IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 33 of 1984

Between:

AIR PACIFIC LIMITED Plaintiff

- and -

THE ATTORNEY GENERAL OF FIJI Defendant

JUDGMENT

On 21st December, 1983, the Permanent Secretary for Employment and Industrial Relations referred a certain matter to the Permanent Arbitrator for settlement.

That reference was in the following form :

" WHEREAS a trade dispute exists between the Air Pacific Employees Association and the Air Pacific Limited;

AND WHEREAS I, Peter Howard, Permanent Secretary for Employment and Industrial Relations have reported the said trade dispute to the Minister for Employment and Industrial Relations who has authorised me to refer such trade dispute to an Arbitration Tribunal for settlement pursuant to the provisions of subsection (2)(b) of section 6 of the Trade Disputes Act (Cap. 97);

NOW THEREFORE I do hereby refer the said trade dispute to the Permanent Arbitrator for settlement in relation to the following matter :

'A claim by the Air Pacific Employees' Association that the termination of employment of their President, Mr. Veer Singh, by Air Pacific Limited is unfair and that he should be reinstated.'

Dated at Suva this 21st day of December, 1983.

(Sgd) Peter Howard
Permanent Secretary for Employment
and Industrial Relations. "

Section 6(2)(b) of the Trade Disputes Act, cited by the Permanent Secretary in that reference, reads as follows :

"(2) The Minister may authorise the Permanent Secretary, whether or not the parties consent, to refer a dispute to a Tribunal where -

(a) ....
(b) a trade dispute, whether reported or not, involves an essential service,
(c) .... "

Exception is taken to that reference by the Plaintiff, Air Pacific Limited, which seeks

"A declaration that the Permanent Secretary for Employment and Industrial Relations erred in law in accepting that a 'trade dispute' existed between the plaintiff and the Air Pacific Employees' Association as defined in the Trade Disputes Act."

It was common ground that the employee mentioned in the reference, Mr. Veer Singh, was a member of the plaintiff company's senior staff and that the claim that his employment had been unfairly terminated was based on a collective agreement made between the plaintiff company and a trade union which was not the one mentioned in the reference, the Air Pacific Employees' Association (APEA) but the Air Pacific Senior Staff Association (APSSA).

It was also common ground that, before it was referred to the Permanent Arbitrator,

(i) the matter was taken up by APEA with the plaintiff company

(ii) the matter was reported, by APEA, as an existing trade dispute, to the Permanent Secretary under sections 3 and 16 of the Act

(iii) the Permanent Secretary accepted that report and appointed the Senior Labour Officer to conciliate under section 4(1)(d) and

(iv) the Senior Labour Officer's efforts to conciliate were unsuccessful.

All of that is evident in the two affidavits which are before me and the copies of documents annexed to one of them.

Mr. Flower, for the Defendant, may have considered arguing that the Permanent Secretary had "determined" that a report, that is to say a report of an existing trade dispute, had been made in accordance with sections 3 and 16 which determination, together with the decision it contained that that was an existing trade dispute, was rendered "final and conclusive" by section 40.

I will not lengthen this judgment by quoting sections 3, 16 and 40. I think I need only say that, if Mr. Flower did consider the argument at all, he was, in my view, right in not submitting it. As Professor Wade points out in the fourth edition of his "Administrative Law", at page 567, "If a statute says that the decision 'shall be final' or 'shall be final and conclusive to all intents and purposes' this is held to mean merely that there is no appeal: judicial control of legality is unimpaired." In the present case the plaintiff is not appealing, he is asking for declarations.

Mr. Matawalu has drawn my attention to another matter referred to the Permanent Arbitrator, Reference No. 1 of 1984. A copy of the Permanent Arbitrator's award in that matter has been placed before me by Mr. Matawalu with Mr. Flower's consent. It shows that, as in the present matter, APEA was claiming that the termination of the employment of one of its members (a Mr. Shankaran) who was also one of the plaintiff company's senior staff, was unfair. That claim was based on the collective agreement made between the plaintiff company and the other trade union, APSSA. The Permanent Arbitrator took the view that, as the company and APSSA had agreed in that collective agreement that APSSA would be "the sole representative of and agent for the purpose of collective bargaining .... of senior staff" it would be an undermining of the foundations of collective bargaining if APEA were allowed to appear before him for the employee. In his award he went on to explain that view by referring to the general rule that a contract cannot confer rights on someone not a party to it and by saying :

> "When a trade union is granted exclusive rights to negotiate on behalf of a group of employees, that general rule reaches beyond the actual negotiation of the collective agreement. It must also apply to disputes over the administration or interpretation of that agreement."

He concluded :

> "If Shankaran's grievance is to be brought to arbitration it must be carried by APSSA. The Tribunal must consequently reject APEA's claim to process the grievance."

Mr. Matawalu has not, of course, submitted that I am bound by the views and conclusions of the Permanent Arbitrator. He has, however, adopted what the Permanent Arbitrator said into his own argument that a trade dispute was not in existence at the time of the reference to the Permanent Arbitrator in the present case.

With all due respect, I must say that I cannot understand how anything the Permanent Arbitrator said, logically forms part of Mr. Matawalu's argument. The Permanent Arbitrator did not express the view that there was not a trade dispute. What he decided was that "If Shankaran's grievance is to be brought to arbitration it must be carried by APSSA." He did not express the view that "Shankaran's grievance" was not a trade dispute.

What I have to decide in the present case is whether or not there was a trade dispute as defined in the Act.

A trade union, APEA, was contending on behalf

of one of its members that the termination of his employment by the company was unfair and that he should be reinstated. The company was counter-contending that the termination was justified and was refusing to reinstate the employee. Was that a trade dispute? In my view, the fact that APEA's contention and the company's counter-contention were based on a collective agreement made between the company and another union, APSSA, has nothing to do with that question.

Section 2 of the Act attributes the following meaning to the term "trade dispute":

> "any dispute or difference between employers and employees, or between employees and employees or between employees and any authority or body, connected with the employment or non-employment, or with the terms of employment, or with the conditions of labour, of any person."

There certainly was a "dispute or difference ... connected with the employment or non employment of" a "person". If that dispute or difference was "between employers and employees" it was a "trade dispute". What does "between employers and employees" mean?

The words "employers" and "employees" used in the statutory definition are, as I think a gramarian would say, in the plural number. Strictly construed, they denote more than one employer and more than one employee. However, Mr. Matawalu did not argue that it takes more than one employer on one side and more than one employee on the other to make a trade dispute and I think he was right in not so arguing. Subsection (4) of section (2) of the Interpretation Act says :

> "In every written law, except where a contrary intention appears, words and expressions in the singular include the plural and words and expressions in the plural include the singular."

I can see no such "contrary intention" in the Trade Disputes Act.

In Rex v. National Arbitration Tribunal; Ex parte South Shields Corporation (1952) 1 K.B. 46 the court (Lord Goddard C.J., Hilbery J. and Pilcher J.) considered the following definition of "trade dispute" :

> "any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person".

It was concluded that, on a true construction of that definition in the light of a provision of the Interpretation Act, 1899, that "unless the contrary intention appears .... words in the singular shall include the plural and words in the plural shall include the singular", that a dispute between one employer and one workman was a "trade dispute". I consider that to be abundant authority for saying that there was, in the present case, at least a trade dispute between Mr. Veer Singh and the plaintiff company.

In Regina v. Industrial Disputes Tribunal; Ex parte Mary College, University of London (1957) 2 Q.B. 483 the court (Lord Goddard C.J., Byrne J. and Devlin J.) considered a definition of the word "dispute" which was quite different from the definition of "trade dispute" which appears in our Act. The word was defined as meaning :

> "any dispute between an employer and workmen in the employment of that employer connected with the terms of employment or with the conditions of labour of any of those workmen".

The employer, a college of the University of London, had refused an employee's application for promotion. The trade union of which he was a member had taken the matter up and reported to the Minister of Labour " a dispute between this association" (the trade union) "and the governing body" (of the employer college) and the Minister had referred that "dispute" to a tribunal. The college contended that there was not a dispute within the definition as it was a dispute to which only one workman was a party.

It was held that, as there was a contrary intention in the relevant legislation which prevented "workmen" being read as "workman", a "dispute" must be between an employer and a number of workmen. Even so, it was also held that a dispute between an employer and a single workman became a dispute with a number of workmen when the workman's trade union chose to take up the cudgels on his behalf and make it a union matter. Delivering the judgment of the court Devlin J. said :

> "In short, the proposition .... comes down to this: If the union chooses to make the matter a union issue, if it chooses to take up the cudgels on behalf of its member and thereby to become a belligerent in the matter, it is a dispute to which more than one workman is a party. No doubt the union will not do so unless there is a matter of some general principle involved; but if the union chooses to make it a general issue, the matter becomes a dispute to which the whole body or group

of workman are made parties. We think that that is the right view of the matter ...."

That was, I think, another way of saying that a dispute between an employer and a trade union which arises when the union takes up the cudgels on behalf of one of its members is the same thing as a dispute between the employer and the members of that union. It can be called a dispute with a trade union or a dispute with its members as one might choose. There seems to be no room, in such circumstances, for the argument that, a trade union being a body corporate with an existence separate from that of its members, a dispute with a trade union is not a dispute with its members. I should, perhaps, add that no such argument was put to me.

So, it seems to me that in the present case the dispute could have been correctly called a dispute between APEA and the company and it could also have been correctly called a dispute between the members of APEA and the company. That dispute was, in my view, a "trade dispute" as defined in Section 2 of the Trade Disputes Act (read in the light of Section 2(4) of the Interpretation Act) since it was a dispute between a single employer and a number of employees connected with the employment or non-employment of a person.

I therefore cannot see my way clear to making the first of the declarations sought by the plaintiff company, that the Permanent Secretary erred in accepting that a "trade dispute" existed between the plaintiff company and APEA as defined in the Act.

Now the plaintiff also seeks the following declaration :

> "A declaration that an order by the Minister for Employment and Industrial Relations prohibiting the continuance of a lockout and declaring the lockout unlawful, which order was dated the 29th day of December, 1983, and published in the Fiji Royal Gazette of that date, was beyond the powers conferred upon him by subsection (4) of section 6 of the Trade Disputes Act and therefore null and void."

Mr. Flower concedes that the existence of a lockout on the date of the Permanent Secretary's reference of the trade dispute to the Permanent Arbitrator was a condition precedent to the exercise of the Minister's power and that, because a lockout was not in existence on 21st December, 1983, the date of the reference, the declaration should be made. That is clearly a correct concession. Subsection (4) reads as follows :

> "Where a trade dispute has been referred to a Tribunal or to conciliation under this Act, the Minister may by order prohibit the continuance of and declare unlawful any strike or lockout in connection with such dispute which may be in existence on the date of the reference."

It was common ground that on the date of the reference, 21st December, 1983, no lockout in connection with the dispute was in existence.

I therefore make the second of the declarations sought by the plaintiff company in the terms above stated.

R. A. Kearsley

(R.A. Kearsley)

JUDGE

Suva,

25th April, 1984.