disputes Committee is unable to arrive at a decision by consensus or where the Disputes Committee fails to comply with subsection (3) of this Section:

(a) the Permanent Secretary shall refer the dispute to the Minister who shall authorise the Permanent Secretary to refer such dispute to a Tribunal for settlement; and

(b) the Tribunal after hearing the parties to the dispute shall make an award which shall be binding on the parties to the dispute.

(6) (a) No employees employed by an employer who is a party to the dispute shall discontinue or impede normal work either totally or partially, in respect of a dispute referred to a Disputes Committee or tribunal;

(b) No such employer shall take any action in respect of a dispute already referred to a Disputes Committee or Tribunal;

Provided that where the dispute involves an intention to dismiss an employee, the employer shall suspend the said employee, pending the settlement of the dispute already referred to a Disputes Committee or to a Tribunal and the period of suspension will not attract renumeration unless decided otherwise.

(7) (a) Any employee or employees and any employer who are parties to a dispute already referred to a Disputes Committee or a Tribunal by the Permanent Secretary who contravenes the provisions of subsection (6) shall be guilty of an offence.

(b) Any person or organisation who causes or procures or counsels or in any way encourages, persuades or influences the parties or either party to a dispute already referred to a Disputes Committee or to a Tribunal to contravene the provisions of subsection (6) shall be guilty of an offence.".

[16] Section 6 of the Act, as slightly amended by the Amendment Act, reads as follows:

"*Reference of trade disputes to Tribunal*

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, authorise the Permanent Secretary to refer such trade dispute to a Tribunal for settlement.

(2) The Minister may authorise 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 jeopardised or may jeopardise 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 or to a Disputes Committee 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."

[17] For the avoidance of confusion we note that the Permanent Secretary referred to in the Act became known as the Chief Executive Officer (CEO) with the coming into force of the Public Service (Senior Executive Service) Regulations 2003 (LN 61/03).

COMMENCEMENT OF PROCEEDINGS

[18] On 23 February 2004 the unions successfully applied for leave to move for judicial review. They sought certiorari to quash the reference of the three trade disputes to the Permanent Arbitrator by the CEO, certorari to quash the decision of the Minister authorising the CEO to refer the disputes to the Permanent Arbitrator and a stay of the proceedings before the Arbitration Tribunal.

[19] The grounds of relief and the other materials filed in support of the motion for judicial review were quite unnecessarily prolix and repetitive. The judge (Pathik J) with whom we have considerable sympathy, remarked that "there is much overlapping ... as if the whole book has been thrown at me, so to say". Fortunately, Mr. Kapadia, in paragraph 2.5 of his initial written submissions was able quite succinctly to place the principal issues before the Court. He wrote:

> "The crux of the judicial review proceedings ... filed by the Unions is that the Respondents acted ultra vires Section 6 (2) (b) and Section 6 (2) (c) and misdirected themselves in law thereby

frustrating the policy of the Act when there were other means of resolving the trade disputes still available. The other means were:

(a) independent investigation of the trade disputes pursuant to Section 4 (1) (f) of the Act
(b) appointment of conciliation committee for mediation and conciliation under Section 4 (1) (g) of the Act
(c) referral to a board of enquiry under section 7 of the Act
(d) with the consent of the parties referral to Tribunal pursuant to Section 6 (1) of the Act for voluntary arbitration
(e) failing all else for the unions to resort to industrial action which is a fundamental right of the workers."

THE HIGH COURT'S JUDGMENT

[20] From the welter of materials placed before him the judge isolated and focussed his attention on the proper application of Section 4 of the Act. He wrote:

> "the said Section 4 lays down the steps to be taken by the CEO and he applied Section 4 (1) (d) by appointing a conciliator with negotiations resulting in a deadlock. He did not invoke the provisions of Sections 4 (1) (e) and (f) ..."

> "Instead of adopting the steps in (e) and (f) the CEO goes straight to the Minister. In these circumstances I find that there was a procedural impropriety and an error of law on the part of the CEO in administering the provisions of Section 4."

[21] In subsequent paragraphs of his judgment the judge found that the CEO, by not making use of subsections 4 (1) (e) and 4 (1) (f) had acted ultra vires, had denied the unions a fair hearing and had been guilty of procedural irregularity and of unfairness.

[22] The consequences of not employing subsections 4 (1) (e) and 4 (1) (f) were not, in the judgment of the Court, merely sufficient to impugn the decision reached by the CEO. The Court held that the Minister had also fallen into error. The judge wrote:

> ...because of my findings on CEO's non compliance with the provisions of Section 4, his recommendation to the Minister proceeded on a wrong footing having misdirected himself on law in the face of specific statutory provision in the Act resulting in my view in the Minister's decision being a nullity."
>
> "Had the CEO not made the error I had already referred to, the Minister I consider would not have come to the decision which he did."
>
> "By acting as they did in coming to that decision they acted prematurely without exhausting all the other avenues open to them under Section 4."
>
> "The steps set out in Section 4 are there for a purpose and it was incumbent on the CEO to comply with its provisions. It is a statutory provision and failure the implement the relevant portions of it in this case is fatal and in my view vitiates the decisions both of the CEO and the Minister."

Later he wrote:

> "In these circumstances, the decisions were "Wednesbury unreasonable" with the CEO and the Minister taking into account irrelevant considerations and disregarding the relevant factors."

[23] Two other conclusions reached by the High Court which do not depend on the meaning of Section 4 but which we think it is evident were taken into account by the High Court in its approach to the interpretation of the section must also be mentioned.

[24] As has been noted, the first two unions had their trade disputes referred to the Permanent Arbitrator a few days earlier than that of the third. The papers do not reveal why this happened but it may be that this reflected the fact that the position of the unions in relation to the Act was not precisely identical. The first two Unions represent workers in essential services, while the third (which apparently represents about 4,000 to 5,000 teachers) does not. The relevance of this distinction lies in the different provisions of subsections 6 (2) (b) and 6 (2) (c) of the Act. One of the arguments advanced by the unions was that by lumping the third union together with the first two and referring them all to compulsory arbitration the CEO and the Minister had erred in applying Section 6.

[25] The second matter is the question of bias. From the papers filed it can clearly be seen that the dispute between the Union and the PSC (loosely regarded as "the Government") became quite emotionally charged. Photocopies of newspaper articles exhibited by the General Secretary of the first Union, Mr. Rajeshwar Singh, refer to a strike being declared illegal, to the strike being broken by police, to criminal charges being laid, to the country's economy being crippled, to the Minister being in breach of the constitution, to lying, defiance and the "COLA war". The Minister was called a scare – crow and the

Minister suggested that Mr. Rajeshwar Singh was chiefly motivated by his pay – packet. In short, it was a messy exchange of hyperbole, typical of industrial disputes of this kind.

[26] In the opinion of the High Court not only was it:

> "Wrong of the Minister to lump all the three unions together and send them all in one decision to arbitration in complete disregard of the facts pertaining to each Union ...."

But also:

> "Upon the whole of the evidence, the decision of the Minister smacks of bias on his part coupled with the fact that the Minister is also a member of the Cabinet of the government of the day which is the employer of the members of the union."

> "There was a war of words between the Minister and the FPSA General Secretary. The evidence in regard to bias is to be found in numerous newspaper cuttings which show that the Minister was actuated by ill – will in making his decision under Section 6(2)(b) and (c) of the Act."

GROUNDS OF APPEAL

[27] Nine grounds of appeal were filed by the Appellants. Grounds 1, 2, 3, 4, 6, 8 and 9 may be taken together: they each depend on the submission that the High Court erred in finding that every one of the seven steps making up subsection 4(1) (a) to 4(1) (g) should have been resorted to and exhausted before the dispute could properly be referred to compulsory arbitration. In view, however, of our opinion that the court's approach to section 4 was at least partly influenced by its approach to the questions of the joint reference and the

allegation of bias we deal first with these two matters, raised in grounds 7 and 8.

THE JOINT REFERENCE

[28] It has already been noted that the three references did not occur on the same day. The first two were on 2 February 2004, the third three days later. The three unions had exactly the same claim, negotiated jointly under the auspices of the CPSU and withdrew from the conciliation talks on the same day. The members of three unions were all civil servants. Reflecting, however, the fact that only the first two unions had essential service members, the CEO referred their trade disputes to the Permanent Arbitrator under the provisions of Section 6 (2) (b) of the Act while he referred the third dispute under the provisions of Section 6 (2) (c). The terms of reference for the three trade disputes were identical. It is accepted that the Permanent Arbitrator's award to the first two unions would have been applied to the teachers also whether or not they had been part of the compulsory reference. By referring the teachers together with the other two unions they were given the right to make representations to the Permanent Arbitrator which they otherwise would not have had.

[29] In paragraph 41 of his affidavit the CEO explained why he took the view that he could properly seek the Minister's authority to invoke Section 6 (2) (c). He averred that he was chiefly concerned with the well being of the many thousands of school children which might be jeopardised by the failure of their teachers to report for duties. In our view a national strike by school teachers can quite reasonably and properly be regarded as a dispute which might:

> "jeopardise the essentials of life or livelihood ... of a significant section of the nation or may endanger the public safety or the life of the community."

With respect, we do not agree that the CEO acted "with complete disregard of the facts pertaining to each union." In our view resort to Section 6 (2) (c), given all the circumstances, was both sensible and proper.

BIAS

[30] We can do no better than begin by quoting from Wade – Administrative Law – 6th Edition, 1993 at page 489:

> "It is self evident that ministerial or departmental policy cannot be regarded as disqualifying bias. One of the commonest administrative mechanisms is to give a minister power to make or confirm an order after hearing objections to it. The procedure for the hearing of objections is subject to the rules of natural justice in so far as they require a fair hearing and a fair procedure generally. But the Minister's decision cannot be impugned on the ground that he has advocated the scheme or that he is known to support it as a matter of policy ..."
>
> "... if Parliament gives the deciding power to a political body, no one can complain that it acts politically. The principles of natural justice still apply but they must be adapted to the circumstances."

[31] In reaching its conclusion that the Minister's decision to authorise the CEO to invoke Section 6 of the Act was biased, the High Court relied heavily on the fact that the Minister, as a member of the Government, was bound to be opposed to the union's claim. In our view, given the scheme of the legislation such partisanship by the Minister is unavoidable but offers no ground on its own for impeaching the decision which the Minister reaches.

[32] In paragraph 26 of his affidavit the CEO averred that the Minister carefully scrutinized all the files, reports and documents presented to him before authorizing the CEO to refer the disputes to the Arbitration Tribunal. In paragraph 7 of his own affidavit the Minister sets out in detail the various facts and matters taken into account by him before he authorised the CEO to refer the disputes to compulsory arbitration. Although Mr. Rajeshwar Singh denies the CEO's account of what took place and rejects the Minister's explanation as "the height of absurdity" we are not satisfied that it has been shown that the manner in which the decisions were reached was in any way defective.

SECTION 4 OF THE ACT

[33] In our view the interpretation of Section 4 favoured by the High Court faces two major difficulties. The first is the plain meaning of the section. The second is the limited scope for intervention by the court in the exercise of authorised discretion.

[34] As has already been seen, the first sentence of Section 4 (1) of the Act reads as follows:

> "the [CEO] shall consider any trade dispute of which he has taken cognizance and may take any one or more of the following steps as seem to him expedient for promoting a settlement:-"

[35] In our view these words mean, in their ordinary natural and grammatical sense that the CEO has the discretion to take as many of the steps set out in Section 4 as he thinks are likely to promote a settlement. Applying fundamental rules of statutory construction we do not think that the section can be read to require each of the steps to be taken before section 6 is resorted to. The question then

is whether, in the circumstances of this case, the CEO's decision to invoke section 6 was a decision with which the court was entitled to interfere.

[36] When a discretion is conferred upon a decision maker by statute then, absent procedural impropriety, there is only one circumstance in which the court will interfere. As explained by Mason J in Minister for Aboriginal Affairs v. Peko – Wallsend Ltd – (1986 – 1987) 162 CLR 24 at 40:

> "the limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising the discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of the discretion and a decision made within these boundaries cannot be impugned: (Associated Provincial Picture Houses Ltd v. Wednesbury Corportation [1948] 1 KB 223).

The question which must therefore be answered is whether the CEO's decision not to make use of the provisions of subsection 4 (1) (e) and 4 (1) (f) was wholly unreasonable.

[37] As has already been noted, before resorting to subsection 4 (1) (g) and reporting the trade disputes to the Minister, the CEO had already made use of subsections 4 (1) (a), 4 (1) (c) and 4 (1) (d). Subsections 4 (1) (b) and 4 (1) (h) are not relevant to the circumstances. In our view subsection 4 (1) (e) which authorises the CEO to:

> "endeavour to conciliate the parties by all reasonable means at his disposal."

gives the CEO little, if anything, additional to the powers conferred on him by the remaining provisions of the Section.

[38] The remaining subsection which the respondents contend that the CEO should have used, 4 (1) (f), would have required him to arrange to have the trade dispute investigated by an independent person who might or might not be a civil servant. In our view the CEO's decision not to commission such an inquiry (or indeed to make use of section 7 of the Act) was not wholly unreasonable. While the whole intricate background to the disputes, namely the Government's professed intention eventually to replace COLA entirely with a PMS system might not have been fully explained or understood and might well have been a suitable subject for detailed investigation, the actual dispute between the PSC and the unions was entirely straightforward: a claim for 5% COLA and an offer of 1% COLA plus 1% merit payment. As was perfectly clear from Mr. Shiudin's notes and his report following the unsuccessful conciliation talks, deadlock had been reached, a strike mandate had been obtained and further voluntary arbitration had been rejected. In these circumstances we are satisfied that it was not shown that there was any useful purpose to be served by carrying out further investigation, still less that the decision not to hold an investigation was "wholly unreasonable".

[39] In our view the steps taken by the CEO to attempt to resolve these disputes were in full conformity with the provisions and requirements of Section 4 of the Act and it therefore follows that the decision to move to Section 6 cannot be faulted.

THE RIGHT TO STRIKE

[40] The unions submitted that the reference to compulsory arbitration was at least partly designed to circumscribe or frustrate the unions' right to strike. This

right, it was argued, was a fundamental constitutional right which could not be abrogated.

[41] The judge did not reach any conclusion on the broad constitutional submission or on the constitutionality of the Section 6 procedure but confined himself to stating that:

> "the omission to follow the procedures stated in Section 4 by the CEO resulted in the [unions] being denied their common law right to actually go on strike if they decided to do so at the expiry of period of notice in respect of which proper notices were given by the three unions".

[42] Having concluded that there was no failure to comply with the requirements of Section 4 we are unable to agree that there was any consequential breach of the right to strike.

[43] Although the Judge considered the effect of Section 4 on the right to strike, it was not in fact upon this Section that the unions principally relied. As explained to us by Mr. Kapadia, and as set out in paragraph 4.8 of his written submissions to us (and fleetingly referred to in paragraph 2.5 of his written submissions to the High Court) the unions' principal argument was that the reference to compulsory arbitration resulted in the provisions of Section 5A(a) (6)(a) and the penal provisions of Section 5A(7)(a) being brought into play. In our view this argument involves a misreading of the sections. The "Tribunal" referred to in these sections is a tribunal to which a *dispute of rights* may be referred under the provisions of Section 5A(5). The disputes with which this matter is concerned are "disputes of interest" and therefore Section 5A is not relevant.

CONCLUSION

[44] The result in our view is that the High Court erred in finding error in the approach taken by the CEO and by the Minister. No reviewable bias has been revealed and there was no infringement of the right to strike. The orders will be as follows.

[1] Appeal allowed.

[2] The writs of certiorari issued by the High Court on 17 November 2004 are set aside.

[3] Appellants to have their costs which are fixed at $2,000.

Scott, JA

FIJI COURT OF APPEAL

Wood, JA

Ford, JA

Solicitors:

Office of the Solicitor-General, Suva for the Appellants

Messrs. Sherani & Co, Suva for the Respondents