SEAFARERS UNION OF FIJI

v.

THE REGISTRAR OF TRADE UNIONS & FIJI FOREIGN-GOING SEAMEN'S UNION

[HIGH COURT, 1989 (Jesuratnam J) 28 June]

Revisional Jurisdiction

Trade unions- Judicial review to quash registration of new union- Registrar's failure to hold due enquiry- Trade Unions Act (Cap. 96) Section 13 (1) (e).

The Registrar of Trade Unions received a request for registration from a newly formed seamen's union. There already being a registered seamen's union the Registrar was required by Section 13 (1) (e) of the Act to determine whether the already existing union was adequately representative. The High Court HELD: that no adequate enquiry was held by the Registrar and accordingly his decision to register the new union was quashed.

Cases cited.

Anisminic Ltd. v. Foreign Compensation Commission [1969] AC 147
CCSU v. Minister for Civil Service [1985] AC 374

T. Fa for the Applicant
Ratu J. Madraiwiwi for the 1st Respondent
No Appearance for 2nd Respondent

Jesuratnam J:

This is an application by the Seafarers Union of Fiji, a registered trade union, for judicial review, by way of certiorari, of an order made by the Registrar of Trade Unions, the first respondent, registering the Fiji Foreign-Going Seamen's Union, the second respondent, as a trade union.

It may be helpful to trace briefly the history of the applications made by the applicant and the second respondent for registration as a trade union.

The applicant made its application for registration as a trade union on 18 February 1982. The second respondent made its application on 25 February 1982. On the 14th of April 1982 both applications came up for consideration before the Advisory Committee (which is appointed under section 3 of the Trade Unions Act - Cap.96).

It was the duty of the Advisory Committee to advise the Registrar of Trade Unions on such matters. The Advisory Committee accepted the applicant's application for registration and refused the application of the second respondent for registration. The letter dated 14 April 1982 sent by the Registrar to the second

respondent conveying his refusal was in the following terms:-

> "You are hereby notified that your application to register the Fiji Foreign-Going Seamen's Union as a trade union under the Trade Union Act is refused. The ground of such a refusal is that under the provisions of section 13(1)(e) of the said Act the Seafarers Union of Fiji which is already registered *adequately represents a substantial proportion* of the interests in respect of which registration is sought." (The emphasis is mine).

The second respondent thereupon appealed to the Supreme Court and Justice Kearsley by his judgment dated 26 July 1984 allowed the appeal of the second respondent and directed the Registrar to reconsider the second respondent's application for registration after complying with the proviso to section 13(1)(e) of the Act. The proviso to S.13(1)(e) requires the Registrar to notify in the Gazette or otherwise inviting objections from registered trade unions to the registration.

I may say at this stage that the acceptance of the applicant's application for registration and the refusal of the application by the second respondent took place on the same day after considering them both on the same occasion, namely, at a meeting of the Advisory Committee on 14 April 1982.

It seems to me that the requirement of section 13(1)(e) for gazetting is intended to give notice to trade unions which had been registered prior to the date of consideration of the new application for registration. It is in order to alert already existing registered unions to the new application that is being made for registration and to enable them to lodge objections if they are so minded. In the instant case both contending applications were considered together and one was accepted and the other was refused. Even if therefore the Registrar had complied with 13(1)(e) before refusing the second respondent's application, it would have been futile and a mere academic exercise vis-a-vis the applicants' case because in so far as the two contending applicants were concerned their respective cases were before the Committee before it decided to accept the one and reject the other. The acceptance of one necessarily meant the rejection of the other in the circumstances. The process was the same. So far as other registered trade unions were concerned there was already a gazette notification published on 5.3.1982 notifying the second respondent's application for registration.

However, the Registrar was obliged to comply with 13(1)(e) on pain of contempt in view of the judgment of Justice Kearsley.

It is admitted that on the 16 of August 1984 i.e. about three weeks after the judgment of Justice Kearsley, the applicant wrote to the Registrar of the Trade Unions setting out its objection to the registration of the second respondent as a trade union. The general secretary of the applicant, Mr. Apisai Vere, states in his affidavit that he heard from a clerk in the office of the Registrar of Trade Unions that the Supreme Court judgment had been delivered on the 26 of July 1984. The

clerk concerned advised him to lodge his objection and that he accordingly did so on the 16 of August 1984. The Registrar in compliance with the Supreme Court order again advertised in the Fiji Royal Gazette on 28 September 1984 that the second respondent had applied for registration and called for objections. He advertised again on 1 August 1986.

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It is common ground that the applicant did not file his objection specifically in response to these Gazette notifications. The applicant's position is that he was under the impression that its objection lodged on the 16 August 1984 was sufficient. It is also accepted by the Registrar in his affidavit that he received the letter of objection by the applicant on 16 August 1984 and that he considered it. I may also add that in his written submissions counsel for the first defendant states that the Registrar and the Advisory Committee took into consideration the objection contained in the letter of the applicant dated 16 August 1984.

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It therefore does not matter much in this case whether the applicant filed his objection in response to the Gazette notifications of the 28 September 1984 or 1 August 1986 or in anticipation of them on 16 August 1984. In fact according to the affidavit of the Registrar it is clear that the Advisory Committee again considered the issue between the two contending parties, i.e. the applicant and the second respondent on 16 September 1986. The Registrar states in his affidavit in paragraph 13: "the Committee unanimously agreed to advise the Registrar to obtain clarification from the applicant union on its membership position. What class of people it caters for? The same should he done with the Seafarers Union's position as well and that this may be brought up at the next TUAC meeting". Having conceded that the applicant's objection was considered by the Advisory Committee one cannot understand the Registrar's complaint in paragraphs, 18 and 19. There was either a full consideration or no consideration. There is no half-way house.

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However the Registrar wrote both to the applicant and the second respondent inquiring about their respective membership positions. It is obvious from the Gazette notification, the rules of the two unions and the letter of the Registrar addressed to the second respondent on 14 April 1982 that the classes and interests to which both unions catered were practically the same. The crucial issue - in fact the only issue - was as to which union *was more representative.*

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The applicant replied promptly on the 8th October 1986 showing, a total of 114 members for 1986 and 103 for 1982. The Registrar's letter to the second respondent was returned unclaimed on the 31 October 1986. The Registrar then directed it on the 5 November 1986 to Messrs. Bulewa and Company, solicitors for the second respondent. Messrs. Bulewa and Company did not reply and the Registrar sent another letter to him dated 11 November 1986 without any response. Thereafter the Registrar sent a reminder on the 17 December 1986 to Messrs. Bulewa and Company to which at last he received a reply on the 22 December 1986.

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It should also be noted that after the judgment of Justice Kearsley was delivered on the 26 July 1984 the second respondent wrote to the Registrar indicating that it intended to appeal to the Fiji Court of Appeal. It was nearly two years later that Messrs. Bulewa and Company withdrew their appeal in the Fiji Court of Appeal on 14 July 1986. It was thereafter that the Registrar set about his task of considering the second respondent's application anew. It seems to me from all these factors that the second respondent was lethargic and lackadaisical in the pursuit of its application. It also seems to me that the Registrar and the Advisory Committee seem to have acted on the impression that when Justice Kearsley ordered the Registrar to reconsider the second respondent's application he ordered him to reconsider it favourably. One gathers that impression from the manner in which the Registrar relentlessly pursued the second respondent and his solicitors to obtain somehow the particulars of membership which he required in order to oblige it with registration by accepting what it supplied at its face value without any investigation.

The second respondent gave its membership figures as 183 of which only 141 had their signatures against their names. 42 names were without signatures. I find that in the membership lists submitted by the second respondent about 34 names appear under a list headed "Names of seamen who want to join the Fiji Foreign-Going Seamen's Union in the event of it being registered." Another 34 names appear in a similarly headed list with the heading subsequently scored off. If such names contained in the first list made under reservation (even without taking into account the second list) are eliminated the second respondent's membership would be less than the applicant's membership. This is a manifest error on the face of the record which will vitiate any order or decision made on its basis.

That is not all. It was the clear duty of the Registrar to have carried out a meaningful investigation or probe in order to obtain fool-proof figures of membership of current membership not hypothetical membership. At this stage the crux of the matter had boiled down to the question of figures which were easily ascertainable and verifiable. Again it seems to me from the manner in which the Registrar and the Advisory Committee have accepted whatever haphazard figures were furnished by the second respondent that they misunderstood the order of Justice Kearsley that they were required to consider the second respondent's application favourably. Indeed Justice Kearsley said in his judgment "it may well be that the ultimate result of the appellant's union's application would have been the same, compliance or non-compliance." That should have given the cue to the Registrar and the Advisory Committee. What Justice Kearsley ordered was a consideration after compliance - not a favourable consideration after a formal query.

It seems to me that the Registrar was acting under a misapprehension. The very basis of his approach was therefore wrong. This is enough to invalidate an order that was made on a wrong basis.

It is not as if a rejected applicant can freely canvass his case before the Registrar over and over again, year after year, when its membership position becomes better. When the Registrar makes an order once rejecting an application it should attract some finality. However one can understand a rare case in which the majority of the membership of an existing trade union has lost its faith in it and is in search of another union. In such a case a vacuum is created for the emergence of another union. Such is not the case in the present dispute.

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There can even be cases in which two or more unions representing practically the same interests may be registered. But in the instant case the issue that the contest was between the applicant and the second respondent was raised and decided by the Registrar and the Advisory Committee themselves in applicant's favour. And there was no further reliable material on which they could have deviated from that decision.

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In my view section 13(1)(e) embodies the policy of the law that it is best to avoid a multiplicity of trade unions as far as possible. From the point of view of recognition by employers and bargaining strength the fewer the unions the better their strength. The Registrar seems to have recognised this when he wrote to the second respondent on 14 April 1982 setting out the correct principle. He subsequently deviated from this principle without proper material. There is absolutely no basis for the Registrar's statement in paragraph 17(d). "There were 183 members without a union". It is solely based on an unauthenticated and unattested list furnished by the second respondent' s solicitors.

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A proper inquiry was a necessary pre-requisite to resolve the question whether to register the second respondent or not. It flowed logically from the Advisory Committee's advice to the Registrar on 16 September 1986 to obtain clarification from the applicant and second respondent about their respective membership position. This was not done in the proper way. The Registrar acted unfairly and unreasonably. Lord Reid said in the case of Anisminic Ltd v. Foreign Compensation Commission [1969] AC 147 at 171: "But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity." Here there was no inquiry at all.

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The applicant has been functioning lawfully since 1982 when in 1987 after nearly five years it was foisted with another union to its bewilderment. In its letter to the Registrar on the 16 August 1984 the applicant has indicated to him forcefully that it had entrenched itself firmly in the trade union front by having itself recognized by various ship owners. It had furnished ample proof to the Registrar. In explaining its membership position it had split up the membership figures into groups and assigned them to the respective ships on which they worked. It has given detailed and convincing proof of its membership of 114. The second respondent has done nothing of that sort. The list submitted by the second respondent has not been authenticated or verified or attested by a responsible

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member of the union. There was no affidavit accompanying it. It was not even on its letter-head. There is only a covering letter by its solicitors.

A The present case is not a dispute between two unions as regards the class of employees it represents. As shown above the interests sought to be represented are practically the same. It is only a question of which is more representative. It is a question of mere arithmetic. When such is the case it was the elementary duty of the Registrar to have held an inquiry and investigated into the truth of the claim of membership made by the respective unions. When the proviso to 13(1)(e) B gave the Registrar power to entertain objections he was also by necessary implication empowered to deal with those objections by, for instance, holding an inquiry in the presence of each other. Here the Registrar has not dealt with the objection even in an elementary way. It is true that he made a query from each of the two unions, But there was no follow-up. There was no inquiry at all in the real sense. The situation demanded an inquiry to verify whether the membership C lists were bona fide and fool-proof.

In my view the Registrar's approach to the question was irrational. Lord Diplock remarked in C.C.S.U.v. Minister for Civil Service [1985] A.C. 374 at 411: "Irrationality by now can stand upon its own feet as an accepted ground on which a decision may be attacked by Judicial Review".

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The Registrar himself had on the 14 April 1982 strongly indicated his firm view that "under the provisions of section 13(1)(e) of the said Act the Seafarers Union of Fiji which is already registered adequately represents a substantial proportion of the interest in respect of which registration is sought". What was the material that was subsequently made available to the Registrar which made him to alter E this view to the detriment of the Seafarers Union and the advantage of the Fiji Foreign-Going Union? Nothing whatever except for some unauthenticated and uncertified figures supplied by the second respondent's solicitors. This is not a case of a wrong decision made by the Registrar. The entire decision-making process was tainted and tarnished. The decision has been made without an inquiry. What the Registrar did was not even an apology for an inquiry.

F I therefore quash the registration of the second respondent as a trade union made on 20 January 1987 and direct the Registrar to make a fresh decision on proper material after a proper inquiry as indicated in the judgment. I am sending the case back to him because I have quashed his decision as having been arrived at without adhering to the due decision-making process. The decision is his. The duty of the court is to ensure that the process by which he makes it is lawful and G not open to question.

The applicant will be entitled to costs as against the first respondent.

(Motion allowed, certiorari issued.)