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IN THE COURT OF APPEAL
SUVA, FIJI ISLANDS

APPELATE JURISDICTION

Civil Appeal No. ABU 0070/2007
(HCA No. HPJ 24D of 2002S)

BETWEEN : AIRPORTS FIJI LIMITED

APPELLANT

AND : THE PERMANENT SECRETARY FOR LABOUR, INDUSTRIAL RELATIONS & PRODUCTIVITY

1ST RESPONDENT

AND : DISPUTES COMMITTEE (appointed by the Permanent Secretary for Labour, Industrial Relations & Productivity)

2nd RESPONDENT

AND : THE FIJI PUBLIC SERVICE ASSOCIATION

3rd RESPONDENT

CORAM : BYRNE, J.A
: PATHIK, J.A

COUNSEL : C. B. YOUNG (for the Appellant)
Ms S. LEVACI (for the 1st and 2nd Respondents)
H. NAGIN (for the 3rd Respondent)

Date of Hearing and Submissions : 4th, 11th & 18th of March 2009

Date of Judgment : 7th July 2009

JUDGMENT OF THE COURT

1.0 INTRODUCTION

1.1 The appellant was the applicant in Judicial Review proceedings in the High Court at Suva in Judicial Review no. HBJ 24D of 2002S. The proceedings were filed on 4th of September 2002 and were heard on the 4th of April 2003. Judgment in the form of a Decision was delivered on the 22nd of June 2007. The Court Order was sealed on 14th September 2007. The High Court refused the Appellant leave to apply for judicial review and also refused to grant a stay of the decision of the 2nd Respondent dated the 8th of August 2002.

1.2 The proceedings in the High Court and now in this court are yet another chapter in what the learned High Court Judge described as "The multiplicity of litigation between the AFL and FPSA following the re-organisation of the Civil Aviation Authority of Fiji (CAAF).

2.0 THE FACTS

2.1 The facts of the present litigation can be briefly summarized as follows:

Airports Fiji Limited ("AFL"), the Appellant, is a statutory authority vested under the Civil Aviation Authority Act Cap 174 (A), with all the powers and functions to conduct and regulate the national civil aviation business. The Appellant had in 1996 succeeded in part the Civil Aviation Authority of Fiji Islands (CAAFI). CAAFI had a collective agreement with the Fiji Public Service Association (FPSA), the union representing the employees of the authorities. According to FPSA, AFL is bound by the terms of the collective agreement because of the successor clause in the agreement.

2.2 Pursuant to rule 20(1) of the Court of Appeal rules the appellant has filed an Amended Notice of Motion and Grounds of Appeal which, *inter alia*, sets out an additional ground of appeal namely that the learned trial judge had erred in law in delivering his judgment after allowing more than four years to elapse before delivering his judgment which it is alleged affected the quality of his decision and/or the manner in which he arrived at it so that it cannot be allowed to stand.

2.3 The appeal raises yet again the question of what constitutes *res judicata*. It will be necessary in the course of this Judgment to consider some of the numerous authorities on this and here the court expresses its gratitude to counsel for all the parties, but particularly for the appellant and 3rd respondent for the industry and quality of their submissions which have helped the Court come to its judgment.

3.0 THE FACTS SURROUNDING THE APPEAL

3.1 The appeal relates to the employment of thirteen (13) trainee firemen by the Appellant who were dismissed from their employment for failing to report for work.

3.2 These firemen were employed by the Appellant from the 2nd of October 2000 for 3 months and were then offered 12 months probationary employment from 29th December 2000.

3.3 On the 20th and 21st July 2001 the firemen did not report for duty or respond to Counseling or give any explanation for their absence on the two (2) days.

3.4 On 11th December 2001, the Appellant terminated the firemen's employment under Section 28 of the Employment Act Cap. 92.

3.5 Pursuant to a request from the Minister of Public Enterprises, the dismissed firemen were again offered probationary re-employment for a six-month probationary period and were to report to work on the 29th of December 2001.

3.6 They failed to report for employment and FPSA reported a trade dispute on 6th June 2002.

3.7 By letter of 3rd July 2002, the Permanent Secretary of Labour accepted the report of a trade dispute and referred it to a Disputes Committee.

3.8 On 8th August the Disputes Committee directed the 13 firemen be re-instated in accordance with their probationary contract. The reason the Committee gave was that Section 28 of the Employment Act allows an employer to terminate employment only where there is an oral and not written contract.

3.9 We state here that there is no justification for such a reason. In Section 2 of the Employment Act "contract of service" means any contract, whether oral or in writing, whether express or implied to employ or to serve as an employee for any period of time or number of days to be worked, or to execute any task or piece of work or to perform for wages any journey and includes a foreign contract of service.

3.10 From this decision the Appellant sought judicial review.

3.11 Central to this appeal is whether the Appellant had recognized the Fiji Public Service Association (3rd respondent) as the union representing the firemen.

4.0 FACTS NOT IN DISPUTE

4.1 The Appellant signed an Agreement on 9th June 2002 recognizing the Fiji Public Service Association as the representative of all members of its union employed by the Appellant.

4.2 The respondents have contended that the Minutes of a Board Meeting of the appellant of 21st December 1999 Item 2.4 show that the Board agreed with and noted a directive from the Government that it should accept the Collective Agreement and ratify the acceptance of the Collective Agreement between CAAF and FPSA; that FPSA was therefore the union for the 13 firemen and therefore their dismissal from employment by the appellant was inconsistent with the Collective Agreement.

4.3 In the High Court the Appellant filed submissions (volume 2 pp 415 – 428) which specifically referred to the fact that in spite of the Board minutes of the Appellant the FPSA filed an agreement on the 9th of June 2002 claiming that the Appellant had recognized the 3rd respondent. The Appellant denied this and said at page 420 of the record so far as relevant :

"The Agreement is headed "**RECOGNITION**" and annexed as AN3 in the Ashok Nath affidavit. Clause 1 of the Agreement has the parties regarding and treating the **application for** and **granting of recognition** under the Trade Unions (Recognition) Act as having "been complied with upon the executive by them of this Agreement". This means that FPSA was recognized by AFL from 9th day of June 2002. FPSA was not recognized on 6th June 2002 when it reported the dispute".

4.4 A Notice of Opposition was filed by the 3rd Respondent giving the following as its grounds for opposition :

a) The Applicant is wrongly attempting to review decisions in one Judicial Review namely:-

i) Decision of the Permanent Secretary.

ii) Decision of the Disputes Committee.

b) The Applicant has participated in previous arbitrations and is therefore deemed to have waived its objection on the issue of recognition.

c) The Disputes Committee's decision was unanimous and therefore there is no review available against that.

d) The Applicant is abusing the process of this Honorable Court to delay implementation of the award.

e) The Third Respondent is applying to strike out this application for judicial review.

4.5 The learned trial judge held that although the appellant had a sufficient interest in the matter under Order 53 (5) of the High Court (Amendment) Rules 1994 it did not have an arguable case on the merits. It would seem that the learned judge did not mean to canvass the merits of the Appellant's case when he said this but rather that in his view the appellant did not have an arguable case. The judge held that the Court had already decided that the collective agreement originally entered into between CAAF and FPSA was also binding on AFL, relying on State v. Permanent Secretary for Labour Industrial Relations and Productivity, Arbitration Tribunal & FPSA exp. Airports of Fiji Limited HBJ.31/2002). In other words the Court found that AFL had recognized FPSA as representing the employees.

4.6 He said: "This agreement has now been formalized between the parties in June 2002. At the heart of this case, and on which the whole of the Applicant's case rests is the issue of union recognition and if there existed a collective agreement between the parties. The arguments of illegality, irrationality and procedural impropriety advanced by the Applicant are in fact based on there being no union recognition and no collective agreement. These matters have however been conclusively decided against the Applicant in HBJ 31/2002. This being the case, then there is no arguable case on the merits, of which this Court may even begin to consider whether leave should be granted. The issue is moot. Leave is refused".

4.7 Clearly the learned judge is saying that the issues between the parties are *res judicata*, that is there has been a decision by a judicial tribunal having jurisdiction over the cause and the parties which disposes once and for all of the matters decided, so that except on appeal they cannot afterwards be relitigated between the same parties or their privies.

5.0 **TRADE DISPUTES ACT (Amendment) DECREE 1992**

TRADE UNIONS (Recognition) ACT (Cap. 96A)

5.1 The above Decree amends the meaning of collective agreement to mean any agreement:

(a) "that is made by a trade union of employees recognized under the Trade Unions (Recognition) Act and an employer or trade union or employers duly registered under the Trade Union Act; and

(b) prescribes (wholly or in part) the terms and conditions of employment of employees of one or more description, or a procedure agreement or both."

5.2 The Constitution Amendment Act 1997 did not repeal the Trade Disputes Act (Amendment) Decree 1992.

5.3 Hence, it is clear that the collective agreement recognized for the purpose of a trade dispute must be a collective agreement "duly registered under the Trade Unions Act" (our emphasis).

5.4 The only agreement that is registered under the Trade Disputes Act is the Recognition Agreement dated 9th June 2002 [p42 & 43 Vol.1].

5.5 The Trade Unions (Recognition) Act sets out the steps by which a union is to be recognized by the employer. Section 3(1) provides that there has to be 50% of the employees who are members of the union. When these criteria are satisfied subsection (2) provides that the trade union may claim:

"to be entitled to recognition by the employer...but if the employer refuses recognition, the trade union may refer the question to the Permanent Secretary who, after taking into account all facts and circumstances appearing to him to be relevant, may, subject to the provisions of subsection 10, make an order, under this Part referred to as a 'compulsory recognition order'-

(a) Declaring that the trade union is entitled to recognition under this Act; and
(b) Specifying the manner in which the employer shall accord recognition to the trade union".

5.6 It was argued in the court below that there could be recognition by conduct and by its conduct the appellant had recognized the union. It appears that the learned judge accepted this argument and in doing so in our judgment he was wrong. The Trade Unions (Recognition) Act makes it clear that the satisfying of the 50% membership condition is an absolute pre-requisite to a recognition. There is no room in our judgment for recognition by conduct. Neither is it open to the 3rd respondent to argue that because the Minister directed the Appellant to accord recognition, the union did not have to prove 50% membership and follow

the procedures set out in the legislation for recognition. In our judgment the Trade Disputes Act (Amendment) Decree 1992 clearly envisages only a Trade Union recognized under the Trade Unions (Recognition) Act and not anything contemplated outside it.

5.7 The signing of the Agreement between FPSA and the Appellant on 9th June 2002 was the only other way in which recognition could be obtained under the Trade Unions, (Recognition) Act and that is when an employer voluntarily gives such a recognition under section 3(1). We are satisfied that no such voluntary recognition was given by the Appellant.

6.0 GROUNDS ONE AND TWO

6.1 It is clear the Judge ignored the submissions of the Appellant at first instance when he raised the issue of the subsequent signing of the Recognition Agreement on 9th June 2002. A Judge has a duty to consider the arguments of Counsel. Handley, J.A, speaking for the **Court of Appeal of New South Wales in Wrigley v Holland** (2002) NSW CA 109 at pp. 16 & 17 explained the obligation of a Judge in dealing with counsel's argument:

> "16. The Judge, in exercising his discretion, was bound, as a matter of law, to take into account the claim advanced by the worker's counsel in argument, and if he decided to disregard that claim and award substantially more, he was bound to give adequate reasons for doing so. He either failed to take this relevant consideration into account or failed to give his reasons for disregarding this submission and on either view he erred in law. See ***Australian Wire Industries Pty Ltd v Nicholson*** (1985) 1 NSWCCR 50 at 56-7 per McHugh JA. This Court should assume that the Judge has complied with his duty to give reasons, and if he has not referred to a material matter, the Court should conclude that he did not consider it was material. See ***Sullivan v Department of Transport*** (1978) 20 ALR 323, 353 per Fisher J; ***Baldwin & Francis Ltd v Patents Appeal Tribunal*** (1959) AC 663,693 per Lord Denning.
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> "17. The Judge also denied procedural fairness to the employer whose counsel had no opportunity to deal in address with the Judge's reasons for disregarding the submission of counsel for the worker and awarding so much more than had been sought on her behalf. Compare ***Stead v State Government Insurance Commission***

> [1986] HCA 54; (1986) 161 CLR 141. In that case the trial Judge, during final addresses, stopped counsel for the plaintiff addressing further on his client's credit, but in his reserved judgment found against the plaintiff on that issue. The High Court ordered a new trial because there had been a denial of natural justice affecting the entitlement of a party to make submissions on an issue of fact."

6.2 It is also to be noted that in his final submissions the Appellant's then Counsel Mr Vuetaki referred to the Agreement in 2002 (record page 506-volume 2). It is true that the Judge's notes on these are very cryptic but it is clear that the agreement was brought to his Lordship's notice and indeed was relied on by the Appellant. In a situation such as this, a Judge has a duty to the parties to at least refer to the arguments of Counsel on any relevant question and, if he rejects these arguments, to say why. He need not give detailed reasons for this unless the facts require it.

6.3 In our judgment the Recognition Agreement signed on the 9th of June 2002 is to a large extent the foundation of the appellant's case.

6.4 Clause 3 provides that as soon as practicable after the execution of the Agreement by the parties to it they shall in good faith enter into negotiations in relation to all matters which are widely likely to enhance their long term relationship including entering into a Collective Agreement.

6.5 The Recognition Agreement of the 9th of June 2002 is not a "collective agreement " as defined under the Trade Disputes (Amendment) Decree 1992 :

> "(a) that is made by a trade union of employees recognized under the Trade Unions (Recognition)Act and an employer or trade union or employers duly registered under the Trade Union Act; and

(b) prescribers (wholly or in part) the terms and conditions of employment of employees of one or more description, or a procedure agreement or both".

We say this because in our view FPSA was not recognized under the Trade Unions (Recognition) Act". The "Recognition" envisaged under the Act is one which only provides for voluntary recognition by a recognition agreement voluntarily executed by the employer and the Trade Union or, in default of such agreement, in accordance with a compulsory recognition order made by the Permanent Secretary [Section 3 (1)].

6.6 The evidence is clear. There was no compulsory recognition order, there was no recognition agreement voluntarily executed by the employer and the trade union until 9th June 2002. It follows that there could be no collective agreement prior to 9th June 2002 because there was no voluntary recognition or compulsory recognition before that date.

6.7 For these reasons we uphold Grounds 1 and 2.

7.0 **THE THIRD RESPONDENT'S SUBMISSIONS**

7.1 In reply the submissions of the 3rd Respondent referred the Court to correspondence between the parties prior to June 2001, more particularly on the issue of conduct by the Appellant in accepting the Collective Agreement between the Civil Aviation Authority of Fiji and the Fiji Public Service Association.

Counsel drew our attention to pages 158, 161, 171, 157, 172, 173 ,174, 251, 362, 363, (paragraph 2.4l, 176, 177 – 179 and 185 and 186.

7.2 Of these references one calling for comment is at page 251 which is a letter dated 30th September 1999 from one Alan Lodge apparently the Chief Executive of the Appellant which is dated the 30th September 1999 Paragraph (1) reads:

> **"I refer to various recent discussions, and write to address the question of recognition by Airports Fiji Ltd ('AFL') of the Fiji**
>
> **Public Service Association ('FPSA') as a trade union with bargaining rights for its members. There has been no request for recognition. However, AFL understands that most if not all the people it employed, following the receipt of a prime ministerial directive, with effect from 26 May 1999 are members of the FPSA.**
>
> **AFL considers that it has accorded recognition to the FPSA by its conduct since the staff members were absorbed. However, the terms and conditions of their employment should now be formally established. A draft collective employment contract is being prepared and will be available for your consideration at the appropriate time".**

7.3 We note that in the first paragraph Mr Lodge states: " there has been no request for recognition" . The second paragraph states the opinion of AFL that it had accorded recognition to the FPSA by its conduct since staff members were absorbed, then Mr Lodge writes that the terms and conditions of their employment should now be formally established and that a draft collective employment contract was being prepared and will be available for consideration by FPSA at some appropriate time.

7.4 In our judgment this letter simply expresses the opinion at the end of September 1999 that AFL believed it had accorded recognition to the 3rd Respondent but that nothing had been formalized. Whatever the situation was at the 30th September 1999 the undisputed fact is that subsequently AFL refused to give recognition to FPSA. This is evidenced in a letter dated 20th of June 2001 from AFL to the 1st Respondent (record page 237) . The first two paragraphs which we now quote make this clear but in addition they also correctly state the law governing the parties. This letter was before Mr Justice Jitoko but he makes no mention of it at all in his 3 – page decision although in our view he should have because it was relevant.

The two paragraphs are as follows:

> **The trade dispute is reported by the FPSA as a Trade Union, which therefore claims to be a party to the trade dispute. Under sections 3(1)(a) of the Trade Disputes Act as amended by the Trade Disputes Act (Amendment) Decree No.27 of 1992 only a Trade Union that is recognized by the employer under the Trade Union (Recognition) Act No. 53 of 1998 is a proper party to a dispute reported under Section 3.**
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> **Recognition of a trade union for the purpose of collective bargaining must be in accordance either with a voluntary recognition agreement executed between the employer and the trade union under Section 3 or a compulsory recognition order issued under Section 8 of the Trade Unions (Recognition) Act No. 53 of 1998.**

7.5 In our judgment by failing to mention section 3 of the Trade Unions (Recognition) Act 1998 the learned Judge fell into error. Section 3 of that Act makes clear the action which FPSA should have taken but did not before it could rightly claim that the appellant had recognized it as the representative of the thirteen firemen.

8.0 The 3rd Respondent has very persuasively endeavoured to satisfy us that there can be recognition by conduct but with due respect to Mr Nagin we do not agree.

8.1 It is very clear that His Lordship relied heavily on his own decision in The State, The Permanent Secretary for Labour, Industrial Relations & Productivity, Arbitration Tribunal and Fiji Public Service Association ex parte Airports Fiji Limited HBJ 31/2002. However, we note from the record that this case was not referred to by His Lordship to Counsel in the course of the hearing, nor did any counsel refer to it for the simple reason that the decision was not delivered until 18th April 2005. This

was a judgment of His Lordship himself and, before he delivered his judgment in the instant case he was under a duty of fairness to reconvene the Court and inform Counsel that he might rely on this case in his judgment and invite further submissions from them if they wished to make any. That he failed to do this in our judgment is another reason why we cannot uphold his decision in the present case.

8.2 In his judgment in HBJ 31/2002 delivered on the 18th of April 2005 the Judge deals with the question of recognition and relied on the English case of National Union of Tailors and Garment Workers v. Charles Ingram & Co. Ltd. (1978) 1. ALL ER pg 1271. This was a decision of the Employment Appeal Tribunal the Chairman of which Phillips. J was a judge of the English High Court.

8.3 Phillips, J said at p.1273 :

"Recognition" plainly, we think, implies agreement, which of course involves consent. That is to say, it is a mutual process by which the employers recognize the union, which obviously agrees to be recognized and it may come about in a number of different ways. There may be a written agreement that the union should be recognized. There may be an express agreement not in writing. Or, as we think, it is sufficient if neither of these exists but the established facts are such that it can be said of them that they are clear and unequivocal and give rise to the clear inference that the employers have recognized the union. This will normally involve conduct over a period of time. Of course, the longer that state of facts has existed the easier it is in any given case to reach a conclusion that a proper interpretation of them inevitably leads to the conclusion that the employers have recognized the union. Against that test, it has not been suggested here that there is any formal document by which the company recognized the union. It is necessary to look at the facts.

8.4 The Ingram case was an appeal by the National Union of Tailors and Garment Workers from a decision by an Employment Tribunal under the English Employment Protection Act 1975 that the union was not "recognized by the company for the purposes of collective bargaining within section 99 of the Act, and that therefore there was no obligation on the part of the company to consult the union. Phillips, J and his fellow members reversed the employment tribunal. In our judgment Jitoko,J erred in not noticing the different definition of the word 'recognition' in the English Employment Protection Act and the fact that no such definition exists in any of the relevant Fiji Legislation. In the English Act 'recognition' in relation to a trade union means " the recognition of the union by an employer, or two or more associated employers, to any extent, for the purpose of collective bargaining". Such a definition does not exist in any of the relevant Fiji legislation.

8.5 Further more it would appear that the Employment Protection Act 1975 does not have similar procedures for recognition as are in the Fiji Trade Unions (Recognition) Act Cap 96 A. Consequently for yet another reason we must uphold this appeal.

9.0 Finally we pass to the third ground of appeal that by delaying for more than four years before delivering the judgment after argument concluded this affected the quality of his decision. Whilst it is accepted that mere delay in delivering judgment is not an automatic reason to set aside a judgment, it is nevertheless a factor which in an appropriate case can be taken into account.

9.1 The Judge stated on page 4 of his decision (record page 11) that he was aware that the current matter was heard in April 2003 and it had not been possible to hand down a decision until the 22nd of June 2007. He did not give any reasons for such a delay and we think he should have done so. Whilst a Judge is the master of his own list, nevertheless

a Judge is also the servant of the public. If his delay was due to inadvertence or too heavy a case load it would not have done any harm for him to mention this. We have little doubt that the parties would have been sympathetic to him if any of these were his reasons. His justification appears to have been that as he saw it, the legal issues posed had been decided in April 2005.

9.2 This court is not satisfied that they were because as we have said in our view the learned judge failed to consider the relevant legislation.

9.3 In **Campbell v. Hamlet** (2005) ***3 All ER 1116 the Privy Council*** cited with approval the case of **Goose v. Wilson Sandford & Co.** (1998) TLR 85 at p.1124 where the court stated :

> **"Delay may have so adversely affected the quality of the decision that it cannot be allowed to stand. It may be established that the judge's ability to deal properly with the issues has been compromised by the passage of time, for example if his recollection of important matters is no longer sufficiently clear or notes have been misled."**

9.4 In our opinion it is wrong to claim as does the 3rd respondent that the four year delay in delivering judgment was of no consequence. In our view the Judge's hand-written notes reveal that he made only a very small and even ambiguous record of the appellant's submissions. We have little doubt that fuller oral arguments, such as we received in the present appeal would have been made but this Court has not been given the benefit of such arguments. It is entitled to know what they were. That said however, there are other perhaps more cogent reasons

for upholding this appeal which the bulk of this judgment addresses. Principal among them is the failure of the 3rd Respondent to show the existence of a voluntary recognition agreement **executed** by the Appellant and the 3rd Respondent.

10.0 For the reasons we have given we allow the appeal and order that leave be granted for the Appellant to apply for Judicial Review of the decision of a Disputes Committee dated 8th August 2002 directing the re-instatement by the Appellant of 13 firemen dismissed by it on the 11th December 2001 and that the substantive matter be referred back to the High Court for directions to hear the substantive matter in review. The 3rd Respondent must pay the Appellant's costs of this appeal which we fix at $4,000.00.

J. E. BYRNE
JUDGE

D. PATHIK
JUDGE

7th July 2009