IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

JUDICIAL REVIEW NO. 2 OF 2004

Between:

STATE

v

THE PERMANENT SECRETARY FOR LABOUR INDUSTRIAL RELATIONS AND PRODUCTIVITY

Respondent

Ex parte: SPOR (FIJI) LIMITED

Applicant

NATIONAL UNION OF HOSPITALITY CATERING & TOURISM INDUSTRIES EMPLOYEES

Interested Party

Mr. J. Apted for the Applicant
Ms. M. Vuibau for the Respondent
Mr. V. Naidu for the Interested Party

Date of judgment: 28th February 2006

JUDGMENT

This is an application for judicial review by Spor (Fiji)' Limited (which trades as 'Turtle Island Resort') (hereafter referred to as "Turtle[1]")-

Decision impugned

Pursuant to leave granted to Turtle to apply for judicial review, the **decision impugned** is that of the then Permanent Secretary for Labour, Industrial Relations and Productivity ('PSL') made on 22 January 2003 to grant the **Interested Party,** the **National Union of Hospitality, Catering and Tourism Industries Employees** (the **"Union")** a compulsory recognition order ('CRO[1]') under section 8 of the **Trade Unions (Recognition) Act 1998** (the **"Recognition Act")** requiring Turtle to recognise the Union for the purpose of collective bargaining. It is to be noted that originally, Turtle applied for judicial review **of** a subsequent decision by the Permanent Secretary in these proceedings refusing to determine whether the Union remained entitled to recognition within section 10 of the Act. Mr. Apted says that as the PSL changed his mind and carried out the determination Turtle is no longer seeking judicial review of that subsequent decision.

I have before me for my consideration the affidavit of Richard Evanson, the Managing Director of Turtle in suppoit of the application and an affidavit in reply from Brian Singh, the Respondent. Although the Interested Party applied to file affidavit in Reply out of time, its counsel failed to appear to pursue it. Hence it was struck out for want of prosecution and also it was objected to by the applicant's counsel.

As ordered both counsel filed written submission and they relied on them.

The reliefs sought

The reliefs sought are as follows (as stated in applicant's application p.2):

/. *An Order of Certiorari to remove into this Court and quash the First Decision;*

2. *A Declaration that the First Decision is invalid, void and of no effect because the Respondent erred in fact and in law and acted in breach of natural justice in coming to the First Decision insofar as he-*

fa) ***in*** *calculating the number of "voting members" of the Union, who were in the employment of by the Applicant, for the purpose of determining the Union's entitlement to recognition by the* ***Applicant,*** *wrongly included persons who had paid no entrance fee or subscription to the Union as required by the Union's constitution and rules;*

(b) *wrongly determined that, of the persons in the employment of the Applicant on 7 November 2002, there were 84 "voting members" of the Union;*

(c) *wrongly determined that more than fifty percent of the persons who were in the employment of the Applicant and who were eligible to be voting members of the Union, were "voting members" of the Union on 7 November 2002;*

(d) *wrongly declared by the First Decision that the Union was therefore entitled to be accorded recognition by the Applicant under the Trade Unions (Recognition) Act, 1998; and*

(e) *failed to allow the Applicant an opportunity to be heard prior to reaching the First Decision.*

5. *Further,....., a Declaration that in all the circumstances, the First Decision.....* **is** *invalid, void and of no effect on the ground that it is so unreasonable, no reasonable Permanent Secretary for Labour, Industrial Relations & Productivity could have come* ***to*** *it.....*

Grounds of review

The grounds and the **issues** in this case are as follows (as in the application):

(a) *in respect of the First Decision, whether the Respondent has correctly appreciated and discharged his statutory and administrative law duties under section 3 and 8 of the Trade Unions (Recognition) Act, 1998 in -*

(i) *treating various employees* ***of*** *the Applicant as "voting members" of the Union for the purposes of determining the Union's entitlement to recognition by the Applicant for the purposes of collective bargaining, when the employees had not paid any entrance fee or subscriptions to the Union as required by its constitution and rules; and*

(ii) *failing to accord the Applicant an opportunity to be heard before making the First Decision;*

Consideration of the application

(i) Background facts

This application for judicial review is. to be considered in the light of the background facts of the case which have been well summarised by counsel for the applicant in his written submission which are, inter alia, as follows:

*On or about 7 November 2002, Turtle received an application from the Union for voluntary recognition under section 3(1) of the Recognition Act (a copy is annexed to RE's Affidavit marked "**RE1**"). The Union claimed to have recruited more than 50% of Turtle's employees as voting members.*

Turtle did not grant voluntary recognition as it did not believe that the Union had the necessary 50% membership among Turtle 's employees required by section 3(1) of the Recognition Act to establish entitlement ***to*** *recognition. This belief was based on the fact that various employees were in the process of registering an in-house staff association and had indicated to Turtle that they wished to bargain collectively with it through this association.*

The Turtle Island Staff Association became registered under the Industrial Associations Act, Cap, 95 with effect from 18 November 2002 and all eligible employees became members soon thereafter.

On or about 7 December 2002, Turtle became aware that the Union had applied to the Permanent Secretary for Labour for ***a*** *CRO against Turtle.*

On 13 December 2002, Turtle's solicitors, Munro Leys, wrote to the Permanent Secretary for Labour reserving Turtle's right to be heard on the Union's application for a CRO before the Permanent Secretary for Labour made any decision on it.

In January 2003, a Labour Officer visited Turtle and inspected its records for the purpose of determining the Union's eligibility for compulsory recognition. This inspection was pursuant to section 6 of the Recognition Act. An inspection of the relevant records of the Union was also carried out at around this time.

Shortly after this, Turtle's Managing Director, Mr. Richard Evanson received reports from some employees that the Union had included them among the list of Union members it had submitted to the Permanent Secretary for Labour when they had not signed any forms or done anything which was consistent with joining the Union. They were told to make a complaint to the Police. Mr. Evanson was also informed that many employees had never paid any money to join the Union.

On 22 January 2003, Turtle's solicitors, Munro Leys, wrote to the Permanent Secretary for Labour requesting him to verify this information before determining whether the Union was entitled 'to a CRO and requesting him to advise on the outcome of that process before making any CRO (a copy of this letter is annexed to RE's Affidavit makred "RE5 ")

Neither-Turtle nor Turtle's solicitors ever received a reply to that letter. Instead, on the same day. Turtle received a copy of the CRO made by the Permanent Secretary for Labour declaring that the'Union was entitled to recognition by Turtle and that Turtle must accord it such recognition (a copy is annexed to RE's Affidavit marked "RE6 ").

Apart from the inspection carried out by the Labour Officer of Turtle's records, and despite its solicitors' letters of 13 December 2002 and 22 January 2003, Turtle was never given any opportunity to be heard by the Permanent Secretary for Labour prior to his decision to make the CRO.

Later it came to light in another case that the alleged members' membership fees were paid by the Union which it is submitted by the applicant is contrary to **section 10** of the **Trade Unions Act Cap. 96.** Also sections 64 and 65 forbid the Union to finance its own membership.

It is Mr. Apted's submission that the facts as stated above shows that the Labour Officer and PSL concluded on the basis of the Union's claim that it was entitled to pay member's fees, that of the 153 persons in Turtle's employment on 7 November 2002, there were 84 "voting members*' **of the"Union,** that the Union

therefore had as its "voting members" 54.9% (i.e. more than 50%) of the persons employed bv Turtle and eligible to be members of the Union and the Union is entitled to recognition under the Recognition Act.

(ii) Principles pertaining to judicial review

In considering a judicial review application there are certain principles which ought to be borne in mind.

In a judicial review the **Court** is concerned "not with the decision but with decision-making process. Unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power" **(Lord** Brightman in **Chief** Constable of the North Wales Police v Evans [1982] 1 **W.L.R.** 1155 at 1173]. Further in that case Lord Hailsham at 1160 commented on the purpose of the remedy under Order 53 as follows which is apt:

> *"**This** remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual, against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner."*

In the instant case the applicant raised a number of grounds for Court's determination and I shall consider them in the light of the above principles.

The factors which should not be lost sight of in considering the review of a decision are set out in the following passage from the judgment of Lord Lane

C.J. in **Regina v Immigration Appeal Tribunal, ex parte Khan (Mahmud)** (1983) 2 W.L.R. 759 at 762-3 which is apt:

> *"Where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis upon which they have reached their determination upon that issue, then that is a matter which will be very closely regarded by this court, and in normal circumstances will result in the decision of the tribunal being quashed. The reason is this. A party appearing before a tribunal is entitled to know, either expressly stated by the tribunal or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not. Secondly, the appellant is entitled to know the basis offact upon which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it many not".*

(Hi) **Error of fact and law**

In this case there clearly was an error of fact and law.

It has now turned out that the respondent proceeded to ascertain the membership of Turtle when the true facts were not divulged to the respondent when it made inquiries.

Further, it was unlawful for the Union to pay 'entrance fee[1] itself to make the employees of Turtle its members.

The fifty per cent (50%) requirement is set out in **section 8** of the **Trade Unions (Recognition) Act Cap. 96A** (the **'Recognition Act')** which is as follows:

> *"Compulsory recognition order*

8, - (1) The Permanent Secretary, on receipt of an application under section 3(4), must consider the application, taking into account ***all*** *the facts and circumstances appearing to be relevant and may, subject to section 11, make a compulsory recognition order -*

(a) declaring that a registered trade union is entitled to recognition; and

(b) specifying the manner in which the employer is to accord recognition to the trade union."

Further there is provision under subsection 3(4) of the Recognition Act to apply to the Permanent Secretary for the issue of compulsory recognition under section 8. **Subsection** 3(4) provides:

"(4) 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 1 month of the application;

may apply to the Permanent Secretary for the issue of a compulsory recognition order under section 8".

As Mr. Apted submits, which I accept, sections 3 and 8 show that in order to qualify for a CRO, a union must, as a necessary minimum, meet the qualification in subsection 3(l)(a) for entitlement to recognition i.e. have more than 50% of the persons eligible for membership and employed'by the particular employer as "voting members'*.

In this case the Union did not qualify for a Compulsory Recognition Order ('CRO") and the PSL was not entitled to make one, unless the Union **in fact** and **in law,** meets the 50% qualification in subsection 3(l)(a) which provides:

"3. - (I) Where there is -

(a) a registered trade union of which more than 50% 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. " (our emphasis)

The Respondent **(PSL)** in this case erred in calculating the total number of Union's "voting members'. Consequently, he erred in evaluating that the Union met the 50% qualification and holding that the Union was entitled to recognition, and in making the **'CRO**

The Respondent made an error both in fact and in law for he proceeded on the basis that he was told by the Union executives, in response to inquiry by his Labour Officer that the employees had not actually paid the entrance fee but that it w^as "advanced by the Union"' and that this was permitted by the Union's constitution and rules as a consequence the Respondent treated the employees as "voting members" and determined that the Union met the necessary 50% membership requirement.

This was completely against the provisions of the Trade Unions Act and the Rules of the Union.

In these circumstances one can come to no other conclusion but that the Union's claim and the Respondent's belief that the union could fund its own membership was **ultra vires** clause 64 of the Constitution and Rules of the Union and section 50 of the Trade Unions Act which do not permit the Union to use its funds to fund new membership; section 18(i) of the Union's Constitution and Rules is also specific on the payment of subscriptions by members. It provides:

> *"18. (i) It shall be the duty of each member to see that his/her subscriptions are paid regularly. The responsibility for keeping payments of subscriptions up to date shall rest with the members and not with any officer of the Union."*

The process by which the Respondent reached his decision was clearly wrong. It is a blatant disregard of the **rules of natural justice. Lord Diplock** in **Mahon v Air New Zealand Ltd** (1984) A.C. 808 at pp.820-821 delivering the judgment of the Privy Council, said as follows in relation to a person making a finding in the exercise of an investigative jurisdiction:

> *"**The** second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made: ....The second rule requires that any person represented at the inquiry who **will** be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result"*

It has been held that **"judicial review is required to put right a situation where things have gone wrong and an injustice requires to be remedied" (Woolf L.J.** in **R v Woherhampton Coroner, ex p McCurbin** [1970] 1 WLR 719). This is such a case.

I find that there has also been a **procedural impropriety.** The Respondent not only ignored the Constitution and Rules of the Union and the provisions of the Trade Unions Act referred to above, but it did not conduct the inquiry as to membership properly.

The applicant wanted to be heard on the issue but the Respondent ignored it. This is a clear cut case **of denial of natural justice** to the applicant to which it was entitled. Had the Respondent given the opportunity to be heard, the situation the parties are in today would possibly not have arisen and if anything membership issue would have been properly resolved.

The actions of the Respondent are certainly **ultra vires as he failed** to comply with the requirement of certain statutes and by common law.

In any view of a decision the court is concerned to **evaluate fairness. [Lord Hailsham L.C.** in **Chief Constables of North Wales Police v Evans** at 1160 supra]. The parameters of this ground called the **'procedural impropriety'** has been explained by **Lord Diplock** in **Council of Civil Service Unions v Minister for the Civil Service** (1985) AC 374 at 408 thus:

> ***"7 ...describe the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be .affected by the decision. This is because the susceptibility to judicial review under this head covers also the failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred^ even where such failure does not involve any denial of natural justice."*** (emphasis added)

Hence in this case there was **procedural irregularity** or **impropriety or unfairness.**

These are good grounds for judicial review.

From the procedure adopted by the C.E.O. there clearly was an **error of law** and on this aspect **Lord Diplock** in Inre **Racal Communications Ltd** [1981] AC 374 at 382 - 383 has succinctly summarised it as follows:

> ". . . . *where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so. The break-through made by Anisminic [1969] 2 A.C. 147 was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would he a nullity,"* (emphasis added).

The decision I find is **Wednesbury unreasonable** as the Respondent has, because of the error of law and fact, taken matters into considerations which he should not have and ignored relevant considerations because of his belief on information he had from the Union which turned out to be completely wrong and against the law.

The following extract from the judgment in **R v Hillingdon London Borough Council** [1986] AC 484 at 518, on **unreasonableness** in amplication of Wednesbury case (supra) is apt and have been borne in mind by me in considering unreasonableness in this case:

"The ground upon which the courts will review the exercise of an administrative discretion is abuse of power e.g. had faith, a mistake in construing the limits of the power, a procedural irregularity, or unreasonableness in Wednesbury sense - unreasonableness verging on absurdity. Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and the fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of the fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely,"

Conclusion

To sum up, for the reasons given I uphold the argument put forward by the applicant's counsel on the grounds for judicial review.

There has been a **denial of natural justice** to the applicant by the Respondent, procedural irregularity and an error of law and fact which-led to the Respondent coming to the decision to which he came. Also, in the circumstances of this case I find that the decision was **Wednesbury unreasonable** with the Respondent taking into account irrelevant considerations and -disregarding the relevant factors.

The applicant was justified **in** having the decision of the Respondent reviewed.

The application for judicial review succeeds.

Order

I grant certiorari quashing the decision of The Permanent Secretary for Labour, Industrial Relations and Productivity dated 22nd January 2003.

The Interested Party is Ordered to pay costs the sum of $400.00 to the applicant's solicitors within 21 days.

D. Pathik

.Judse

At Suva

28 February 2006