IN THE COURT OF APPEAL, FIJI ISLANDS
CIVIL JURISDICTION

Miscellaneous Appeal No. 31 of 2007
(On Appeal from the High Court of Fiji at Suva in Judicial Review No. HBJ3 of 2004)

BETWEEN	:	**CORAL SUN LIMITED**
		Applicant
AND	:	**PERMANENT SECRETARY FOR LABOUR, INDUSTRIAL RELATIONS AND PRODUCTIVITY**
		First Respondent
	:	**MINISTER FOR LABOUR, INDUSTRIAL RELATIONS AND PRODUCTIVITY**
		Second Respondent
AND	:	**FIJI SUGAR AND GENERAL WORKERS UNION**
		Third Respondent
COUNSEL	:	**J. Apted for the Appellants** **Miss K. Naidu for the 1st and 2nd Respondent** **H. K. Nagin for the 3rd Respondent**
Date of Hearing And Submissions	:	**1st October, 1st November, 15th November, 7th December 2007, 18th, 21st January 2008.**
Date of Ruling	:	**12th June 2009**

RULING ON APPLICATION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

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1. Confession is said to be good for the soul. The truth of that saying, well known to many of us, will doubtless only be revealed when we have shuffled off our mortal coils and, asked by whatever God we may believe in to account for our stewardship on this earth.

2. In the present case, I have a confession to make which some cynics may think unusual for a judge that I overlooked my being seized of the case which I found lying in repose under a number of files only recently.

3. I have now resurrected it and can only ask the parties for their absolution.

4. **HISTORICAL NOTE:**

5. On the 9th of November 2006, Mr Justice Jitoko in the High Court in Suva ordered that the Applicant's applications for judicial review of the Minister for Labour, Industrial Relations and Productivitty's decisions on lockouts by the Applicant against 41 of the Applicant's employees and members of their Union, the third respondent were without merit and they were dismissed.

6. The judgments and Order made by Mr. Justice Jitoko were in respect of the following three decisions:

   i) The decision of the 1st Respondent ("The Permanent Secretary") to issue a Compulsory Recognition Order ("CRO") dated 1st September 2003 against the Applicant, and in favour of the Third Respondent (and Interested Party in the High Court), the Fiji Sugar and General Workers Union ("The Union").

   ii) The decision of the Second Respondent ("The Minister") purportedly made under Section 6(4) of the Trade Disputes Act (Cap 97) and dated 4th December 2003 ordering that termination of the employment of three employees of Coral Sun or redundancy constituted an unlawful lockout.

   iii) The decision of the Minister purportedly made under Section 6(4) of the Trade Disputes Act (Cap 97) and dated 24th December 2003, ordering that the acceptance by Coral Sun of the abandonment of employment by its 41 employees as termination of their employment constituted an unlawful lock-out.

7. In its judgment, the High Court held *inter alia* that:

   (a) The Applicant's claims for Judicial Review of the Permanent Secretary for Labour, Industrial Relations and Productivity's decision on the Compulsory Recognition Order (No.12) were of no merit and were therefore dismissed;

   (b) The Applicant's claims for judicial review of the Minister for Labour, Industrial Relations and Productivity's decisions on the lockouts on 4th and 24th December 2003 were without merit and therefore dismissed;

   (c) Each party to bear its own costs.

8. Coral Sun now applies by summons for an extension of time to file an appeal against the second order. It does not appeal against the 1st Order regarding the making of the CRO or the third regarding costs.

9. The grounds on which Coral Sun proposes to appeal are set out in a Draft Notice of Appeal annexed to the affidavit of Richard Lal, a Director of the company sworn on the 29thof June 2007 in support of the application, I now set them out:

   1. The Learned Judge misdirected himself or erred in law, in construing section 6(4) of the Trade Disputes Act Cap 97 and in finding that the Orders made by the Second Respondent ('the Minister') declaring there to be "unlawful lock-outs" on 4 and 24 December 2003, by failing to consider and apply the definition of "lock out" provided in Section 2 of the Act.

   2. The Learned Judge misdirected himself or erred in law in holding:

      (a) That the termination of the employment of the Union's members for redundancy and arising out of their abandonment of their employment with the Union, although in accordance with the contractual terms and conditions, were "matters affecting terms and conditions of their employment".

      (b) That the effect of the Compulsory Recognition Order **("CRO")** made by the First Respondent **("the Permanent Secretary")** against the Appellant **("Coral Sun")** and in favour of the Third Respondent **("the Union")** and its members, was to

require that these terminations of employment should have been negotiated with the Union.

(c) That the CRO pre-empted contractual rights.

(d) That the terminations in issue were in violation of the CRO when the effect of the CRO, properly construed under the Trade Union (Recognition) Act 1998, was only to require Coral Sun to bargain collectively with the Union over terms and conditions of employment to be contained in a collective agreement or the revision or renewal of such an agreement.

3. The Learned Judge misdirected himself or erred in law in so far as he held implicity that the terminations of employment for redundancy and abandonement of employment were ineffective or unlawful because they had not been accepted by the Union's members and/or because they had not been negotiated with the Union and/or because they were in violation of the CRO.

4. The Learned Judge misdirected himself or erred in law in failing to hold and declare that the Minister's two orders declaring unlawful lock-outs were made in breach of the rules of natural justice and were therefore void in law.

5. The Learned Judge misdirected himself or erred in law holding that the delay in the Appellants' challenge to the validity of the CRO was pertinent to the Court's overall assessment of whether there had been lock-outs and for which the Minister had to respond with prohibition orders", when:

(a) The existence or non-existence of a legal challenge to the CRO was irrelevant to the question of whether or not there was any "lock-out" within the meaning of the Trade Disputes Act entitling the Minister to declare an unlawful lock-out under Section 6(4) of the Act; and

(b) The legal challenge was not filed by Coral Sun until after the Minister had purported twice to order that unlawful lock-outs existed.

6. The Learned Judge misdirected himself and erred in law in concluding that there had been "lock-outs" that satisfied Section 14 of the Trade Unions (Recognition)Act 1988, when the Minister's decisions, which were challenged in the judicial review, were not expressed to be made under the section and when, in any event, the provisions of the section had not been satisfied."

10. The Application is made pursuant to Section 20(1)(b) and (e) of the Court of Appeal Act and Rules 26 and 27 of the Court of Appeal Rules and the inherent jurisdiction of this Court.

11. Both of the Orders declaring unlawful lockouts made by the Minister and which were challenged by Coral Sun in the High Court were in relation to the termination of employment of members of the Union that had taken place prior to the Minister's Orders.

    It is submitted by the Applicant that in making his Orders and finding that Coral Sun's challenges were without merit, the terms of the judgment make it clear that the Learned Judge did not have regard to the definition of lock out contained in Section 2 of the Trade Disputes Act, which had been relied on by Coral Sun in its submissions and, which is in these terms, **"lock out" – "means the closing of a place of employment, or the suspension of work, or the refusal of an employer to continue to employ any number of persons employed by him, done in consequence of a trade dispute, not with the intention of finally determining employment but with a view to compelling hose persons, or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment."**

12. The Learned Judge also made findings to the effect that the terminations of employment although made pursuant to existing contractual terms and conditions were in violation of the CRO as they were "matters relating to the terms and conditions" of employment which Coral Sun was required by the CRO to negotiate with the Union. The Applicant claims that in so holding, the Learned Judge failed to have regard:

    (a) To Section 2 of the Trade Unions (Recognition) Act 1998 which defines for the purposes of the Act and subsidiary legislation (including a CRO) made under it:

(i) "recognition" means recognition for the purpose of collective bargaining; and

(ii) "collective bargaining" means treating and negotiating with a view to the conclusion of a collective agreement or the revision or renewal of such an agreement; and

(b) To the full terms of paragraphs 3 and 4 of the CRO which were to be construed in light of the foregoing definitions and which stated:

> 3. "Recognition"
>
> The Union is entitled to recognition by the employer under section 8 of the Trade Union (Recognition) Act 1998.
>
> 4. "Manner of recognition"
>
> The employer must accord recognition to the Union for the purpose 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 any specific matter relating to the terms and conditions of employment of any person who is a voting member of the union".

13) It is alleged that the Learned Judge also failed to consider and decide Coral Sun's argument that the Minister had failed to accord it natural justice before making the two Orders ordering unlawful lock outs.

14) The Applicant believes that there will be no detriment to the Permanent Secretary, the Minister or the Union or its members if the time for filing the notice of appeal is extended, but that instead there would be prejudice to Coral Sun and the other parties if Coral Sun is denied the opportunity to file an appeal.

15) Richard Lal states in his affidavit that the relevant former employees have not been re-instated, although there are both pending Trade Disputes before the Permanent Arbitrator and a Civil Action in the High Court seeking their re-instatement and/or compensation or damages.

16) The Court was told that unless an appeal is allowed, both the Permanent Arbitrator and the High Court may find themselves bound by the holdings of the Learned Judge that the terminations in issue constituted "unlawful lock-outs", and violation of the CRO, rather than effective terminations as a result of the application of existing contractual terms and conditions; and were not effective terminations of employment.

17) Richard Lal also deposes that were Coral Sun to appeal such decisions at that time and to raise the same questions as it now seeks to raise on appeal, this would necessitate multiple appeals, to which the Union and its members would have to be parties, and subject to the usual inconvenience and expense. The resolution of the underlying questions of the fact and lawfulness of the terminations of employment, the effect of the CRO and the existence of any lockout would also be unduly delayed further.

18) Mr Lal also states that there would also be the possibility of Coral Sun being required to reinstate or to pay damages to more than 40 employees pending such appeals, which he says are unlikely to be recoverable or reversible should Coral Sun succeed on appeal.

19) In that regard, I am told that Coral Sun no longer has positions for the former employees and in the present uncertain economic climate does not have the ability to create new positions or meet any order for compensation or damages. The Company has calculated that its potential liability may be as high as $1,832,527.82.

20) The Applicant claims, and this is not disputed by the Respondents, that its principal business is tourism transport operations and it has suffered a downturn in trade since the 5th December 2006 when the Interim Government overthrew the elected Qarase Government. It pleads these matters as grounds for a stay of proceedings pending an appeal and says that the reason for the delay in bringing the Appeal is related to the effects of the events of 5th December 2006.

21) Prior to that date, Coral Sun says that it was considering the effects of the Judgment of the High Court and taking advice from overseas senior Counsel on its prospects of appeal. At that time the Court's order had not been sealed so the time to file a notice of appeal had not begun to run.

22) Richard Lal states that the unexpected events of 5 December 2006 and their drastic effects on his Company's business forced it and its management to focus on saving its business and the livelihoods of its other employees. In the effort to ensure the Company's survival Coral Sun over-looked that the Order of the High Court had been sealed and the time to file appeal had begun to run and subsequently expired.

23) The foregoing recitation of the Applicant's problems, if true, paint a very gloomy picture. Is there any substance in it?

24) The Respondents, not unnaturally, say that if the Company has problems, these are to a large extent of its own making and should not be blamed on the events of the 5th of December 2006.

25) The Third Respondent through its General Secretary, Felix Anthony swore in an affidavit of 17th August, 2007 that if the Company were facing losses of the magnitude of $1.8m then surely it should have put everything aside and got on with its appeal.

26) The Third Respondent apropos of this says that the admission by the Applicant's Solicitors that the Applicant only took steps to appeal when the Third Respondent sought to enforce the judgment clearly shows that there was no intention to appeal until the applicant was compelled to act on the Orders given by Mr Justice Jitoko.

27) An impartial observer knowing the facts might be tempted to say it is always easy to be wise afterwards. In my view, despite the criticism leveled by the Respondents at the Applicant, the applicant has at least a plausible argument.

28) **THE LENGTH OF THE DELAY**

29) The Third Respondent claims that the delay in applying for leave to appeal is 142 days. The Applicant says it is 4 months and 9 days or 133 days. There is not much difference and it certainly is a long delay. But the applicant replies that so too was the Learned Judge guilty of delay because he did not deliver his judgment for two years after argument concluded and this was not the Applicant's fault.

30) I do not intend to venture into that mine-field because the real question here is will justice be done if I refuse the Application? I think not: In this regard I find support in paragraph 15 of the Second Affidavit of Richard Lal sworn on 15th November 2007 and on which of course he has not been cross-examined. So far as relevant he says this:

a) The existence or non-existence of a legal challenge to the CRO was irrelevant to the question of whether or not there was any "lock out" within the meaning of the Trade Disputes Act entitling the Minister to declare an unlawful lock out under section 6(4) of the Act; and

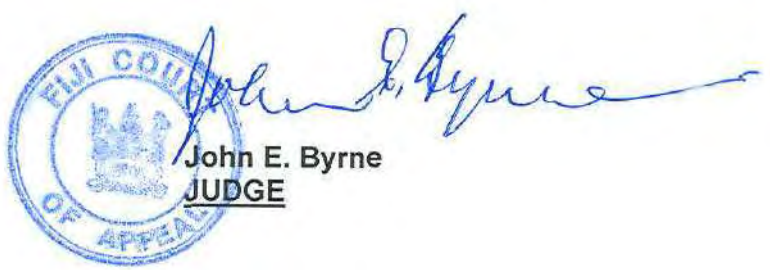
b) The legal challenge was not filed by Coral Sun until after the Minister had purported twice to order that an unlawful lock out existed."

31) I also take judicial notice of the fact, which I do not think can be denied, that tourism is probably the most important industry in Fiji and has been for some years. I do not intend to discuss the wealth of case law on the question involved in this summons. Each case must be decided on its own merits and I am persuaded that the applicant has arguable grounds of appeal and reasonable prospects of success on the material so far before me.

32) I consider it very arguable that the Learned Judge did not consider the statutory definition of lockout and that this failure affected his judgment. In my view it is also arguable that the Learned Judge reached an inconsistent and erroneous conclusion about the effect of a compulsory recognition order on an employer's exercise of existing contractual rights.

33) In the exercise of my discretion, I shall grant the Applicant leave to appeal out of time subject to this condition:

> ***That it pay the costs of the Respondents which I fix at $2,000 for the 1st and 2nd Respondents together and a similar sum to the third Respondent to be paid within 14 days of the delivery of this ruling.***



John E. Byrne
JUDGE

At Suva
12th June 2009