IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO.: HBJ 14 OF 2007

BETWEEN:

THE STATE v. ARBITRATION TRIBUNAL

RESPONDENT

EX-PARTE: FIJI ELECTRICITY AUTHORITY

APPLICANT

Counsels: Mr. J. Sloan for Applicant
Ms N. Karan for Respondent
Mr. R.P. Singh for Interested Party

Date of Hearing: 11th October 2007
Date of Judgment: 28th November 2007

JUDGMENT

BACKGROUND:

On 9th May 2006 the Arbitration Tribunal handed down its award. Fourteen months later the applicant filed this application for judicial review of two parts of the award. The grounds upon which it seeks to review are error of law in that the Tribunal did not have regard to established principles of contract law and secondly the Tribunal failed to take into account relevant considerations and took into account irrelevant considerations.

The applicant and the Interested Party could not settle the Union's 2004 log of claims consisting of nineteen items. The union reported the dispute to the Chief Executive Officer (CEO) of the Ministry of Labour. He accepted the report and referred the dispute for conciliation. There was still no settlement so the Minister authorized the CEO to refer the dispute to the Arbitration Tribunal for resolution. Happily a large number of items in dispute were settled with only three outstanding issues not resolved. These three issues were: public holiday pay, day workers to be paid more for working shifts and $200.00 bonus for hourly paid workers represented by Electrical Trade Union. The Tribunal allowed two of the claims namely public holiday pay and $200.00 bonus but rejected the third. It is these two allowed items that the applicant has sought to judicially review.

The application is opposed. The first ground is that there has been an inordinate delay in making the application and secondly that the Tribunal acted fairly and reasonably.

I had granted leave and left the issue of delay to be argued at the substantive hearing. Order 53 Rule 4 is the relevant order when considering delay. It gives the court discretion to refuse leave if there is undue delay or if it has granted leave to refuse relief if grant of such relief would cause substantial hardship to the rights of any person, substantially prejudice the rights of any person or would be detrimental to good administration. The prejudice need not be to the parties; it can be to any person.

The issue of delay can be considered at the substantive stage of judicial review proceedings : State v. Public Service Commission; ex-parte Olimiva Cagica – HBJ 33 of 1996; Harkissun Ltd. v. Singh – ABU 19 of 1995.

Application of principle – Delay:

The applicant was aware of the award. The Union wrote to the applicant on 23rd May 2006 seeking compliance with the award – see letter annexed to the affidavit of John Alexander sworn on 30th August 2007. Annexed to the affidavit of John Alexander is a list of persons who would not receive the benefit of the award because of death, retirement or resignation. Altogether they number 103.

Those who died would definitely lose out. There may be problems locating people who have retired or resigned. Their whereabouts may not be known. The delay also affects current members as payment would be delayed for them as well.

The applicant says that it had instructed his solicitor Mr. Devanesh Sharma to file judicial review and it believed that he was going to attend to it. It says it had verbally instructed Mr. Sharma. In short the applicant is trying to take shelter behind its solicitor's shortcomings. At the same time it says there was significant misunderstanding regarding the instructions to Mr. Sharma. However, there is a letter dated 30th April 2007 written by Mr. Sharma to the applicant saying judicial review is not feasible in these proceedings. The letter is annexed to the affidavit of Pio Vunituraga sworn on 7th June 2007. Hence as at 30th April 2007 the applicant knew that no application for judicial review had been filed. That letter also expressed the opinion that an extension of time would need to be sought as three months had lapsed since the decision. This letter should have signaled to the applicant a sense of urgency. However the applicant still waited till 15th June 2007 before filing this application.

It is about three years now since the Unions 2004 log of claims have not been resolved. The prejudice to the members of the Union is obvious. Hence I refuse the application because of delay. As Donaldson J. stated in R. v. Aston University Senate; Ex-parte: Roffey (1969) 2 Q.B. 538 at 555 C: ***"The prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights."***

Error of Law – Tribunal failed to apply principles of contract law:

In the event I am found to be incorrect in my above conclusion, I shall in deference to submissions by counsels also look at the substantive matter.

The applicant submitted that the collective agreement between the Union and the applicant was a freely negotiated contract and the Tribunal or a court can only interpret it but not make or interfere with or fill in gaps left in a contract: It

submits that the Award of the tribunal interfered with the collective agreement and therefore the tribunal exceeded its jurisdiction and there was an error of law.

An error of law by the tribunal can open an award to a successful application for judicial review. Mr. Sloan submitted that by providing increased holiday pay and bonus the Tribunal interfered with the collective agreement. It went beyond merely interpreting the contract. Courts cannot remake a contract he stated. This was an error of law.

The collective agreement is not like an ordinary contract between two individuals under the common law principles. The collective agreement has statutory underpinnings. The Trade Disputes Act Cap 97 is the relevant guiding legislation when considering a collective agreement. The Trade Disputes Act as amended by Trades Disputes Act (Amendment) Decree 1992 gives a wide definition of what is a trade dispute. It defines ***"trade dispute"*** as

> ***"any dispute or difference between any employer and a trade union recognized under the Trade Union (Recognition) Act or between a union of employers connected with the employment or with terms of employment, or with conditions of labour, of any employee."***

It includes difference regarding terms of employment. Those terms were contained in the collective agreement. The provisions of the Trade Dispute Act allow trade disputes to be referred to the Permanent Secretary. The Permanent Secretary considers the trade dispute and tries to promote settlement under Section 4 of the Act. Section 6 then provides that where a trade dispute is not settled, the Minister may, if he thinks fit, and if both parties consent, and agree in writing to accept the award of the Tribunal, refer the dispute to the Tribunal for settlement.

The parties did agree in writing in compliance with this Section. Section 6(3) provides that the Tribunal after hearing the parties to a trade dispute shall make an award which shall be binding on the parties to the award. Section 23

says that the Tribunal shall make its award without delay or within twenty-eight (28) days which again confirms legislature's desire for speed in industrial disputes. Section 25 specifically provides that where the dispute relates to wages, hours of work of terms of employment regulated by written law, then the Award cannot be inconsistent with the written law.

Here the parties agreed to submit their dispute before the Tribunal. They addressed the Tribunal with lengthy submissions. At the end of it the Tribunal made the award and it gave reasons for doing so. One might disagree with its reasoning but I do not consider that the reasoning was perverse or reached the high threshold of Wednesbury unreasonableness. In fact the reasoning appears quite logical.

If what Mr. Sloan submits is correct, then the only way a collective agreement can be varied is by another negotiated collective agreement and if that fails the employees to go on a strike to force the issue. This approach would defeat the purpose of the Trade Disputes Act. The long title says it is an Act to make provision for the settlement of trade disputes and the regulation of industrial relations. Arbitration is one such way of settling disputes without recourse to industrial action.

ORDER:

Accordingly the application for judicial review is refused. I award costs summarily fixed in the sum of $700.00 each to the respondent and the interested party to be paid in fourteen (14) days.

[Jiten Singh]
JUDGE

At Suva
28th November 2007