THE STATE

v

THE ARBITRATION TRIBUNAL

ex parte

AIR PACIFIC SENIOR STAFF ASSOCIATION

[HIGH COURT, 1993 (Byrne J), 14 May]

Revisional Jurisdiction

Trade Disputes-whether Arbitration Tribunal functus following expiry of date for delivery of award- whether any procedural impropriety disclosed-Trades Disputes Act (Cap 97) Section 23- Interpretation Act (Cap 7) Section 53.

The Applicant submitted that the Arbitration Tribunal had breached the requirement to deliver its award within the statutory period. It also complained of procedural errors by the Tribunal. The High Court HELD: (i) the relevant requirement was merely directory and (ii) no procedural errors were disclosed on the facts.

Cases cited:

Howard v. Bodington (1877) 2 P.D. 203
Simpson v. Attorney-General (1955) NZLR 271

Motion for Judicial Review in the High Court.

M.D. Patel for the Applicant
P. Cowey for the Respondent
B.N. Sweetman for the Interested Party

Byrne J:

In May 1989, Air Pacific, Fiji's national air carrier, decided in principle to relocate its operational activities and corporate Headquarters to Nadi Airport. This move was estimated to entail the relocation of approximately 75 posts in the senior staff category from the Suva/Nausori areas to Nadi Airport leaving approximately about 10-20 senior staff being ultimately required in the Suva/ Nausori district. As part of the proposed move Air Pacific also carried out an exercise with the assistance of consultants of a detailed planning of the move which covered, inter-alia, the needs and requirements of those employees who would move to Nadi. The relocation was intended by Air Pacific (hereinafter called "the Company") to be progressive commencing in April 1990 and not concluding at least until the end of 1992.

Once the Board of the Company made a decision in August 1989 definitely to relocate the Company at Nadi, and this decision was relayed to staff, the proposed move met with opposition from the Applicant. The Arbitration

tribunal subsequently appointed by the Minister for Labour and Industrial Relations on the 31st of May 1991 to attempt to resolve the dispute between the Applicant and the Company later described this opposition as showing "a degree of antagonism and lack of co-operation based presumably on the fact that the Association viewed with caution any matters that could affect its members".

After its appointment by the Minister the Tribunal sat in Nadi and Suva on nine days between the 13th of June and 22nd of August 1991 to hear evidence and detailed written submissions were subsequently supplied to the Tribunal by the parties.

The Tribunal handed down its Award on the 4th of November 1991, which, as a matter of fact, rejected most of the claims made by the Applicant.

On the 17th of June 1992, Fatiaki J. granted the Applicant leave to judicially review the tribunal's Award but declined to grant a stay in the implementation of the Award.

The referral of the dispute to arbitration and the
Grounds on which judicial review is sought and
The legal submissions

Acting under Section 20(1) of the Trade Disputes Act, Cap. 97 the Minister appointed an Arbitration Tribunal to adjudicate on the dispute. The Tribunal was given two Terms of Reference, namely:

(1) "To determine the Terms and Conditions of relocation to be applicable to Air Pacific employees who relocate with their positions from Suva/Nausori bases to Nadi.

(2) To determine the extent of compensation to be paid by air Pacific to those employees whose employment is terminated when they elect not to relocate to Nadi."

As I have said the Tribunal delivered its Award on the 4th of November 1991. Eight grounds of review are stated by the Applicant namely A to H but of these three, grounds B, C and D are repetitive. It will be convenient to deal with the grounds in two groups, A, B, C & D and E, F, G & H. The first group, grounds A to D raise questions of law and the last group E to H concerns the proceedings before the Tribunal and the conduct of the Tribunal. I shall now discuss all these grounds.

The first ground, A, is that the Tribunal in rendering its Award contravened the provisions of Section 23 of the Trade Disputes Act, Cap. 97 ('the Act') and thereby acted in excess of jurisdiction conferred under the Act. To understand the submissions on this ground I must set out the terms of Section 23. It reads:

> "A Tribunal shall make its award or, as the case may be, furnish its advice on any matter referred to it under the provisions of the Act without delay and in any case within twenty-eight days from the date of reference thereto:
>
> Provided that the Minister, if in his opinion the circumstances of the case make it necessary or desirable so to do, may extend such period of twenty eight days for such further period as he thinks fit."

The Applicant's complaint is that although the hearing was commenced on 6th of August 1991 and concluded on 22nd of August 1991 and the Award was handed down on 4th November 1991, the jurisdiction of the Tribunal had lapsed because the Minister had not granted an extension of time for the Tribunal to deliver its Award before the first period of twenty-eight days elapsed. The Applicant contends that without any extension being granted the Tribunal was obliged to deliver its Award no later than 28th of June 1991. I note that the Applicant does not mention the first and somewhat formal hearing of the Tribunal which occurred in the Tribunal's office on the 13th of June 1991 when appearances on behalf of the parties were taken and then two consent Orders were made. These were first that each party was to file and serve written submissions within twenty-eight days from the 13th of June 1991 and that any reply was to be delivered within fourteen days of the service of the first submissions. The hearing of evidence was then adjourned to the 6th of August 1991. My immediate comment on this first hearing, which apparently occupied one hour, is that it seems strange to me, if any credence is to be given to the Applicant's submission under Ground A, that the representative of the Applicant consented to an order that the first submissions were to be delivered by the 11th of July 1991 when it must have been obvious to the Applicant, if I accept its argument under Section 23, that it would have been impossible for the tribunal to deliver its Award by the date on which the Applicant claims that it should have been delivered, unless the Applicant was abandoning the right to make any submissions at all. Clearly it was not.

According to the record of the Tribunal not a word was said by the Applicant to draw the Tribunal's attention to the claim now made by the Applicant.

But then this failure by the Applicant continued over the subsequent days of the hearing on which evidence was taken. If the position is as claimed by the Applicant then it follows that all the hearings before the Tribunal in which the Applicant very actively participated were nothing but an exercise in futility. The Applicant must have believed then, as it alleges now, that since the tribunal had not requested an extension of time in the first instance any Award it subsequently made would have been a nullity. Is this correct? In my judgment it is not and the Applicant's submission under Ground A is wrong. This is to the effect that the first paragraph of Section 23 is mandatory and not directory.

For this the Applicant relies on the words in Section 23 "shall make", "without delay", "in any event" and argues that these words are clear proof that Section 23 is meant to be mandatory. A

As a general rule of law it may be said that a statute or rule which is not mandatory and imperative, but specifies the way in which a thing should be done is directory and a thing done otherwise is not invalid. The word mandatory may be said in general to mean the opposite of directory.

However over the years the courts have recognised that the question of whether B a provision is regarded as mandatory or directory is not easy of resolution. It would have been simple for the courts to have held that words such as "shall", "must", "is required" etc. indicate some sort of an obligation in contrast to words such as "may", "it is lawful", "if he thinks fit" etc. which suggest a discretion resting in the person concerned. This perhaps straight-forward approach has not however been followed. The courts have chosen rather to C examine the true effect and intent of legislation in an attempt to decide whether a provision is to be regarded as mandatory or compulsory on the one hand or discretionary or directory on the other. Perhaps one of the most useful statements of the law was given as long ago as 1877 by Lord Penzance in Howard v. Bodington (1877) 2 P.D. 203 at p. 211 when His Lordship said: D

> "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is E called imperative or only directory."

Thus it has been held that if great inconvenience or injustice will follow from requiring strict compliance with a provision a court will be reluctant to rule that the provision imposes an obligation even though it may be couched in mandatory terms. F

Thus in Simpson v. Attorney-General [1955] NZLR 271 the court held that strict compliance with certain provisions of the New Zealand Constitution relating to the dissolution of the Parliament would have been to nullify a large number of Acts of the Parliament, and the court refused to do so holding that although the words "shall" had been used in the relevant provisions, they were G directory only.

Applying the dictum of Lord Penzance and the general policy of the law as a I understand it, in my judgment to accede to the Applicant's submission on Ground A would be to defeat the clear policy of the Trade Disputes Act.

The title of this Act is "An Act to make provision for the settlement of Trade Disputes and the Regulation of Industrial Relations".

A In this case the Tribunal applied to the Minister for four extensions of time in which to deliver its Award namely up to 20th August 1991, 10th September 1991, 8th October 1991 and 15th November 1991. The applicant submits that all such extensions could be granted only if the Tribunal's jurisdiction had not expired at the relevant time the Application for extension was made. It is said that the onus was on the Tribunal that it did in fact have the jurisdiction at the
B time it sought and obtained the extension.

I cannot accept this argument which in my view is covered by Section 53 of the Interpretation Act, Cap. 7. This Section reads:

> "Where in any written law a time is prescribed for doing any
C act or taking any proceedings, and power is given to a court or other authority to extend such time, then, unless a contrary intention appears, such power may be exercised by the court or other authority although the application for the same is not made until after the expiration of the time prescribed."

D In my judgment no contrary intention appears in the Trade Disputes Act which would render nugatory the tribunal's application for an extension of time beyond the twenty-eight days mentioned in Section 23.

I therefore reject this argument.

It is then submitted however that there is no evidence that the Minister personally
E exercised his discretion or, if he did, that this was upon the ground that the circumstances of the case made it necessary or desirable to do so in accordance with the proviso to Section 23. The record of the hearing shows that all the extensions of time given to the Tribunal were in letters from the Ministry of Employment and Industrial Relations and signed either by the Permanent Secretary or the Acting Permanent Secretary for Employment and Industrial
F Relations.

There is nothing to indicate to me that the Minister was not aware of the proceedings before the Tribunal or of the actions of the Tribunal and in any event, given the policy of the Act, that the extensions were not granted in accordance with that Policy.

G The fact is that it was the Applicant who first applied for appointment of an Arbitration tribunal to consider the dispute between itself and Air Pacific. For the Applicant to contend eleven months after the Award was made that all the evidence and all the submissions tendered by the Applicant to the Tribunal were nothing but a waste of time and a nullity seems to me very strange indeed.

I am satisfied that the Tribunal in seeking the extensions of time which it did from the Minister was acting correctly and fully in accordance with the policy of the Trade Disputes Act. I therefore reject Ground A.

A

Grounds B, C and D

By section 31 of the Trade Disputes Act a Tribunal is entitled to "elicit all such information as in the circumstances may be considered necessary, without being bound by the rules of evidence in civil or criminal proceedings ....."

B

Ground B alleges that the Tribunal erred in law in ordering the Applicant to commence its case first. At page 320 of the record of the Tribunal on the first day on which evidence was taken there was a short argument as to whether the Applicant or the Company should begin. The Applicant contended that the Company should begin but the Tribunal, apparently without hearing the Company, held that the Applicant should start. No objection was taken to this ruling by the Applicant and the Tribunal then went on to consider whether it could begin the taking of evidence in the Nadi Magistrate's Court, which was then duly done the next day.

C

Since 15th of June 1982 industrial relations between the Applicant and the Company have been governed by a Collective Agreement. This was in evidence before the Tribunal and it makes no reference to relocation of the operations of the Company simply because, presumably, this was not contemplated by the parties at that date. The Company had proposed certain terms of relocation which generally did not satisfy the Applicant. As I have said at the beginning, this led to a dispute between the parties which the Applicant saw fit to refer to the Permanent Secretary for Labour and Industrial Relations with a view to having the dispute resolved by Arbitration. The Applicant had submitted counter proposals to the Company and the Company's proposals were before the Tribunal and evidence was given as to the relative merits of the competing proposals. It is thus clear to me that the Applicant was the claimant. Without an Award it would receive no compensation whatsoever for relocation. It therefore behoved the Applicant to either negotiate benefits acceptable to its members, or failing this, persuade the Tribunal that its members were entitled to a benefit exceeding that proposed by the Company. In my judgment therefore the Tribunal committed no error in requiring the Applicant to begin its case. Similar considerations apply to Ground C which claims that the Tribunal committed an error on the face of the record on the question of onus of proof and burden of proof.

D

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The applicant alleges that the Tribunal placed undue reliance on the provisions of the Collective Agreement but does not provide any particulars to support this claim nor am I able to find any passage in the Award which would justify such an assertion. It is also alleged that the Tribunal had clearly pre-determined that the package offered by the Company was fair and reasonable and that for

this reason had placed the onus and burden of proof erroneously upon the Applicant. Again I can find nothing in the Award to suggest that the Tribunal
A had pre-determined the reasonableness of the offer of the Company. This is a serious allegation which in effect amounts to a claim of bias by the Tribunal. Thus this Court is entitled to expect the Applicant to provide full details of such claim and not merely offer a general assertion. I find no substance in this ground and reject it.

B Ground D claims that the Tribunal in determining the various claims committed an error of law on the face of the record by undue reliance on the provisions of the Collective Agreement between the Applicant and the Company. Surprisingly therefore, almost in the next breath, the Applicant then contends that "the terms and conditions of the employment of the Applicant's members were regulated at that time by its then subsisting Collective Agreement".

C I fail to see how the Applicant can complain that the Tribunal committed an error of law by relying on the provisions of the relevant Industrial Agreement and yet at the same time assert that the terms and conditions of the employment of its members were regulated by that agreement.

This submission by the Applicant is clearly contradictory and I therefore also
D reject Ground D.

Grounds E, F, G and H may be taken together. Ground E claims that the Tribunal erred in law in holding that the Applicant failed to produce any legal or other precedents or show any contractual rights in support of its claim for penalty and compensation. A reading of the record of the Tribunal shows that
E the Applicant did not produce any precedents or establish any contractual rights to support its claim for penalty and compensation. The situation was that the Applicant and the Company had submitted detailed particulars of competing offers.

In the terms of reference it was for the Tribunal to determine the terms and conditions of relocation to Nadi and in my judgment its Award on these terms
F and conditions cannot be questioned. It was simply performing the duty imposed on it by the Minister but also agreed by the parties. I find no error of law by the Tribunal.

Ground F merely repeats Ground C in that it alleges that the Tribunal committed an error of law in not holding the onus was on the Company to justify the offer
G made by it. For the reasons given on Ground C I also reject Ground F.

Ground G claims that the Tribunal acted in excess of jurisdiction by taking into account irrelevant considerations and failing to take into account relevant considerations in that it:

(i) in dismissing the evidence of the witnesses of the Applicant failed to consider the evidence in totality;

(ii) that in concluding that the offer of the company was generous the Tribunal failed to consider the evidence given on behalf of the Applicant; A

(iii) that the Tribunal misconstrued the meaning and effect of "compensation" and "penalty" and ignored their practical significance and effect from the point of view of the Applicant's's claim.

The answer to the first two submissions lies in p. 373 of the record of the Tribunal where the Tribunal states: B

> "It is apparent to me from the totality of evidence adduced that the Association had failed to enter into serious negotiations in respect of the issues involved in the exercise of relocation after the initial announcement was made by Air Pacific in 1989." C

Again at p. 378 the Tribunal said this:

> "I have given due consideration to each witnesses' evidence and I bear in mind the general nature of the complaints, the grievances of the Association and of the plight of the individuals who will be involved in relocation." D

These passages show clearly in my view that there is no substance in these grounds.

As to the third sub-ground, at p. 79 of the Award the Tribunal remarked that he considered the offer by the Company to compensate its employees based on the period of notice given for relocation appeared to him to be generous. He then questioned the use of the word "penalty" by the Applicant and said that he thought the word "compensation" was more appropriate. E

I do not understand the Applicant's submission here and can find no fault in the Tribunal's comment which I have just quoted. The Tribunal was simply expressing its opinion as to the choice of the terminology used by the parties and how this could be said to show an error of law on the face of the record completely escapes me. I thus reject this ground also. F

Ground H avers that the Tribunal erred in the construction of a letter by the Company of the 7th of September 1989 which appears at p. 251 of the record. This was a specimen letter written by the Company to employees at Nausori and Suva informing them of the company's decision to relocate all its operation to Nadi. It is claimed by the Applicant that the Tribunal erred in holding this letter to constitute a notice to the Applicant as opposed to an invitation to negotiate terms and conditions. I fail to see any error of law committed by the Tribunal under this ground; whether it be called a letter or a notice seems to me immaterial. The fact is that the document dated the 7th of September 1989 G

was certainly a notice to all employees of the Company's intentions. As an employer it was entitled to make any decisions it considered desirable in the interests of the Company and, it should also be remembered, of the Company's employees. The Applicant contended that its members should have received an eighteen month notice but the Tribunal rejected this and held that all senior employees had had sufficient notice of relocation to Nadi. (See p. 79 of the Award.)

The Tribunal then continued that every employee of the Applicant was aware of the fact that the Company would relocate all its operations to Nadi and that this would require most employees to move from Suva and Nausori to Nadi. It is clear that the company appreciated that this, like any transfer or relocation of employment and housing, would cause some problems and irritations. For this reason, and contrary to the claim made by the Applicant under Ground H, it did propose its terms and conditions of such transfer.

To succeed in its application for Judicial Review the Applicant must show illegality, irrationality or procedural impropriety on the part of the Tribunal. All the well-known authorities make this clear. None of the submissions by the Applicant persuaded me that the Tribunal made any error of law or acted irrationally in reaching its decision. The mere fact that obviously the Applicant did not obtain an Award which satisfied it in many respects is no reason for this Court holding that the Tribunal erred in law. I am satisfied that it did not.

The Application for Judicial Review is therefore refused and I order the Applicant to pay the costs of both Respondent.

(Motion dismissed)