IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

ERCC 07 of 2020

BETWEEN : **FEDERATED AIRLINE STAFF ASSOCIATION**

PLAINTIFF

A N D : **AIR TERMINAL SERVICES**

DEFENDANT

Appearances:	Mr. Padarath with Mr. Anthony M. for the Plaintiff Mr. Charan R. on instructions of R. Patel Lawyers for the Defendant
Date of Hearing:	24 June 2020
Date of Ruling:	25 June 2020

RULING

INTRODUCTION

1. Over the course of the last week, beginning Friday 19 June 20230, the Air Terminal Services (Fiji) Pte (**"ATS"**) issued termination letters to almost all of its employees.

2. Some five hundred and ninety-five of these employees are members of the Federated Airline Staff Association (**"FASA"**).

THE LETTERS

3. I am told that the letters sent to every employer are all similar to the one served on Mr. Semisi Turagabaleti dated 19 June 2020 which was signed by Mr. Richard Donaldson and annexed to Turagabaleti's affidavit marked **"E"**. Mr. Turagabaleti is the President of the Federated Airlines Staff Association (**"FASA"**).

4. This letter which Mr. Turagabaleti received says as follows at paragraphs 1 to 3:

> *The effect of the COVID-19 pandemic continue to have a severe effect on ATS business. As you know, we have operated with more than a 95% reduction in business since international flight services were suspended on 26 March 2020, with operations since then only facilitating ad hoc repatriation and freight only flights. There are currently n scheduled international passenger flights.*
>
> *In the circumstances, the Company is unable to fulfill your contract of employment, in that, as your employer, we are unable to provide you with work. As a consequence, it is with considerable regret that I must advise you that the Company has resolved to terminate your contract of employment with immediate effect, meaning that your last day of employment with the Company is today,* ***Friday 19 June 2020****.*
>
> *Pursuant to article 2B of your contract of employment in the event of termination of your employment, you are entitled to a period of two weeks' prior notice. As your employment is being terminated with immediate effect, the Company will make a payment in lieu of notice to you. This will be paid directly into your bank account by the close of business tomorrow, together with any accrued annual or long service leave or outstanding payments.*

THE APLICATION

5. An urgent *ex-parte* application was filed by FASA yesterday morning before the High Court Employment Division seeking the following Orders:

(i). *That the Defendant and/or its servants and/or its agents be restrained from terminating the members of the Plaintiff association from employment until final determination of the matter.*

(ii). *That the Defendant and/or its servants and/or agents be restrained from terminating the collective agreement dated 22nd January 1998 until final determination of the matter.*

(iii). *That the costs of this application be in the cause.*

6. The application is supported by an affidavit of Semisi Turagabeliti sworn on 23 June 2020. The matter was referred to Mr. Justice Mansoor, the Learned Judge in the Employment Division of the High Court, who is based in Suva.

7. Mansoor J directed the Registry to issue the proceedings, returnable before him on **Wednesday 01 July** when he will be sitting in Lautoka as Employment Court.

8. However, with the insistence of counsel that there is utmost urgency involved, and upon further direction from Mansoor J to the Registry, the file was allocated and placed before me just yesterday morning.

INJUNCTION - PRINCIPLES

9. A party seeking injunctive orders *inter-partes* is ordinarily required to satisfy the test under the **American Cyanamid** case and show that there is a serious issue to be tried, that the balance of convenience favors the granting of the interim injunction, and that damages are not an adequate remedy.

10. However, where an application is, initially, being brought *ex-parte* seeking the court to preserve some *status quo* pending determination of the issues at an interlocutory *inter-partes* hearing to be held as soon as possible thereafter, the applicant must show that there is such urgency that any delay, however brief, will result in irreparable or serious mischief (see Order 29 Rule 1(2) as amended in 1991 in LN 61/91). The applicant must show that he has a legal

right in the subject-matter which is under an immediate threat of being violated - unless the court intervenes with an *ex-parte* restraining order.

11. In addition, the applicant must convince the court that the balance of convenience favours the granting of the injunction *ex-parte*. He must also disclose all relevant facts to the Court, including any matters favourable to the other side.

12. Megarry J in **Bates v. Lord Hailsham** [1972] 1 WLR 1373; [1972] 3 All ER 1019 said:

> *An injunction is a serious matter and must be treated seriously. If there is a plaintiff who has known about a proposal ... for nearly four weeks in detail and he wants an injunction to prevent effect being given to it at a meeting of which he has known for well over a fortnight, he must have a most cogent explanation if he is to obtain his injunction on an ex parte application made two and a half hours before the meeting is due to begin. (1380 A);*

And:

> *Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion ..... Accordingly, unless perhaps the Plaintiff had had an overwhelming case on the merits I would have refused the injunction on the score of insufficiently explained delay alone (my emphasis).*

(see also Fiji Court of Appeal in **Fiji Public Service Association v Chetty** [2005] FJCA 38; ABU0061J.2003S (4 March 2005)).

HEARING

13. I did hear the application very briefly, *ex-parte*, yesterday morning at 10.30 a.m. After that, I stood the matter down to 2.30 p.m. and directed counsel to serve the ATS all the documents.

14. I did that so I could have the benefit of a Pickwick hearing, that is, to have the ATS attend Court and address me on the legal issues involved, even without an affidavit, and to give me a balanced perspective on all that is involved

(see **Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd and Another**; 1972 (3) AER 384-385).

SOME COMMENTS ABOUT COUNSEL'S APPROACH

15. Because I had not had an opportunity to fully study the file, as the file was just placed before me yesterday morning before I sat at 10.30 a.m, the first thing I asked counsel at the *ex-parte* hearing was whether **Bill No. 12 of 2020** which was to amend the Employment Relations Act, had been passed.

16. I was told that the Bill had been passed by Parliament but that the Minister was yet to gazette a commencement date. The hearing then proceeded.

17. I had opportunity to check up on the status of Bill No. 12 2020 during the stand-over time before the 2.30 p.m. hearing and found that:

    (i) the Bill was passed by Parliament on 28 May 2020 and became Act No. 11 of 2020 – The Employment Relations (Amendment) Act 2020.

    (ii) the Employment Relations (Amendment) Act 2020 was gazetted on Friday 29 May 2020 by **Legal Notice No. 47** which appointed the commencement date as 29 May 2020. **Legal Notice No. 47** reads as follows:

> *Commencement Notice*
> *In exercise of the powers conferred on me by section 1(2) of the Employment Relations (Amendment) Act 2020, I hereby appoint 29 May 2020 as the commencement date of the Employment Relations (Amendment) Act 2020.*

18. At 2.30 p.m., at the earliest opportunity, counsel apologized for his error and inadvertence in the above advice, which apology I accept.

19. I was also told in the morning that a total of 285 employees out of 595 have been served with termination letters. The rest remained to be served.

However, at 2.30 p.m. in the afternoon, I was told that ALL 595 employees had now been served with termination letters.

SECTION 41 & SECTION 24

20. Section 41 of the Employment Relations Act 2007 says if an employer is not able to fulfill the contract…. the contract may be determined.

21. Section 24, as amended by section 2 of the Employment Relations (Amendment) Act 2020, will now read as follows:

> *24. (1) An employer must – unless the worker has broken his or her contract of service or the contract is **frustrated** or its **performance prevented by an Act of God**,*
>
> *(a) provide the worker with work in accordance with the contract during the period for which the contract is binding on a number of days equal to the number of working days expressly or impliedly provided for in the contract; and*
>
> *(b) if the employer fails to provide work to the worker, pay (sic) to the worker, in respect of every day on which the employer so fails, wages at the same rate as if the worker had performed a day's work.*
>
> *(2) In this section, **"act of God"** includes a pandemic declared by the World Health Organization*

DUSCUSSION

22. I accept that there are serious issues to be tried. An individual contract of employment can be frustrated. But whether a Collective Agreement can be "frustrated", there is authority in **McGavin Toastmaster Ltd v Ainscough** et al [1976] 1 S.C. R. 718, a copy of which was handed up to me by Mr. Padarath, that in Canada at least – a Collective Agreement cannot be frustrated as it undermines the collective bargaining process and the employers duty to consult a union in a collective bargaining process. In **Fiji Public Service Association v Board of Fire Commissioners of Suva** [1991] FJHC 52; HBC 0145J.88s (28 August 1991) Mr. Justice Byrne appears to express similar misgivings obita:

Accepting for the sake or argument that the Doctrine of Frustration could apply to the Master Agreement I am not satisfied that it would be just to apply it here or pit in another way, that it would be positively unjust to hold the parties bound by the agreement.

23. Section 24(1) as amended however appears to treat *frustration* and *Act of god* as two separate categories. While *Act of god* or *force majeure* is usually considered a "frustrating" event which renders a contract incapable of performance in terms of contract law, section 24(1) treats *Act of god* (COVID-19), and frustration, as two separate standalone justifications to dismiss an employer from that obligation to provide work to an employee.

24. There is enormous strength in the argument that the doctrine of frustration does not apply to ATS's Collective Agreement with FASA, so that ATS cannot undercut the obligation to consult and bargain collectively with FASA on account of some other frustrating event.

25. However, can the doctrine of frustration still apply separately to each individual contract which ATS has with each individual employee?

26. Granted that section 24(1), as amended, releases an employer from the obligation to provide work in the event of a global pandemic declared by WHO, and granted that the Employment Relations (Amendment) Act 2020 appears to have been passed to assist employers weather the COVID-19 storm so to speak, is it open to an employer to say that the collective agreement is not viable for the time being as the employer weathers the storm in current drastic COVID-19 situation, because, to adhere to the agreement means to "submit" to the collective bargaining process which will only prolong an unrealistic obligation to keep people in its employ, but for whom the employer cannot provide work? Is the effect of the Employment Relations (Amendment) Act 2020 to suspend collective bargaining in current COVID-19 situation?

27. What is at the very heart of the applicant's grievance, is the manner in which the ATS management had gone about terminating the individual employment contract of every worker, by serving them letters of termination,

without any prior consultation with FASA - which completely undercuts the collective bargaining process in the *Collective Agreement Between Air Terminal Services (Fiji) Limited & Federated Airline Staff Association*. The argument is:

(i) yes, the effect of COVID-19 on ATS is real and cannot be ignored.
(ii) yes, an employer is absolved from that obligation to provide work under section 24(1) if it is unable to provide work because of COVID-19 – and may therefore determine the contract under section 41.
(iii) yes, any other employer unable to provide work because of COVID-19 may determine the contract by serving on the employee a letter or termination, and it is upon an employer to prove that they have no work to provide to an employee due to the impact of COVID-19 before laying off the employee.
(iv) however, ATS is bound by the Collective Agreement to consult FASA before making any decision.
(v) the failure to consult deprives FASA of a right to negotiate on less drastic options, for example, some temporary lay-off measures or other schemes to give its members some comfort in job security while it affords some breathing space to ATS to "weather the storm of COVID-19" so to speak . These options are set out in a letter dated 19 June by the Secretary of FASA:

    (a) give Workers the option of extended leave without pay for 6 months to assist the organization and keep them employed for when things return to normal.
    (b) enact the redundancy clause after the above if there is no improvement on the matter and execute them in a last in, first out manner.
    (c) that this reduction will only be applicable to the current COVID-19 crisis and that workers are re-employed on the last out first in basis as per Collective Agreement.
    (d) allow works to work voluntarily without pay as they had indicated.

28. I accept all these are live issues for Mansoor J.

CONCLUSION

29. I have seriously considered whether or not I should grant an injunction to restrain ATS from terminating the employment of members of FASA until Mansoor J deals with the application properly on Wednesday next week.

30. I have no doubt that there are valid serious issues to be considered. I have considered very carefully the fact that all 595 members of FASA have been served their individual letters. Every letter purports to terminate the employment of every individual recipient, with benefits and other entitlements paid. The horse has bolted so to speak.

31. The question I then ask is whether there is any urgency involved? I answer that in the negative. Justice Mansoor will be in Lautoka on Wednesday 01 July to hear full and proper arguments and determine the matter.

32. The second order sought is for ATS to be restrained from terminating the Collective Agreement dated 22 January 1998 until final determination of the matter. The question I ask is whether there is any urgency in the matter.

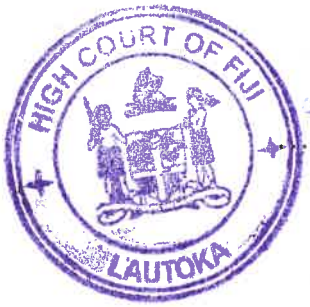
33. I understand FASA's main concern is that the effect of the "mass termination" of all FASA members would be that the Collective Agreement would automatically become redundant.

34. Mr. Charan did say in court yesterday afternoon that the letter of Richard Donaldson does not state that ATS was terminating the Collective Agreement – however, he was quick to recant, when pressed by Mr. Padarath to give an undertaking that ATS would not terminate the Collective Agreement.

35. I see no reason why I should make the Order sought in this regard. Again, the horse has bolted.

36. It is for Mansoor J to determine whether or not the letters can have the legal effect which they purport to effect. That said, the status of the Collective Agreement must remain hanging in the balance for now.

37. I refuse to grant the Orders sought and reserve them for Mr. Justice Mansoor. This matter is adjourned to Wednesday 01 July 2020 before Mansoor J.



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Anare Tuilevuka

JUDGE

25 June 2020