IN THE COURT OF APPEAL
FIJI ISLANDS AT SUVA

(Civil Appeal No. ABU 0020 of 2009)

[On appeal from the High Court of Fiji at Suva in Judicial Review No. HBJ 3 of 2004]

BETWEEN	:	**CORAL SUN LIMITED** APPELLANT
AND	:	**PERMANENT SECRETARY FOR LABOUR, INDUSTRIAL RELATIONS AND PRODUCTIVITY** 1ST RESPONDENT
AND	:	**MINISTER FOR LABOUR, INDUSTRIAL RELATIONS AND PRODUCTIVITY** 2ND RESPONDENT
AND	:	**FIJI SUGAR AND GENERAL WORKERS UNION** 3RD RESPONDENT
CORAM	:	Byrne, A.P.
	:	Wati, J.A.
COUNSEL	:	J. Apted for the Appellant
	:	Ms. K. Naidu for the 1st and 2nd Respondents
	:	H. K. Nagin for the 3rd Respondent
DATES OF HEARING And SUBMISSIONS	:	17th May and 15th September 2010
DATE OF JUDGMENT	:	19th October 2010

JUDGMENT OF THE COURT

[1] This appeal is from a judgment of the High Court of Mr Justice Jitoko delivered on the 9th of November 2006.

[2] The judgment was given on a judicial review brought by Coral Sun of the following three decisions:-

(a) The decision of the first respondent to issue a Compulsory Recognition Order (CRO) dated 1st September 2003 against Coral Sun, and in favour of the 3rd respondent, the Fiji Sugar General Workers Union (FSGWU).

(b) The decision of the 2nd respondent (The Minister) purportedly made under Section 6 (4) of the Trade Disputes Act Cap. 97 and dated 4th December 2003, reciting that the Permanent Secretary, having on 21st November 2003 referred a reported Trade Dispute over Coral Sun making three workers redundant on 17th November 2003 to a Disputes Committee under the Act, Coral Sun was engaging in a lock-out which the Minister declared to be unlawful from 18th November 2003 and which the Minister prohibited from one hour after Coral Sun received the order. ("The First Lock-Out Order) of 4th December 2003 regarding the three workers").

(c) The decision of the Minister purportedly made under Section 6(4) of the Trade Disputes Act Cap 97 and dated 24th December 2003 reciting that the Permanent Secretary having, on 22nd of December 2003 referred a reported trade dispute over Coral Sun deciding to make 41 workers redundant on 17th November 2003 to conciliation, Coral Sun was engaging in a lock-out that the Minister declared to be unlawful from 22nd December 2003 and which the Minister prohibited from one hour after Coral Sun's receipt of the Order ("The Second Lock-Out Order of 24th December 2003 regarding the 41 workers")

[3] In the Court below, Coral Sun had, in its amended Notice of Motion set out at pp.148-150 of the Supplementary Court Record (SCR)in relation to the Minister's first and second lock-out decisions, sought the following declarations and on the following grounds:-

(a) "That the Minister for Labour and Industrial Relations and Productivity was wrong in exercising the powers under Section 6(4) of the Trade Disputes Act and in making the orders of 4th December and 24th December 2003 when in fact there was no lock-out in its proper sense in existence because three employees had been made redundant and others employed were properly terminated in terms of the Contract of Employment and the provisions of Section 6(4) of the Trade Disputes Act were not applicable having regard to the facts and circumstances of the case.

(b) That the Order made by the Minister is wrong unlawful and/or in excess of the Minister's power and/or constitutes an abuse of power because on the proper construction of Section 6 of the Trade Disputes Act the provisions of Section 6(1) to 6(3) of the Trade Disputes Act and those machineries have been lawfully and properly put in motion, the Order is invalid and of no force or effect".

[4] In his Judgment, the Learned Judge ordered *inter alia* that:

(a) The Applicant's claim for judicial review of the Permanent Secretary for Labour, Industrial Relations and Productivity's decision of the Compulsory Recognition Order (No.12) of 2003 is of no merit and therefore dismissed;

(b) The Applicant's claim for Judicial Review of the Minister for Labour, Industrial Relations, and Productivity's decision on the Lock-Out of 4th and 24th December 2003 is without merit and therefore dismissed;

(c) Each party to bear its own costs.

[5] The appeal is concerned only with Order (b) which relates to the Minister's first lock-out order of 4th December 2003 concerning the three workers and the second lock-out Order of 24th December 2003concerning the 41 workers. It is not concerned with Order (a) regarding the Permanent Secretary's making of the CRO or with Order (c) regarding costs.

THE RELEVANT BACKGROUND TO THIS APPEAL

[6] The 3rd Respondent (the Union) had its members employed by the Appellant. The Union wrote to the Appellant on 1st July 2003 seeking "voluntarily recognition" in relation to the terms and conditions of employment pursuant to Section 3 of the Trade Union's Recognition Act 1998.

[7] Section 3(1) says: where there is -

(a) A registered Trade Union of which more than 50 percent of the persons eligible for membership and employed by an employer are voting members; and

(b) No other registered Trade Union claiming to represent those persons, that Trade Union is for the purpose of collective bargaining entitled to recognition by the employer in accordance with a voluntary recognition agreement executed between the employer and the Trade Union.

[8] The purpose of Section 3(1) is to promote and allow Collective Bargaining between an employer and its employees and to protect the interest of the workers. Any such application received by the employer has to be in writing and delivered to its registered office with a copy to the Permanent Secretary in accordance with sub-section 2. Pursuant to sub-section 3, an employer must respond to the Union within seven days. In the present matter the whole dispute

arose when the Appellant failed to comply with Section 3(1) of the Trade Unions Recognition Act 1998 when it failed to respond to the Union within seven days.

[9] Accordingly the Union chose to act under Sub-section(4) which states:

> "A registered Trade Union which has applied for recognition by an employer under Subsection (1) but –
>
> (a) Has been refused recognition by the employer ; or
> (b) Has not been accorded recognition by the employer within one month of the application;
> (c) May apply to the Permanent Secretary for the issue of a Compulsory Recognition Order under Section 8.

[10] The Permanent Secretary issued the CRO on 1st September 2003.

[11] The appellant did not recognise the Order and neglected to negotiate with the Union regarding the terms and conditions of the Employees' Contracts or on a Collective Agreement. On 20th November 2003, the Union wrote to the Permanent Secretary reporting the existence of a Trade Dispute between the appellant and the Union.

[12] On 4th December 2003, the Minister issued a Prohibition Order declaring that the lock- out of the three employees was unlawful.

[13] On 16th December 2003, the Union reported another Trade Dispute involving the terminating of 41 employees of the Appellant. The reason for reporting the dispute was that the Appellant had failed to negotiate with the Union before terminating the 41 employees and had breached the provisions of the CRO.

[14] The Permanent Secretary had accepted the second Trade Dispute and appointed the Ministry's Principal Labour Officer to act as a Mediator and Conciliator. On 24th December 2003, the Minister issued another Prohibition Order declaring that the lock-out of the other 41 employees was unlawful.

[15] Following this the Appellant made an application for Judicial Review in the High Court seeking declaratory relief against all three decisions on the grounds that the Permanent Secretary's decision was irrational, illegal and contrary to fair procedure. Mr Justice Jitoko heard the application and in a 28-page judgment held that there were no irregularities by the Permanent Secretary and the Minister and upheld the three decisions and dismissed the application for Judicial Review.

[16] From that judgment the Appellant has appealed to this Court on six grounds. They are:

> "(1) The Learned Judge misdirected himself or erred in law in construing section 6(4) of the Trade Dispute Act Cap. 97 and in finding that the Orders made by the Second Respondent ("the Minister") declaring there to be unlawful lockouts on 4th and 24th December 2003, by failing to consider and apply the definition of "lock-out" in Section 2 of that Act."
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> (2) The Learned Judge misdirected himself or erred in law in holding:
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> (a) That the termination of the employment of union members for redundancy and arising out of their abandonment of their employment with the employer, although in accordance with 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 against the Appellant and in favour of the Third Respondent and its members was to require that this termination of employment should have been negotiated with the Union;

(c) That the Compulsory Recognition Order 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 Unions (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 implicitly that the terminations of employment for redundancy and abandonment 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 lockouts 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 in holding that "the delay in the appellant's 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 lockout 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 1998, when the Minister's decisions, which were challenged in the Judicial Review were not expressed to be made under that Section and when, in any event, the provisions of the Section had not been satisfied."

[17] When argument began before this Court, Counsel for the appellant stated that the appeal concerned only one narrow legal issue and that was whether the Court below and the Minister correctly construed the ambit of the discretion or powers conferred by Section 6(4) of the Trade Disputes Act read in the context of the Act as a whole and whether the exercise of the discretion under Section 6 (4) fell within the jurisdictional powers conferred by the Section.

[18] The continuing relevance of this appeal is that the lock-out orders are the subject of an action in the High Court at Lautoka against the Appellant so that this appeal has a direct bearing on that case.

[19] We now consider these grounds in their order.

Ground 1

This alleges that the Minister acted in excess of his jurisdiction or powers in making the first and second lock-out orders because the conditions imposed by the legislature on the exercise of his discretion had not been met.

[20] In *Anisminic Ltd v. Foreign Compensation Commission (1969)2 AC 147, 195B-C,* Lord Pearce said (in relation in that case to a tribunal but which principle is accepted as applying generally to any statutory decision-maker) –

> "Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry."

[21] At 207D-E, Lord Wilberforce said –

> "In every case, whatever the character of a tribunal , however wide the range of questions remitted to it, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute: at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited. There is always an area, narrow or wide, which is the tribunal's area; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter."

[22] It is well established that the ambit of a decision–maker's powers is to be construed from the Act as a whole and if he or she exceeds the power, a Court may quash the decision.

[23] In *Padfield v. Minister of Agriculture, Fisheries and Food(1968) AC 997, 1030B*-D, Lord Reid said –

> "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the

> Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act of for some other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court."
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> At 1032G to 1033A, he said –
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> "The Minister's duty is not to act so as to frustrate the policy and objects of the Act."

This view was endorsed by Lord Pearce at 1054 G who said:

"It was for the Minister to use his discretion to promote Parliament's intention".

[24] There have been numerous other statements to this effect in our Case Law and we need not mention them. However, we must mention the statement of Lord Hodson in *Ridge v. Baldwin (1964) AC 40, 136,* who said –

> "Where there is a want of jurisdiction as opposed to a failure to follow a procedural requirement, the result is a nullity."

[25] Coral Sun submits that when Section 6(4) is read in the context of the Trade Disputes Act as a whole –

(a) the Minister's power was limited to declaring an illegal lock-out where the circumstances then existing on the date of the Order were those specified in Section 6(4) itself i.e. namely-

(i) A trade dispute had already been referred to a Tribunal, conciliation or a Disputes Committee;

(ii) There was in existence on the day of the reference of the trade dispute to a Tribunal, conciliation or Disputes Committee, a lock-out (as defined in section 2) which was "connected with" the dispute referred:

(b) A lock-out as defined in section 2 of the Act would only exist if –

(i) The employer had closed a place of employment or suspended work or refused to continue to employ any number of persons employed by him;

(ii) The employer's action had been done in consequence of a trade dispute i.e. it was subsequent to and secondary to a trade dispute and was not the subject of the trade dispute itself;

(iii) The employer's action did not involve the intention of "finally determining employment";

(iv) But instead the employer's action had been taken with the view to compelling those persons (or to aid another employer to compel persons employed by him) to accept terms and conditions of or affecting employment (presumably in relation to the matter in dispute in the trade dispute).

(c) In this case the Minister usurped the jurisdiction conferred by the Act on other decision-makers and in effect pre-determined the Trade Dispute.

[26] The Appellant argues that there was no evidence before the Learned Judge or the Minister to suggest that Coral Sun did not intend to finally determine the employment of the relevant workers but rather that the evidence was that it did intend to do so.

[27] Also there was no evidence that Coral Sun was trying to compel anyone to accept terms and conditions of employment, a requirement of the definition of lock-out in Section 2 of the Trade Disputes Act. The first three workers were terminated for redundancies and the other 41 as a result of not attending work as required by the employment contract.

We are of the view that there was no evidence before the Minister or Jitoko, J to justify a contrary conclusion.

[28] In respect of the first trade dispute we are of the opinion that no trade dispute had been referred to a Disputes Committee. As of 21st November 2003, the Permanent Secretary had only invited the parties to make recommendations for members of the Committee. It had not been constituted and never was. In our judgment therefore the dispute could not have been referred to a Committee.

[29] By a letter dated 4th December 2003, the Acting Permanent Secretary, Mr Saverio Baleikanacea, wrote to the Third Respondent with a copy to Coral Sun advising that he had accepted the report of a trade dispute over the three redundancies under Section 41(a) of the Trade Disputes Act. Relevantly the letter stated among other things –

> "In terms of Section 4(1)(a) of the Trade Disputes Act, Cap 97, I have accepted the report of the trade dispute and shall refer the dispute to a Disputes Committee constituted by me under the provisions of Section 5A(1) of the Trade Disputes Act, Cap 97 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 to the Committee. By a copy of this letter Coral Sun Fiji Limited is also being asked, in accordance with Section 5A(2)(c) of the abovementioned Act to recommend an independent person to represent the Company 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 recommendations be with me within 14 days from the date of this letter."

[30] We have emphasised the expression "shall refer" and the verb "constituted" because in our opinion no dispute had been referred to a Disputes Committee

and could not have been until it was constituted or established. The verb "constitute" in the Oxford dictionary means to do something such as "does an activity constitute a criminal offence".

[31] In our judgment the effect of this letter and the only interpretation which could be placed on it was that the Acting Permanent Secretary **intended** to refer the Trade dispute to the Disputes Committee, but only after the Disputes Committee was formed or constituted following receipt of recommendations of members of it from Coral Sun and the Union within the following 14 days.

[32] We are re-inforced in this view by the statement of Brian Singh the then Permanent Secretary in an affidavit which he swore on 6th of April 2004 in opposition to the application for judicial review. In paragraph 6 Mr Singh stated that the Disputes Committee was not able to sit and hear the dispute because both the union and the employer failed to submit nominations to the Disputes Committee within the required time. It follows therefore in our view that there was no referral to a Disputes Committee because no nominations had been made to it by the Appellant and Third Respondent. The Minister therefore had not referred anything to a Disputes Committee because there was none established.

[33] Coral Sun submits not that it was entitled to an oral hearing to put its case to the Minister before he could decide whether to accept the report of an industrial dispute but simply to allow Coral Sun the opportunity of giving the Minister relevant information as to the circumstances on which the employees were terminated or made redundant. Had he done so, the Minister may have refused to accept the report of an industrial dispute. The Minister acted only on the allegations of one party, the Union. In our judgment he was obliged as a matter of fairness to at least ascertain from Coral Sun the circumstances of the redundancies and dismissal.

[34] In *Kioa v. West (1985) 159 C.L.R 550* which was an Immigration case in the High Court of Australia, Mason, J discussed some of the situations in which natural justice had to be observed when dealing with a decision of a delegate of the Minister for Immigration to deport two Tongan citizens who were the parents of a daughter who was an Australian citizen. At pp 584 - 585 he said that the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute and mentioned the remark of Kitto, J in *Mobil Oil (Australia) Pty Ltd. v. Federal Commissioner of Taxation (1963) 113 C.L.R. 475 at pp 503 - 504* that the obligation to give a fair opportunity to parties in controversy to correct or contradict statements prejudicial to their view depends on the particular statutory framework

[35] Mason, J then continued at page 585 that the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. He said "When the doctrine of natural justice or the duty to act fairly in its application to administrative decision-making is so understood, the need for a strong manifestation of contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is: "What does the duty to act fairly require in the circumstances of the particular case?"

[36] The Trade Disputes Act Cap 97 was stated to be an Act to make Provision for the Settlement of Trade Disputes and the Regulation of Industrial Relations.

[37] In our judgment the regulation of Industrial Relations can only be effective and fair if those persons on whom the duty to regulate such relations rests are seen to act fairly to all parties concerned in an industrial dispute.

[38] The Trade Disputes Act has now been repealed and succeeded by the Employment Relations Promulgation of 2nd October 2007. This is a far-reaching

law and recognises that the previously existing employment laws had in many ways become outdated and there was thus need for a change.

[39] By Section 170 of the Promulgation the Permanent Secretary has the power to accept or reject a dispute reported to him or her within 30 days from the date of receiving the report of dispute. By sub-section 2, the Permanent Secretary must:

(a) Inform the parties that he or she accepts or rejects the disputes; and

(b) Give reasons for rejecting a dispute.

In the instant case had the Minister taken the opportunity to consult Coral Sun as to its reasons for terminating the employees he may well have concluded that the company had not locked them out. In failing to do so, we consider that he misdirected himself and accordingly his reference to conciliation cannot be upheld as a matter of law. We therefore uphold Ground 1 of the Grounds of Appeal.

[40] Turning now to Grounds 2 and 3, in our judgment again the Learned Judge erred in law in his reasons for holding that the CRO had been breached by the appellant. In our judgment the CRO only required Coral Sun to bargain over a collective agreement or a revision or renewal of one. It did not require Coral Sun to bargain over individual cases of employment termination. His finding therefore that there were no lawful terminations cannot be sustained and we therefore also uphold Grounds 2 and 3.

[41] The Third Respondent argues that this Court in dealing with an injunction appeal concerning the same parties, *Coral Sun Limited v. Fiji Sugar and General Workers Union ABU 008 of 2004* was critical of the Appellant but not, in our view, in the ways suggested by the Third Respondent. At page4

of its judgment the Court said inter alia, 'Prima facie Coral Sun's action in locking out 41 employees was both precipitate and provocative and such evidence as there is indicates at least on a prima facie basis that Coral Sun is quite unwilling to negotiate with the Union, to terms of the order notwithstanding". We make two comments about that statement first, it will be noted that the Court was very guarded in the language which it used and secondly it assumes that the 41 employees were locked out. For reasons which we have given we cannot agree with that statement.

[42] It may be true as the Third Respondent suggests in paragraph 6.2 of its additional submissions that the Minister could not finally decide the Trade Dispute but could only make the order provisionally on the basis of what appeared to him and what was best pending the resolution of the dispute. However, in our view to accept only the claim of one party without giving the opportunity to the other party to state its position can only mean that the decision of the Minister, upheld by Jitoko, J, had been made without obtaining the view of Coral Sun and was thus flawed. He may have rejected Coral Sun's claims but at least in our judgment the company should have been given the chance to state its side and it was not. We therefore also uphold grounds 2 and 3.

[43] Even if the order was only provisional, practically it meant that Coral Sun had to obey immediately when doing so was contrary to what was a commercial decision which may have affected the company's financial interests. We cannot bring ourselves to accept that justice required that only the interests of the Union were to be recognised even if on what might be a temporary basis. We therefore uphold grounds 2 and 3.

Ground 4

[44] Ground 4 alleges a breach of the rules of natural justice by the Minister. We have already dealt with this ground in our comments on Grounds 1, 2 and 3 and need say no more here except that we uphold this ground also.

Ground 5

[45] Neither the Permanent Secretary nor the Minister, nor the Third Respondent's submissions addressed these grounds substantively. In the case of the 1st and 2nd Respondents no submissions were made at all in this Court. The 3rd Respondent merely states that the grounds have no merit whatsoever and cannot in any manner affect the decision made by the Minister in relation to the lock-out. We do not agree with the latter's submissions. The learned judge considered that the delay by the appellant in challenging the CRO was relevant to whether the Minister had lawfully exercised his powers under Section 6(4). In our view the existence of a legal challenge to the CRO, albeit nearly four months after it was issued, is not relevant to the question whether the Minister had lawfully exercised his powers under Section 6(4). The existence of a legal challenge to the CRO is not mentioned as a basis for relief in Section 6(4) and in the definition of lock-out in Section 2. Thus we uphold Ground 5 also.

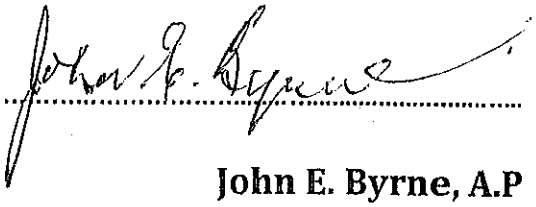
Ground 6

[46] The Learned Judge mentioned Section 14 of the Trade Union's Recognition Act 1998 as being relevant to whether or not there had been a lock-out but this overlooks the fact that the orders by the Minister were made not under Section 14 of the Trade Union's Recognition Act but Section 6(4) of the Trade Disputes Act and, even if Section 14 of the Recognition Act might be considered in some way relevant to the issues before this Court, we respectfully disagree. In our judgment Section 14 would apply only until recognition under the Act had been obtained. In this case, recognition had been obtained on 1st

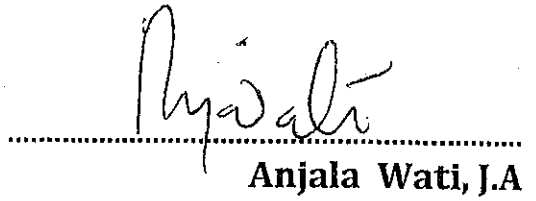
September 2003. Consequently Section 14 cannot apply to the facts of this case. We accordingly uphold Ground 6.

[47] For the reasons we have given we uphold the appeal and order the respondents to pay the Appellant's costs which we fix at $10,000.00.

Dated at Suva this 19th day of October 2010.



John E. Byrne, A.P



Anjala Wati, J.A