PAFCO EMPLOYEES UNION v PACIFIC FISHING CO LTD

HIGH COURT — CIVIL JURISDICTION

BYRNE J

29 June, 9 August 2001, 25 January 2002

[2002] FJHC 60

Employment — labour law — summons — re-employment and fulfill obligations — High Court jurisdiction to enforce awards where lacuna — resort to international law — Arbitration Act Cap 38 — Fiji Constitution ss 33(2), 33(3), 41(1), 43(2) — Maintenance and Affiliation Act Cap 52 s 4(b) — Trade Disputes Act Cap 97 ss 5A, 5A(4).

Applicant sought an application for relief that defendant fulfill all its obligations as mandated by an arbitration award and reinstate its 24 employees dismissed. Defendant submitted that any compliance or noncompliance of the award or decision did not bind them as the decision did not state it was by consensus with the court.

Held — (1) The submission ignores the effect of ss 33(2), (3) and 41(1) of the Constitution. Section 33(2) of the Constitution gives workers and employers the right to organise and bargain collectively. Subsection (3) then provides that everyone has the right to fair labour practices. The right must be deemed to include the right to enforce awards of the Arbitration Tribunal which is the statutory body created to determine trade disputes between unions and employers and, in so doing, to pronounce on what the tribunal considers to be fair labour practices.

Surya Prakash v Shirley Reshmi Narayan Civil Appeal No HBA 1J/99L (unreported), cited.

(2) Paragraph 3 of Art 8 ICESCR gives trade unions the right to function freely subject to limitations necessary in a democratic society. This must include the right to enforce awards in courts of law. Ratification of the Children's Rights Convention (CRC) gave rise to a legitimate expectation that the minister would act in conformity with it in the absence of statutory or executive indications otherwise. The Commonwealth had ratified the CRC but had yet to embody its contents in statutory form.

Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273; [1995] HCA 20, cited.

Cases referred to

Epeli Seniloli and Anor v Semi Voliti Civil Appeal No HBA 33/99S, cited.

G.E. Leung for the Plaintiff

H.K. Nagin for the Defendant

Judgment

Byrne J.

It is submitted with respect that there may never before have been in the High Court such a nebulous case as has been brought by the Plaintiff in this action.

With this very bold, though mildly qualified assertion, counsel for the Defendant begins his written submission to this court on an amended originating summons filed on behalf of the Plaintiff on the 7th of May 2001.

In this summons the Plaintiff seeks the following relief:

(1) That the Pacific Fishing Company Limited fulfills all its obligations as mandated by Award No 40 of 1996 of the Arbitration Tribunal dated 21st day of October 1997 and specifically re-employ the dismissed workers in accordance with their security.

(2) That the Pacific Fishing Company Limited fulfil its obligations as mandated by a decision of the disputes committee made on the 3rd day of April 1997 and re-employ unconditionally the 24 employees who are yet to be reinstated and pay them all moneys due in respect of the said decision that arises from the order for immediate reinstatement as contained in the said decision.

(3) Such order and/or declaration as this honourable court seem just and fair.

(4) Costs of this application.

To decide whether there is any truth in his first assertion by counsel for the Defendant it is first necessary to look at the background of this litigation.

On the 21st of October 1997 in award of the Arbitration Tribunal of the Republic of Fiji, No 40 of 1996 the Arbitration Tribunal considered a dispute between the present Plaintiff and the present Defendant over the dismissal of 57 employees whose names were set out in an annexure to the award. The dispute had been referred to the tribunal by the union which claimed the dismissal of its employees was unreasonable, unlawful and unfair. Their employer, (hereinafter called "the Company") claimed that the dismissed employees failed to observe the provisions of a notice that was posted on Company boards on 15th July 1996. This advised that the previous practice of "leave without pay and absent with information have been abolished since they are forms of absenteeism". The notice then continued as follows:

> *You are also forewarned that abolishment of absenteeism is a company policy; any employee seen to be consistently absent from work will be severely penalised.*
> *The Personnel Section will closely monitor your daily attendance and advise Management accordingly to remedy the situation, the company will take the following lines of action:*
> *FIRST BREACH — LAST WARNING*
> *SECOND BREACH — DAYS SUSPENSION*
> *THIRD BREACH — TERMINATION OF EMPLOYMENT*
> *(Sgd) Mitieli Baleivanua*
> *General Manager*

The suspensions of the respective employees occurred on the 18th and 19th of July 1996. They had breached the provisions of the notice by insisting on taking breaks at particular times contrary to what the Company understood was the practice.

On pp 3 and 4 of his award the tribunal said this:

> *The Tribunal understands the policy behind the Company's determination to eradicate absenteeism. Indeed the survival of the Company's operations depended to some extent on the resolution of this problem. However, it could not change accepted practice at will. It had already voluntarily recognised the Union and it was obliged to consult with it and agree on any changes. There being no collective agreement in place was hardly*

an excuse to impose the Company's proposals. Seen against that background, the reaction of the dismissed employees while unjustified was at the very least understandable.

The dismissal followed upon the dismissed employees' alleged breach of the 15 July 1996 notice. Yet even according to the terms of the said notice, the employees had only committed one breach of its terms. They were not due for dismissal at the time it was effected. Howsoever, the fact remains that the said notice was invalid as a unilateral attempt by the Company to change existing practice.

I respectfully agree with these comments which then led the tribunal to find without hesitation that the employees were unfairly, unreasonably and unlawfully dismissed in that the Company purported to alter existing practice unilaterally and then dismiss the employees pursuant to an invalidly issued directive. He then made the following award:

The Tribunal finds the employees whose names appear in the annexure to this award were unfairly, unreasonably and unlawfully dismissed. They are to be each paid three months' pay and given first preference (in order of seniority) for jobs appropriate to their experience in the Company as and when they become available (if that has not yet happened). The notice dated 5 July 1996 is hereby invalidated and the Company is directed to negotiate a new arrangement regarding absenteeism with the Union.

DATED at Suva this 21 day October 1997.

(Sgd) Joni Madraiwiwi
ARBITRATION TRIBUNAL

Various affidavits have been filed on behalf of the parties but apart from para 11 of an affidavit of Tomasi Tokalauvere the General Secretary of the Plaintiff sworn on the 8th of May 2001 and paras 6 and 8 of the affidavit of Tevita Momoka, the Manager Corporate Services of the Defendant sworn on the 28th of June 2001 I find it unnecessary to refer any further to them.

It is common ground that as a condition of their reemployment 35 of the dismissed employees were retested and taken back because they passed the required standards. It is also common ground as claimed in the affidavit of Mr Momoka sworn on 14 March 2001 that much later following a decision of the disputes committee on 3 April 1997 10 out of the 24 remaining employees passed the test and were duly re-employed.

In para 11 of his affidavit of 8 May 2001 Tomasi Tokalauvere deposes, and I agree, that the re-test was completed outside the ambit of the Disputes Committee Decision. He also denies the statement by Tevita Momoka that the decision of the Disputes Committee was not arrived at by consensus and therefore not binding on the Defendant.

In para 8 of his affidavit of the 28th of June 2001 Mr Momoka claimed that if the decision had been arrived at by consensus it would have been mentioned in the decision, and it was not. I shall consider this shortly but first I must refer to s 5A of Decree No 27 of 1992 which amends certain sections of the Trade Disputes Act. Section 5A(4) states:

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

The Defendant submits that because the decision does not state it was by consensus this court must find that it was not so reached. I disagree.

By signing the decision as the representative of the employer, I hold that Mr Poate Mata thereby acknowledged by clear implication that the Committee's decision had been reached by consensus. Furthermore the claim that Mr Mata did

not approve the decision is hearsay and I accordingly disregard it. I pass now to the Defendant's submission on the jurisdiction of this court to hear the originating summons.

The Defendant contends that any compliance or non-compliance of the award or decision of the Trade Disputes Committee constitutes a further trade dispute and should be taken to the Arbitration Tribunal after following the Disputes Procedure set out in the Trade Disputes Act Cap 97. That Act makes no provision for matters to be brought to the High Court. It is submitted that the only way awards or decisions of a Disputes Committee can come to the High Court is by way of judicial review and then only with a view to setting aside the award or decision on the established grounds on which judicial review will be granted. It is submitted that there is no procedure for an award or decision of a Trade Disputes Committee to be enforced by way of originating summons.

Order 5 r 3 of the High Court Rules reads as follows:

> *Proceedings by which an application is to be made to the High Court or a judge thereof under any Act must be begun by originating summons except where by these Rules or by or under any Act the application in question is expressly required or authorised to be made by some other means.*

Thus it is submitted this application is misconceived and not properly before this court which is invited to refer the dispute back to follow the disputes procedure. It is further submitted that under the Arbitration Act Cap 38 arbitrations under that Act may be referred to the High Court for enforcement with leave (my emphasis). Reliance is placed on s 13(1) which reads:

> *An award on a submission may by leave of the court be enforced in the same manner as a judgment or order to the same effect.*

It is submitted that this procedure is available strictly for Arbitration awards made under the Arbitration Act and not to awards made under the Trade Disputes Act. It therefore follows according to the Defendant that if parliament had intended enforcement of awards under the Trade Disputes Act to be made by the High Court then a similar provision would have been inserted in that Act. It is true as counsel submits, that as far as I know there are no cases in which such an application has been made before. On its face this is an attractive submission and appears in the absence of any other authority to give some weight to the opening sentence of the Defendant's submission that this is a nebulous case.

But appearances can be deceptive. In my judgment the submission ignores the effect of ss 33(2), (3) and 41(1) of the Constitution and three decisions, that of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; [1995] HCA 20; *Surya Prakash v Shirley Reshmi Narayan* Civil Appeal No HBA 1J of 1999L High Court Lautoka (unreported);; *Epeli Seniloli and Anor v Semi Voliti* Civil Appeal No HBA 33/99S.

Section 33(2) of the Constitution gives workers and employers the right to organise and bargain collectively.

Subsection (3) then provides that everyone has the right to fair labour practices.

In my judgment that right must be deemed to include the right to enforce awards of the Arbitration Tribunal which is the statutory body created to determine trade disputes between unions and employers and, in so doing, to pronounce on what the tribunal considers to be fair labour practices.

Section 33 is part of Ch 4 of the Constitution which contains a Bill of Rights. So too are ss 41 and 43 to which I shall refer in a moment. While the United Kingdom does not have any written Constitution and while, for example, Australia does, there is as yet no Bill of Rights in the Australian Constitution although at times there have been proposals to incorporate such a Bill in the Constitution. Bearing in mind the fact that an amendment to the Australian Constitution can only be made by Referendum the history of the country shows that unless a proposed amendment is supported by all political parties, it is foredoomed to failure. In the United Kingdom which has no written Constitution and where the rights of the individual are stated either by statute or by the common law it is interesting to note that the late Lord Hailsham nearly 20 years ago expressed the view that in England the time was ripe to enact a Bill of Rights so that there could be no doubts as to the rights of individuals vis-a-vis the state and each other. England still has no Bill of Rights although in 1998 the Human Rights Act was passed which in many respects is similar to the Bill of Rights in the Constitutions of the United States of America and Canada. However the English Act is, as its Long Title states, designed "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights".

For this reason and because unlike Fiji, the United States and Canada where a Bill of Rights is incorporated in the Constitution, the English legislation, although eminently worthwhile, must lack the authority of a written Constitution which is the supreme law of the land. All that said, the important fact now is that with the recognition of the United Kingdom of the need to set out clearly the rights of individuals towards the State and each other and a similar recognition by the European community of the need for this, it is clear that courts in democracies will henceforth be obliged to recognise their duty to guard against any attempt to dilute the rights of the individual and deprive him of those rights should a narrow interpretation of legislation lead to that result. For that reason in my view to describe the Plaintiff's case here as nebulous is wrong.

Section 41(1) of the Constitution states that if any person considers that any of the provisions of the Bill of Rights have been contravened in relation to him or her then that person may apply to the High Court for redress.

By subs (2) that right is without prejudice to any other action with respect to the matter that the person concerned may have.

I therefore find it an irresistible implication of law that the combined effect of these sections confers jurisdiction on the High Court under the Trade Disputes Act to enforce awards. The admitted lacuna under the Trade Disputes Act is in my view filled by s 43(2) of the Constitution which provides:

> *In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.*

I take subs (2) to incorporate by reference provisions of international instruments such as Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the issue of ratification is irrelevant.

Paragraph 3 of Art 8 of ICESCR gives trade unions the right to function freely subject to limitations necessary in a democratic society. This must include the right to enforce awards in courts of law. In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; [1995] HCA 20 the High Court of Australia held that ratification of the Children's Rights Convention (CRC) gave rise to a

legitimate expectation the Minister would act in conformity with it in the absence of statutory or executive indications otherwise. The Commonwealth had ratified the CRC but had yet to embody its contents in statutory form.

In *Teoh's* case, Mason CJ Deane, Toohey and Gaudron JJ held that although a Convention ratified by Australia did not become part of Australian law unless its provisions had been validly incorporated into municipal law by statute, the ratification was an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers would act conformably with the Convention. They also held that it was not necessary that a person seeking to set up such a legitimate expectation be aware of the Convention or personally entertain the expectation. It was enough that the expectation was reasonable in the sense that there were adequate materials to support it.

Relying on s 43(2) of the Fiji Constitution this court applied the principle of *Teoh's* case to import Art 3 of the CRC to hold that a Magistrate's Court could make interim custody orders under s 4(b) of the Maintenance and Affiliation Act (Cap 52). I refer to what I may call with respect the admirable judgment of Madraiwiwi J in *Surya Prakash v Shirley Reshmi Narayan* Civ App No HBA0001J of 1999L and the no less informed judgment of Shameem J in *Epeli Seniloli v Semi Voliti* Civ App No HBA0033 of 1999S.

Consequently I hold that this court has jurisdiction to entertain the Plaintiff's summons.

I pass finally to Award No 40 of 1996.

The Plaintiff admits that the Defendant has paid its members the three months' salary awarded by the Arbitration Tribunal but says that assuming 11 of the dismissed employees have been re-employed the remaining 46 represent unemployed workers. I consider there is some merit in the Defendant's submission that no time limit was given by the tribunal to employ all the employees concerned and that they are only to be re-employed when jobs appropriate for their experience in the Company become available.

Holding as I do that the Defendant had no right to add its own terms either to the award or the decision of the Disputes Committee I rule that the 14 employees remaining were and are entitled to be reinstated with no conditions attached to such reinstatement.

The Defendant contends that Mr Tokalauvere and his union have lost touch with their members because they were not aware that the 10 employees had been re-employed or whether the remaining 14 employees want their jobs back or not.

The town of Levuka is not a huge metropolis. According to the Bureau of Census and Statistics of which I have taken the liberty to enquire the population of Levuka at 31st August 1996 were 3746. I do not consider it beyond the wit of the parties to ascertain whether any of the remaining 14 employees still wish to be re-employed by the Defendant. It is a pity that no evidence of this was called because I would have thought it reasonably easy for the Plaintiff to ascertain this. For this reason I intend to adjourn the hearing of this case for a fortnight from the date of this judgment to enable evidence to be called of the situation and the wishes of these fourteen. Subject to that I grant the relief sought by the Plaintiff in para 1 of its originating summons conditional only on my being satisfied that the workers have not yet been re-employed or if not, they do not wish to be. Likewise in accordance with para 2 of the summons I direct the Defendant to re-employ unconditionally if they so desire the 24 employees who are yet to be

reinstated and that they are to be paid all moneys due to them in respect of the award and the decision of the Disputes Committee.

The Plaintiff is entitled to its costs of these proceedings which I fix at $750.

Relief allowed.