IN THE HIGH COURT OF FIJI AT LAUTOKA

CIVIL JURISDICTION

CASE NUMBER:	HBJ 007 of 2001
BETWEEN:	BARTON LIMITED T/A SHERATON FIJI RESORT
	APPLICANT
AND:	THE DISPUTES COMMITTEE
	1ST RESPONDENT
AND:	NATIONAL UNION OF HOTEL AND CATERING EMPLOYEES
	2ND RESPONDENT

Appearances:	*Mr. Adrian Ram for the Applicant.*
	Mr. Pickering for the 1st Respondent.
	No Appearance for the 2nd Respondent.
Date/Place of Oral Judgment:	*Friday 20 November 2015 at Lautoka.*
Date/Place of Written Judgment:	*Monday 4 January 2016 at Suva.*
Coram:	*The Hon. Madam Justice Anjala Wati.*

JUDGMENT

Catchwords:

JUDICIAL REVIEW - JURISDICTION OF DISPUTES COMMITTEE TO HEAR THE CASE - WHETHER THE DISPUTES COMMITTEE ACTED ON WRONG TERMS OF REFERENCE AND WHETHER THERE WAS PROCEDURAL IMPROPRIETY IN HEARING THE CASE.

Legislation:

Trade Disputes Act (Amendment) Decree 1992 ("TDAD"): s. 5A.

The Cause

1. The applicant applied for judicial review of the decision of the Disputes Committee ***("DC")*** of 23 April 2001 which was over a dispute between the applicant and the 2nd respondent on behalf of one Ms. Joyce Qila.

2. The decision of the disputes committee was that the action of the employer in terminating the employee amounted to constructive dismissal and that Ms. Qila was to be reinstated to her former position with immediate effect and that she was to be paid the full wages for the period 20 November 2000 to 9 January 2001.

Grounds

3. The application for judicial review was based on principally the grounds on which leave was granted in that the DC:

   i. ***acted in excess of its jurisdiction by failing to hear the dispute within the requisite timeframe.***

   ii. ***failed to carry out any or sufficient or reasonable enquiries to enable it to be satisfied that there was constructive dismissal as against voluntary resignation thus breaching the principles of natural justice and arriving at a decision which no reasonable tribunal would have arrived at.***

   iii. ***erred as to the nature of the hearing by being under misconception that the hearing related to constructive dismissal.***

Background of the Dispute

4. Ms. Qila was employed by Sheraton Fiji Limited until 2 November 2000. The employer noted some irregularities in her activities and suspended her. Under the Collective Agreement ***("CA")***, the incident was reported to National Union of Hotel and Catering Employees ***("NUHCE").***

5. An investigation was conducted and Ms. Qila admitted the allegations. Subsequently she resigned. She then complained to NUHCE which then complained to the Secretary for Labour and Industrial Relations that she had been constructively dismissed.

6. The employer's position was that Ms. Qila had simply resigned.

7. The dispute then became whether she simply resigned or was there a constructive dismissal.

8. On 20 February 2001, the Permanent Secretary for Labour and Industrial Relations ***("PS")*** appointed a DC pursuant to s. 5A (2) (a) to (c) of the TDAD.

9. The DC consisted of Mr. Sahadeo Singh as the Chairman, Mr. Daniel Urai as a representative of the NUHCE and Mr. Jonacani Lailai as the representative of the employer.

10. The Terms of Reference in essence was as follows:

"...to decide on the trade dispute existing between the National Union of Hotel & Catering Employees and Sheraton Resorts over the constructive dismissal of Mrs. Joyce Qila with effect from 20 November, 2000 which action the union claims is harsh, unfair, unjustified and in breach of clause 12.0 of the Collective Agreement. Therefore, the union seeks her reinstatement without loss of benefits".

11. By a letter of 20 February 2001, the PS informed the members of the DC about its composition and referred the trade dispute to it. It also informed the parties about the composition of the DC and informed that the chairman of the DC would inform them of the hearing date which shall be within the 14 days.

12. On 2 March 2001 the Chairman of the DC wrote and advised the parties that the hearing was to take place on 15 March 2001.

13. In fact the matter was heard on 15 March 2001 and a decision was delivered on 23 April 2001.

14. The order of the DC read as follows:

" WHEREAS a trade dispute was reported to the Permanent Secretary for Labour and Industrial Relations on 21 November, 2000 under Section 3 of the Trade Disputes Act, Cap 97 to be existing between the National Union of Hotel and Catering Employees (hereinafter referred to as the "Union") of the one part and Sheraton Resort (hereinafter referred to as the "Resort") of the other part over the constructive dismissal of Ms. Joyce Qila with effect from 20 November, 2000 which the union claims is harsh, unfair, unjustified and breach of clause 12.0 of the Collective Agreement. Therefore the union seeks her reinstatement without loss of benefits.

AND WHEREAS the Permanent Secretary for Labour and Industrial Relations accepted the said trade dispute and referred it to the Disputes Committee on 20 February, 2001.

NOW THEREFORE after hearing the submission made by the Union and the Resort on 15 March 2001, the Disputes Committee DECIDED as follows:

1. *THAT the action taken was constructive dismissal.*

2. *THAT Ms. Qila shall be reinstated to her former position with immediate effect.*

3. *THAT she shall be paid full wages for the period 20 November 2000 up to 09 January 2001".*

15. I could not locate any written reasons for the decision in the court records. It appears that there was none.

Submissions

16. The applicant argues that the terms of reference prejudged that there was constructive dismissal and the DC decided the issue on the basis that there was constructive dismissal. The affidavit of the employer indicates that the DC did not want to hear the employer's representative fully. The representative was not allowed to explain the reasons behind the resignation because it was pre-judged that there was constructive dismissal. The representative was asked by the DC to limit himself to the issue of constructive dismissal. This also indicates the bias that the DC had.

17. It was further contended that there was breach of natural justice in that parties were not given an opportunity to give evidence. The representatives tendered their submissions, certain issues were clarified from them and a decision made where the two representatives position was quite contrary to each other. The DC should have done the fact finding exercise by hearing the evidence. When it did not, relevant matters were not considered and irrelevant matters influenced the decision.

18. Since proper procedure of natural justice was not followed, the decision was so unreasonable that no reasonable tribunal could arrive at it.

19. The applicant also complains that the DC did not have the jurisdiction to hear the case when it did not do so within 14 days of the matter being referred to it by the PS. The time frame is provided for by s. 5A (3) of the TDAD. The DC was also warned by the PS to hear the case within 14 days and even that warning was not adhered to. The matter was not only to be heard within 14 days but a decision was also to be delivered within that 14 days.

20. It was argued that under s. 5A (3), the PS can extend the period of time within which a decision can be made but no such extension was granted in this case. When there was failure to comply with the statutory timeframe to hear and determine the case, the PS then ought to have referred the dispute to the Minister who shall authorize the PS to refer such dispute to a Tribunal which shall hear the case and make an award: ***s. 5 A (5) (a) and (b)***. The DC then acted beyond its jurisdiction when it proceeded to hear the case.

21. The decision was not arrived at by consensus as the parties to the dispute had not agreed to the final orders imposed by the DC so the respondent cannot say that the decision is binding on the parties because it was arrived at by consensus.

22. The 1st respondent argued that although the matter was not heard and decision given within the timeframe, there is a valid decision of the DC which was delivered after hearing both the parties. In that way, there is a proper order to be followed by the parties. There is no prejudice that the matter was not heard and determined on time.

The Law and Analysis

23. Pursuant to the grant of leave, the first aspect that this court needs to determine is that of the jurisdiction of the DC to hear and determine the case. For that I need to examine s. 5A of the TDAD which reads as follows:

> *" 5A (1). The Permanent Secretary shall refer a dispute of rights to a Disputes Committee for settlement.*
>
> *(2). There shall be constituted a Disputes Committee consisting of three persons as follows:*
>
> *(a) a Chairman who is not a party to or concerned with the dispute appointed by the Permanent Secretary;*
>
> *(b) a member approved and appointed by the Permanent Secretary on the recommendation of the trade union affected by the dispute of rights;*
>
> *(c) a member approved and appointed by the Permanent Secretary on the recommendation of the employer or the trade union of employers affected by the dispute of rights:*
>
> *Provided that the recommendation for membership under paragraphs (b) and (c) shall be submitted to the Permanent Secretary within 14 days from the date of acceptance of the trade dispute.*
>
> *(3). The Disputes Committee shall hear the parties to the dispute and make its decision without delay and in any case within fourteen days from the date the trade dispute was referred to it:*
>
> *Provided that the Permanent Secretary may extend the period within which a decision is to be made if in his opinion the circumstances of a case require that the extension be given.*

(4). A decision of the Disputes Committee that is arrived at by consensus shall be binding on the parties and be deemed an award.

(5). If one or both parties fail to comply with subsection (2) or where the Disputes Committee is unable to arrive at a decision by consensus or where the Disputes Committee fails to comply with subsection (3) of this Section:

(a). the Permanent Secretary shall refer the dispute to the Minister who shall authorize the Permanent Secretary to refer such dispute to a Tribunal for settlement; and

(b). the Tribunal after hearing the parties to the dispute shall make an award which shall be binding on the parties to the dispute..."

24. S. 5A (3) provides that the DC must hear and determine the dispute within 14 days from the date of referral of the same by the PS.

25. In this case the dispute was referred to by the PS on 20 February 2001. The matter was heard on 15 March 2001 and the decision delivered on 23 April 2001. The hearing and the delivery of the decision on the dispute did not take place within 14 days as mandated by the statute.

26. Under proviso of s. 5A (3) the PS only has powers to extend time for the delivery of the decision but even on the further material before me I do not find that any such extension was granted. In that case, the PS was obligated under s. 5A (5) to refer the dispute to the Minister who shall then have authorized the PS to refer the dispute to the tribunal for determination.

27. I therefore find that the DC did not possess any further jurisdiction in the dispute when it did not sit within the required timeframe to hear and determine the matter.

28. Even if it had the jurisdiction, the issue is whether it proceeded to hear the dispute on the proper terms of reference and whether natural justice was accorded to the parties.

29. The applicants argue that the terms of the reference had already stated that the DC had to decide over the constructive dismissal. The way the terms reference was drafted directed the DC

that there constructive dismissal. This definitely had the tendency to prejudice the case of the employer which had always maintained that the employee had resigned. Even that is the position that the employer maintained during its submission to the DC. This then brings me to the issue of natural justice and in particular on the aspect of hearing the parties on a point of contention.

30. When the parties had two different positions on whether there was constructive dismissal or voluntary resignation, the DC ought to have made findings of fact. In order to do that a right of hearing by allowing witnesses to be produced and examined ought to have been granted to the parties. That right on the material before me was not afforded to the parties and thus due process of hearing both sides before arriving at the facts was not afforded. There was therefore procedural irregularity in arriving at the decision that the DC did.

Final Orders

31. In the final analysis I find that the DC did not have the jurisdiction to preside over the matter and hear the same outside the time frame provided by the statute and even if it did, it acted on improper terms of reference which had the effect of prejudicing the case of the employer. I also find that the employer was not afforded a right to call witnesses which was necessary given the fact that the employer had refuted that there was constructive dismissal but voluntary resignation.

32. I therefore quash the decision of the DC of 23 April 2001.

33. Each party shall bear their own cost of the proceedings.

Anjala Wati

Judge

04.01.2016

HIGH COURT OF FIJI SUVA

To:

1. *Messrs Gibson & Company for the Applicant.*
2. *Attorney – General's Chambers for the 1st Respondent*
3. *2nd Respondent.*
4. *File: Lautoka HBJ 007 of 2000.*