

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

CIVIL APPEAL NO. ABU 0073 OF 2008
(High Court Judicial Review 28 of 2007)

BETWEEN : **NEW INDIA ASSURANCE COMPANY LIMITED**
Appellant

A N D : **PERMANENT SECRETARY FOR LABOUR, INDUSTRIAL**
RELATIONS, TOURISM AND ENVIRONMENT
First Respondent

A N D : **FIJI BANK & FINANCE SECTOR EMPLOYEES**
UNION
Second Respondent

A N D : **SULOCHANA RAMAN**
Third Respondent

Coram: Byrne, Acting President
Goundar, JA
Calanchini, JA



Date of Hearing : 5 November 2009

Counsel : Mr H Nagin for the Appellant
Ms N Karan for First Respondent
Mr R Singh for Second and Third Respondents

Date of Judgment : 27th January 2010

JUDGMENT OF THE COURT

[1] This is an appeal against a decision of the High Court (Hickie J) handed down on 8 October 2008. The Court upheld the decision of the Permanent Secretary to accept the report of a trade dispute that had been reported by the Second

Respondent in a judicial review proceedings under Order 53 of the High Court Rules 1988 (as amended).

- [2] The relevant facts may be stated briefly. The Appellant and the Second Respondent signed a Collective Agreement (the Agreement) on 11 July 2000. That Agreement was subsequently registered with the Permanent Secretary (the First Respondent) on 31 July 2000. Clause 14 of the Agreement stated:

"The employer may at its discretion retire its employees from service upon their reaching fifty-five (55) years of age."

- [3] Without referring to clause 14 of the Agreement the Appellant forwarded a letter dated 1 June 2007 to Ms Sulochana Raman (the Third Respondent) in the following terms:

"We note from records that you are attaining the age of superannuation on 9 June 2007."

We appreciate your long standing services to our Company and advise you that you will be relieved from the services of the company on 8 June 2007 at the close of the office hours."

- [4] Following correspondence that passed between the Appellant and the Second Respondent, the Second Respondent by letter dated 7 June 2007 reported the existence of a trade dispute over the matter to the First Respondent pursuant to section 3 of the Trade Disputes Act Cap 97 (the Act).

- [5] By letter dated 11 June 2007 the First Respondent wrote to the Appellant advising that:

"The Fiji Bank Finance Sector Employees Union has reported a trade dispute against New India Assurance Company Limited. As the Employer in this regard we await your response, within the next three days, on whether or not you have been served with a copy of the report of trade dispute, as required under sub-section 3 of section 3 of the Trade Disputes Act Cap 97."

- [6] The Appellant did not respond to that letter.

[7] By letter dated 11 July 2007 the First Respondent advised the Second Respondent (with a copy to the Appellant) that the report had been accepted. It is appropriate to set out the full text of that letter.

"I refer to your letter dated 7 June 2007 reporting the existence of a trade dispute between your union and New India assurance Company Limited. I note that the dispute is over the termination of employment of Mrs Sulochana Raman with effect from 8 June 2007. Your union views the company's action as unfair, unjust and unreasonable and constitutes discrimination on the grounds of age and therefore seek her re-instatement without loss of pay and benefits from the date of termination.

In terms of section 4 (1) (a) of the Trade Disputes Act Cap 97 I have accepted the report of the Trade Dispute and in terms of paragraph (h) of the said Section refer the Dispute to a Disputes Committee. The Disputes Committee will be constituted by me under section 5A (2) of the said Act, for a decision.

You are now requested in terms of section 5A (2) (b) of the said Act to recommend an independent person to be appointed to represent your union in the Committee. By a copy of this letter, New India Assurance Company Limited is also being requested in accordance with Section 5A (2) (c) of the above-mentioned Act to recommend an independent person to represent the employer in the Committee.

The person so nominated should be available to hear the dispute and make a decision within 14 days from the date of appointment.

Please note that the Act requires that the recommendation be with me within 14 days from the date of this letter."

[8] By letter dated 24 July 2007 the legal practitioners acting for the Appellant informed the First Respondent that:

"....

Please note that our client is of the view that the acceptance of the Trade Dispute by you is not in accordance with the law. In the circumstances, our client has instructed us to challenge your decision to accept this Trade Dispute by way of a Judicial Review.

....."

[9] Leave was granted on 10 September 2007 to the Appellant to move for Judicial Review under Order 53 of the High Court Rules. The High Court dismissed the motion on the basis of six findings. First, the Court found that the matter came within the definition of trade dispute and was correctly accepted by the First Respondent as a Trade Dispute.

[10] Secondly, the Court found that the First Respondent had complied with the procedural requirements set out in the Act.

[11] The third finding is not relevant to this appeal.

[12] The fourth finding of the Court was that the Third Respondent was entitled to be represented by the Second Respondent and therefore the First Respondent did not abuse his discretion in accepting a trade dispute in which the Third Respondent was being represented by the Second Respondent.

[13] The fifth finding of the Court was that a matter that raises constitutional issues can also be the subject of a trade dispute and therefore the First Defendant did not abuse his discretion in accepting a trade dispute in which the Second Respondent was raising constitutional issues.

[14] Finally the Court found that the First Respondent did not act contrary to the legitimate expectations of the Applicant in accepting the report of a trade dispute.

[15] The Appellant appealed to this Court on the following grounds:

- "1. The Learned Trial Judge erred in law and in fact in not quashing the decision of the First Respondent in accepting the Trade Dispute when the Third Respondent was not covered by the Collective Agreement.**
- 2. The Learned Trial Judge erred in law and in fact in not quashing the decision of the First Respondent in accepting the Trade Dispute when there was no Trade Dispute as the Collective Agreement provided for the retirement age across the Board and did not unfairly discriminate between employees.**
- 3. The Learned Trial Judge erred in law and in fact in not properly considering that the collective agreement was duly registered by the first Respondent under the**

provisions of the Trade Disputes Act well after the coming into effect of the 1997 Constitution.

4. *The Learned Trial Judge erred in law and in fact in not properly applying the definition of "Trade Dispute" to the present case.*
5. *The Learned Trial Judge erred in law and in fact in not properly distinguishing between a dispute of right and a dispute of interest as contained in the Trade Disputes Act.*
6. *The Learned Trial Judge erred in law and in fact in holding that the First Respondent correctly accepted the matter as a trade dispute when the First Respondent had not properly exercised his discretion and/or process but had merely acted as "rubber stamp" and accepted the trade dispute without proper consideration of the matter.*
7. *The Learned Trial Judge erred in law and in fact in holding that the First Respondent had complied with the procedural requirements as set out in the Trade Disputes Act.*
8. *The Learned Trial Judge erred in law and in fact in holding that the First Respondent has not by its acquiescence in NOT renegotiating the retirement age clause in the Collective Agreement, considered such clause to be "fair discrimination".*
9. *The Learned Trial Judge erred in law and in fact in holding that the Third Respondent was entitled to be represented by the Second Respondent.*
10. *The Learned Trial Judge erred in law and in fact when he misapplied the case of State -v- Arbitration Tribunal ; Ex parte SCC HBJ 0014 of 1999S.*
11. *The Learned Trial Judge erred in law and in fact in holding that the First Respondent could accept a trade dispute even though the matter raised Constitutional issues.*
12. *The Learned Trial Judge erred in law and in fact in holding that the First Respondent did not act contrary to the legitimate expectations of the Appellant.*
13. *The Learned Trial Judge erred in law and in fact in holding that the application for judicial review was premature.*

14. ***The Learned Trial Judge erred in law and in fact in not properly considering the various grounds for judicial review and not granting the reliefs sought.***
15. ***The Learned Trial Judge erred in law and in fact in wrongly inviting the Fiji Human Rights Commission to be amicus curiae and make submissions when this was a Trade Dispute matter and not a matter for the Fiji Human Rights Commission.***

- [16] Before considering the substantive grounds of the appeal, it is appropriate to make some preliminary observations. First, in ground 8 of the Grounds of Appeal, the Appellant's reference to "First Respondent" is difficult to understand and may be a drafting error. In both the Judicial Review proceedings in the High Court and in this appeal, the First Respondent is the Permanent Secretary. It would appear the reference should be to the Second Respondent Union. The misunderstanding appears to have arisen as a result of the Proceedings Commissioner mistakenly referring to the "First Respondent Union" which the Trial Judge adopted on page 11 of the Judgment (page 16 of the Record).
- [17] Secondly, the Appellant appears to be "confessing and avoiding", to use the language of pleadings with grounds 11 and 15. On the one hand the Appellant submits that the First Respondent should not have accepted the report of the trade dispute as it raised constitutional issues. Yet, on the other hand, the Appellant submits that the report was a Trade Dispute and not a matter for the Human Rights Commission which should not have been invited to make submissions as amicus curiae.
- [18] However it would seem that if the matter involved constitutional issues, as claimed in ground 8, then it was appropriate to hear from the Proceedings Commissioner.
- [19] Finally, ground of appeal number five raises a substantive issue that did not form part of the grounds for judicial review. In the Appellant's Application for Leave to Apply for Judicial Review paragraph 2 (d) claims that the First Respondent exceeded his jurisdiction and acted ultra vires the provisions of the Trade Disputes Act when he purported to accept the Trade Dispute on 11 July 2007. However there is no reference to the decision of the Permanent Secretary to refer the Dispute to a Disputes Committee on the basis that the Dispute was a dispute of right (as defined

in section 2 of the Act) pursuant to section 5A of the Act. The only decision made by the First Respondent that was challenged in the "Grounds for Judicial Review" was the decision to accept the report of the Trade Dispute.

[20] The essential question in this appeal is whether the decision of the First Respondent can be reviewed on the grounds in the Appellant's Notice for Judicial Review.

[21] The steps that are to be taken by the First Respondent upon receipt by him of a report of a trade dispute are set out in section 4 of the Act (as amended) which states:

"(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;*
- (g) *report the trade dispute to the Minister, who may, if he thinks fit, authorize 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 right.*

[22] In *The Chief Executive Officer for Labour, Industrial Relations and Productivity and Minister of Labour, Industrial Relations and Productivity – v- Public Service Association and Others* (unreported Civil Appeal No. 84 of 2004 delivered 11 November 2005) this Court at page 17 noted:

"In our view [the first sentence of section 4 (1)] means, in their ordinary 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."

[23] In this case the First Respondent exercised that discretion by taking step (a) and step (h). The Permanent Secretary considered the report of the trade dispute, advised the Second Respondent and the Appellant that he had accepted the report of the trade dispute and that he had referred the dispute to a Disputes Committee.

[24] As noted earlier in this Judgment, the Appellant expressly challenged the first of these two decisions and did so on a number of grounds. The Appellant claimed that there was no trade dispute and hence no grounds for the First Respondent to accept the report. The appellant also claimed that the report did not contain any grounds of any trade dispute and therefore the First Respondent should not have accepted the report. The Appellant claimed that the Third Respondent was not entitled to be represented in the Dispute by the Second Respondent and therefore the First Respondent should not have accepted the report. The Appellant claimed that as the

Third Respondent had attained the retirement age of 55 and as there was no breach of the Collective Agreement, the First Respondent should not have accepted the report. Finally, the Appellant claimed that as the report raised Constitutional issues, the matter should have been dealt with by the High Court and therefore the First Respondent should not have accepted the report.

[25] Since it has been raised as a ground of appeal (although not a ground for judicial review), we shall also consider whether the decision to refer the Dispute to a Disputes Committee was in accordance with the Act. The question is whether the Dispute as reported by the Second Respondent was a "dispute of right."

[26] Upon receipt of a report of trade dispute, the Permanent Secretary is required to consider the definition of trade dispute in section 2 of the Act as amended and the requirements of a report of a trade dispute that are specified in section 3 of the Act (as amended).

[27] In section 2 of the Act, trade dispute is defined (so far as it relevant) in the following terms:

"trade dispute means any dispute or difference –

(a) between any employer and a registered trade union recognized 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 employee;

(b)

(c)"

[28] It should be noted that the Trade Unions (Recognition) Act (Cap 96A) was repealed by section 18 (1) of the Trade Unions (Recognition) Act 1998. That Act came into effect, pursuant to section 1 (1), on the date on which the Constitution amendment Act 1997 commenced (27 July 1998).

[29] It was not disputed that the Appellant was an employer as defined in section 2 of the Act. Nor was it disputed that the Second Respondent was a trade union registered under the provisions of the Trade Unions Act Cap 96 and recognised under the provisions of the Trade Unions (Recognition) Act 1998.

[30] However, it is the use of the words "any employee" in the definition of trade dispute that gives rise to one of the significant issues in this appeal. Employee is defined in section 2 of the Act as meaning

"any person who has entered into or works under a contract of service with an employer, whether the contract is for manual labour, clerical work or otherwise, is expressed or implied, is entered into orally or in writing, and whether it is a contract of service or apprenticeship or learnership or a contract personally to execute any work or labour."

[31] The report of the trade dispute was forwarded to the First Respondent by letter dated 7 June 2007 from the Second Respondent's National Secretary. The letter stated:

"Pursuant to section 3 of the Trade Disputes Act I wish to report the existence of a trade dispute on behalf of a member of the union employed by New India Assurance Company Limited.

The dispute is between New India Assurance Company Limited as employer and the Fiji Bank and Finance Sector Employees Union acting on behalf of its member employed by the Company.

The matter in dispute concerns the termination of employment of Mrs Sulochana Raman with effect from 8 June 2007.

- 1. The employer wrote to Mrs Raman on 1 June 07 advising her that she would be "relieved from the services of the Company on 8 June 2007" as she was "attaining the age of superannuation on 9 June 2007"***
- 2. Mrs Raman advised the employer that she did not wish to retire and wanted to continue in employment.***

....

The Union views the employer's action as unfair on the grounds that it is unjust and unreasonable and constitutes unfair discrimination on the grounds of age.

...."

- [32] It was not disputed that Ms Raman (the Third Respondent) was employed as an Assistant Manager and was a member of the Second Respondent Union at the relevant time. Nor was it suggested that her membership of the Union was contrary to the Union's constitution.
- [33] It is also clear that the subject matter of the report was a dispute or difference connected with the employment or terms of employment of the Third Respondent. The dispute or difference concerned the decision by the Appellant to terminate her employment on one week's notice on the basis that she would attain the age of superannuation on 9 June 2007.
- [34] Therefore, the First Respondent was entitled to conclude that what had been reported by the Second Respondent constituted a trade dispute as defined. It was a trade dispute between the Employer and a registered trade union over the decision made by the Employer to terminate the employment of an employee who was a member of the registered trade union. It was similar to other cases of unfair dismissal that had been reported to the Permanent Secretary. However the Appellant claims that there were other matters that the First Respondent was required to consider as a matter of law. One of those matters concerned the mandatory content of a report of a trade dispute. Section 3 (2) of the Act states:

"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 arrangement for the settlement of disputes which may exist by virtue of any registered agreement between the parties to it."***

- [35] Upon a reading of the report dated 7 June 2007 that was forwarded to the First Respondent by the Second respondent, it is sufficient for this Court to indicate that the First Respondent was entitled to conclude that the report complied with section 3 (2) of the Act and was therefore entitled to consider the report and proceed to act in accordance with section 4 of the Act.
- [36] The Appellant also claimed that the Second Respondent was not entitled to represent the Third Respondent in the Dispute. The Appellant's submission was that although the Third Respondent may have been a member of the Second Respondent Union, she was, as an assistant manager, excluded from the benefits of the Collective Agreement, including union representation, by virtue of clause 3 of the Agreement and the provisions of the Trade Unions (Recognition) Act 1998 (The Recognition Act).
- [37] Clause 3 of the Collective Agreement stated:

"This Agreement forms part of the terms and conditions of employment for employees of New India assurance Company Limited to whom this agreement applies. All employees locally recruited by the Company are bound by the provisions of these instructions with the exception of management staff including:-

(i) The Chief Manager

(ii) Branch Manager and officers in Charge of Branches

(iii) Manager Development

(iv) Assistant Managers."

- [38] It is an accepted practice if not a principle, in employment relations, that once a collective agreement is in place, an employer cannot offer different terms and conditions of employment to individual union members. Therefore clause 3 enables an employer to enter into individual contracts with what may generally be termed as upper management even if they are union members. The clause clearly states the specified management staff are not bound or covered by the provisions of the collective agreement.

- [39] However that fact alone could not prevent a registered trade union representing a union member who happened to be included in the class of exempted employees. The definition of trade dispute is sufficiently wide to include such a situation. After all, the termination of the Third Respondent does raise a dispute or difference between the Appellant (the Employer) and the Second Respondent (the registered trade union) recognised under the Recognition Act that is connected with the employment of the Third Respondent (the employee).
- [40] The Appellant submitted that the provisions of the Recognition Act have the effect of limiting union representation to only those employees whose terms and conditions of employment are set out in the collective agreement. The Appellant submits that as the Third Respondent is an exempted employee, the Second Respondent cannot represent her in the reported trade dispute.
- [41] Section 3 (1) of the Act deals with the issue of who may report a trade dispute and states:

"Any trade dispute, whether existing or apprehended, may be reported to the Permanent Secretary by:

(a) or

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

- [42] The 1992 amendments to the Act introduced a definition for the word "party" as:

"party with reference to a trade dispute means a trade union of employees recognized under the Trade Unions (Recognition) Act acting for all or any number of its members in the trade dispute or"

- [43] It was not disputed that the Second Respondent was both a registered and a recognized trade union. The expression recognized trade union is defined in section 2 of the Recognition Act as:

"a registered trade union that has been accorded voluntary or compulsory recognition under this Act."

- [44] Similarly, recognition is defined as meaning "recognition for the purpose of collective bargaining."
- [45] The effect of recognition under the Recognition Act is that the trade union is entitled to be recognized as the representative of the employees who are union members for purpose of negotiating and settling the terms and conditions of employment of those members in the form of a collective agreement. It can be inferred from this that the recognized trade union can agree that certain employees who are union members may be exempted from the provisions of the collective agreement.
- [46] However does it automatically follow that those union members who are exempted employees are denied the unrelated benefits of union membership such as representation by the union in a trade dispute?
- [47] The Appellant submits that section 11 of the Recognition Act has that effect. Section 11 states:

"Upon application by an employer or a registered trade union, the Permanent Secretary may by order exclude from recognition of a trade union, any person who is employed in a confidential capacity or who represents the employer in matters affecting industrial and staff relations."

- [48] There was no evidence in the material that was before either the Permanent Secretary or the High Court that indicated that a formal order had been made. If, however, registration of the collective agreement under section 34 of the Act is to be regarded as constituting an order, then there was no material to suggest that the Third Defendant was employed in a confidential capacity or negotiated on behalf of the Appellant.
- [49] Putting that consideration to one side, it does seem to this Court that it is appropriate to distinguish between the words representation and recognition. Representation by the Union in a trade dispute is a right that arises as a result of union membership and is independent of any right that may arise under a collective agreement negotiated by a recognized trade union. Recognition is a technical statutory term that is acquired either voluntarily or compulsorily upon satisfying certain requirements. Once granted, it enables the trade union to bargain

collectively with the Employer for the purpose of negotiating a collective agreement. The fact that one or more union members are exempted by agreement from the provisions of the Collective agreement does not preclude the union from reporting a trade dispute on behalf of that member.

[50] Such a conclusion is consistent with the provisions of the 1997 Constitution that was in force at the time that this matter arose.

[51] In *Air Pacific Limited -v- Fiji Aviation Workers Association and the Permanent Arbitrator* (unreported Civil Appeal No. 6 of 2003 delivered 17 September 2004) the Supreme Court of Fiji Islands noted at page 9:

"This Court, along with all branches of Government and those performing the functions of any public office (such as the Permanent Arbitrator) must also give effect to section 33 (3) of the Constitution which provides:

Every person has the right to fair labour practices, including humane treatment and proper working conditions."

[52] Since we have concluded that the right of the Second Respondent to report a trade dispute on behalf of the Third Respondent and to subsequently represent her is not affected by either clause 3 of the Collective Agreement or by the provisions of the Recognition Act, it follows that the First Respondent acted within his power when he accepted the report of the trade dispute.

[53] The Appellant also challenged the Permanent Secretary's decision on the basis of the subject matter of the report on two grounds. First the Appellant submitted that the First Respondent had failed to take into account that there was no breach of the collective agreement. The submission implied that as a result there was no trade dispute.

[54] The Second Respondent's letter reporting the trade dispute does not refer to a breach of the collective agreement. It must be said that, in view of our earlier conclusions concerning the applicability of the collective agreement to the Third Respondent, it was necessary for the Second Respondent to avoid placing any reliance on the provisions of the Collective Agreement. Therefore the report of the

trade dispute was not concerned with clause 14 of the collective agreement and nor could it have been as it simply did not apply to the Third Respondent. As a result we agree with the Appellant on that point.

[55] However, the fact that the report of the trade dispute did not raise an alleged breach of a collective agreement does not necessarily lead to the conclusion that there is no trade dispute.

[56] There are two types of disputes that the Act (as amended) makes provision for. They are disputes of interest and disputes of rights. Disputes of rights are concerned with the interpretation, application or operation of a collective agreement. However a dispute of interest is defined in section 2 as:

"a dispute created with intent to procure a collective agreement defined under this Act and includes a dispute created with intent to procure a collective agreement or amendment to settle a new matter as defined under this Act."

[57] It is not necessary for the report to allege a breach of a collective agreement for the Permanent Secretary to accept the report as a trade dispute.

[58] What the Second Respondent alleged in its report was that the termination of the Third Respondent's employment was unfair on the grounds that "it is unjust and unreasonable and constitutes unfair discrimination on the grounds of age."

[59] Disputes alleging unfair termination which do not constitute wrongful dismissal (i.e. a breach of contract) cannot be brought as an action in the Courts. Such claims can only be pursued through the procedure provided for in the Act by reporting the matter to the Permanent Secretary as a trade dispute. Although Fiji does not have unfair dismissal legislation such as in England, to deprive an employee of any redress in such circumstances would constitute an unfair labour practice and would therefore fall foul of section 33 (3) of the 1997 Constitution. As the Supreme Court noted in the Air Pacific Limited decision (*supra*) at page 14:

"Rather that law (the law in Fiji), to put it generally, is to be found in the relevant Collective Agreement, in the common law and in section 33 of the Constitution; section 43 (2) of the Constitution may also be relevant."

[60] Secondly, the Appellant claimed that the first Respondent failed to consider that the report raised constitutional issues which should have been dealt with by the High Court and not under the Act. The report of the Dispute did claim that the termination of employment was "unfair on the grounds that it is unjust and unreasonable and constitutes unfair discrimination on the grounds of age."

[61] The report raised the issue of discrimination which does attract the provisions of section 38 of the 1997 Constitution. By claiming that the termination was unfair the report also impliedly relies upon section 33 of that Constitution. We consider that these provisions imposed obligations on all employers.

[62] Those two provisions appeared in Chapter 4 of the 1997 Constitution which was headed "Bill of Rights". Section 41 stated:

"(1) If a person considers that any of the provisions of this Chapter has been contravened in relation to him or her ... then that person ... may apply to the High Court for redress.

(2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter than the person concerned may have.

(3) The High Court has original jurisdiction:

(a) to hear and determine applications under subsection (1); and

(b)

and may make such orders and give such directions as it considers appropriate.

(4)

(5) If in any proceedings in a sub-ordinate court any question arises as to the contravention of any of the provisions of this Chapter, the member presiding in the proceedings may and must if a party to the proceedings so requests, refer the question to the High Court" (emphasis added).

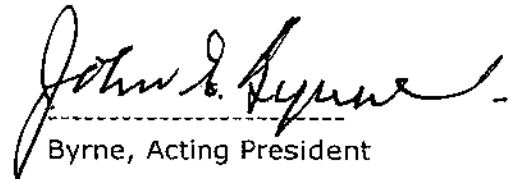
- [63] Although section 41 states that the High Court has original jurisdiction to hear and determine such applications, it does not state that the High Court has exclusive jurisdiction in respect of such applications. The words used in section 41 (2), when given their ordinary and plain meaning, allow a person to pursue the matter under section 41 without prejudice to any other action with respect to the matter that the person may have. The word "action" is not defined in the 1997 Constitution. In the absence of any restrictive definition that word should be given a construction according to its ordinary meaning. It should therefore be interpreted as including action that may be taken by a person pursuant to a statutory right to pursue through a trade union a trade dispute that raises a matter that at the same time may also be the subject matter of an application under section 41 for redress.
- [64] The wording of section 41 (5) also supports the conclusion that the High Court does not have exclusive jurisdiction in relation to such matters. Under that section there is a discretion given to the presiding member to refer a question arising under a Chapter 4 provision to the High Court. That discretion is somewhat fettered in the event that one of the parties to the proceeding requests that the issue be referred to the High Court.
- [65] In the present case, the Appellant was invited by letter dated 11 June 2007 from the First Respondent to respond to the report of the trade dispute. There was no response by the Appellant and the First Respondent accepted the report in a letter dated 11 July 2007 addressed to both the Appellant and the Second Respondent.
- [66] The time for making an application under section 41 (5) would have been either at the proceedings before the Disputes Committee or perhaps more appropriately during the proceedings before the Arbitration Tribunal.
- [67] Under the circumstances it was not improper for the Permanent Secretary to have accepted the report on the ground that it raised issues that could also have been the subject of an application under section 41 of the 1997 Constitution.
- [68] In its ground for judicial review the Appellant also claims that First Respondent acted contrary to the legitimate expectations of the Applicant in that he failed to reject the report of the Trade Dispute when it was obviously wrong. He did not follow his usual practice.

- [69] For the detailed reasons already stated we do not agree that the First Respondent had accepted the report of a Trade Dispute that was obviously wrong.
- [70] On the assertion that the First Respondent did not follow his usual practice, we note that there was no material before the High Court for it to determine what the Appellant asserted to be the usual practice followed by the First Respondent.
- [71] Without repeating our reasons we do not accept that the First Respondent had acted arbitrarily or unreasonably.
- [72] we therefore agree with the learned Judge that the First Respondent did not commit a reviewable error when he accepted the report of the trade dispute lodged by the Second Respondent in respect of a grievance concerned with the Third Respondent's employment with the Appellant.
- [73] The question of whether the First Respondent's decision to refer the dispute to a Disputes Committee is to some extent now academic. The Trade Disputes Act has since been repealed and replaced by the Employment Relations Promulgation 2007 (the Promulgation).
- [74] However, on the basis of the definitions of "dispute of interest" and "dispute of right" in section 2 of the Act (as amended) and in view of the effect of clause 3 of the Collective Agreement, it does seem to us that the dispute should be regarded as a "dispute of interest". As such the First Respondent should have considered referring the dispute to a conciliator pursuant to section 4 (1) (d) of the Act as amended, rather than to a Disputes Committee.
- [75] The matter should be remitted to the First Respondent to be processed in accordance with the requirements of section 170 of the Promulgation. Fortunately, this is one of those rare matters that is covered by the limited transitional arrangements that are set out in Regulation 58 of the Employment Regulations (administration) Regulations 2008.
- [76] we also observe that after all the time that has elapsed the parties may take the view that the appropriate way forward is to negotiate a settlement based on the observations in this judgment in respect of the First Respondent's decision to accept the report of the Third Respondent's grievance.

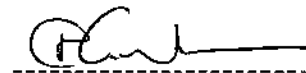
[77] As the Appellant has substantially failed in this appeal, we consider it appropriate to award costs to the Respondents in the sum of \$2000.00 each.

[78] It is ordered that:

1. Appeal dismissed.
2. The Appellant to pay costs fixed at \$2000 to both the First and Second Respondents (Total \$4000)


Byrne, Acting President




Goundar, JA


Calanchini, JA

Solicitors:

Messrs Sherani & Co, Suva for the Appellant

Office of the Solicitor-General, Suva for the First Respondent

Messrs Kohli & Singh, Suva for Second & Third Respondents