

SOLOMON ISLANDS NATIONAL PROVIDENT FUND BOARD -V- SOLOMON ISLANDS NATIONAL UNION OF WORKERS
and
SOLOMON ISLANDS NATIONAL UNION OF WORKERS -V- SOLOMON ISLANDS NATIONAL PROVIDENT FUND BOARD

High Court of Solomon Islands
(Muria, C.J.)
Civil Cases Nos. 437 & 438 of 1993
Hearing: 17 May 1994
Judgement: 9 August 1994

A. Rose for the NPF Board
G. Suri for the Union

MURIA, C.J.: In Civil Case No. 437 of 1993, the Solomon Islands National Provident Fund Board ("the Board") appealed against the decision of the Trade Disputes Panel which decided on 1 December 1993 that the issue of wage increase referred to it by the General Secretary of the Solomon Islands National Union of Workers ("the Union") was valid and that the Panel could proceed to hear the matter at a preliminary hearing within a period of less than seven (7) clear days notice. The appellant also complained that the Trade Disputes Panel was wrong in law to imply that a referral might be made under sections 4 or 6 of the Trade Disputes Act 1981.

In Civil Case No. 438 of 1993, the Union applied by way of Originating Summons seeking a number of declarations which are set out in Originating Summons together with a number of orders. Basically the Union seeks declarations that its striking members did not breach their contract of employment when they went on strike on 26 November 1993; that the termination notices issued to the striking employees were null and void; that the Board contravened section 10(1) and (2) of the Trade Disputes Act 1981 when it continued to carry out a mass dismissal of the striking employees on or after 26 November 1993 after the trade dispute had been referred to the Trade Disputes Panel ("the Panel") on 26 November 1993; and that the Board's actions in excluding striking employees from their places of employment and re-engagement of striking employees on conditions under a new contract of employment constituted a 'lock-out' in terms of the Act.

The two actions arose out of the same incident and cover basically the issues raised between the parties in both matters. It is therefore agreed by both

parties that the two cases be heard together. For ease of reference, I shall refer to the NPF Board as " the Board" and the SINUW " the Union" in both cases.

Before proceeding to deal with the issues raised in the two cases, it is necessary to briefly look at the background of the disputes between the parties in the present cases. As I have said the background of the two cases is the same.

Prior to 25 November 1993, a meeting was held between the Union and Management of the NPF regarding certain terms and conditions of employment of the NPF Board's employees who are members of the Union. The central issue of negotiation between the parties was that of a wage increase of 12.5% claimed by the Union for its members while the Board offered 8% increase.

At about 4.30 pm on 25 November 1993, the Union representatives and the employees of the Board voted to go on strike without notice following their non-acceptance of the 8% wage increase offered by the Board, the employer. The Board only learned of its employees' decision to take strike action early morning 26 November 1993 when the employees did not turn up for work at 8.00 am.

At about 10.20 a.m on the same day, 26 November 1993, the Board met to consider the strike action taken by its employees. The meeting of the Board resolved at about 11.50 am the same morning that the employment contracts of all its employees who went on strike be terminated forthwith for breach of contract.

It was further resolved by the Board that all posts left vacant as a result of the termination of its employees' contracts be advertised and that the terminated employees could re-apply if they wish but on new terms and conditions. There was also no guarantee that those who re-applied would be accepted.

The Board's decision was communicated to the striking employees by a service message over the SIBC at 12.40 pm, 12.55 pm and 1.10 pm that same day. The General Manager of NPF, Mr. Leslie Teama also notified the employees concerned some time between 12.30 pm and 1.00 pm of the Board's decision. Present with the General Manager when he informed the striking employees of the Board's decision at the Multipurpose Hall was the General Secretary of the Union, Mr. Gabriel Suri.

After 2.00 pm on 26 November 1993 following those verbal notification to the striking employees of the termination of their employment, the management, of the Fund sent a formal letter addressed to the General Secretary of the Union for the purpose of informing the striking employees who were members of the Union that they had been terminated from their employment. A standard letter of termination dated 26 November 1993 was also issued to each of the terminated employees who refused to take the letters when the letters were handed to them on Monday 29 November 1993.

At about 2.50 pm on 26 November 1993 the Union referred the dispute over the 1993/1994 wage increase between the Board and its employees to the Panel. A copy of the notice of the referral was received by the Board at about 3.30 pm also the same day.

Of the 130 employees of the Board, 95 of them went on strike and were terminated from their employment.

The sacked employees, however, resolved on 29 November 1993 to reapply to the Board to be employed again. They did reapply, not individually but as a group on 30 November 1993 at about 12.00 noon. Those who reapplied were accepted and have now been reemployed by the Board since then.

Those are the brief back ground circumstances of these cases. I shall now turn to consider the issues raised by the parties in the cases.

Civil Case No. 437 of 1993

I feel it is necessary to consider first the points raised by the Board in its appeal in Civil Case No. 437 of 1993. That is an appeal against the decision of the Trade Disputes Panel.

After the matter was referred to the Panel on 26 November 1993 the Panel decided on 1 December 1993 that the issue referred to it was a trade dispute and therefore should proceed to a full hearing. Secondly the Panel decided that it was proper for the Panel to hear the matter at a preliminary hearing without the need of

the seven (7) clear days notice as stipulated rule 5(2) of Trade Disputes Panel Rules 1981 as read with section 6(2) of the Trade Disputes Act 1981.

The argument for the Board is that the Panel was wrong in law to accept the referral by the Union of the issue of the 1993/1994 wage increase as a trade dispute which had caused the employees of the Board to take strike action on 26 November 1993. It was contended by Counsel for the Board both before the Panel and before this Court that at 1150 hrs on 26 November 1993 the employees' contract of employment had been terminated and from that time onward the relationship between the employer and employees had been severed. There was therefore no **"trade dispute"** between the parties after 1150 hrs on 26 November 1993 and the referral was therefore not valid. If there was any trade dispute, counsel says, then it can only be between the employer and those employees who were not dismissed.

It is further argued by counsel for the Board that having been terminated the only matter of complaint by the sacked employees to the Trade Disputes Panel would be that of **"unfair dismissal"** under the Unfair dismissal Act 1982. In this case the sacked employees did not complain of unfair dismissal.

I shall approach the issue raised by Counsel for the Board by ascertaining first of all whether in fact there was a **"trade dispute"** between the parties in this case. Then I shall proceed to consider the validity of the referral to the Trade Disputes Panel.

Was there a trade dispute?

The question of whether there is a trade dispute or not is a question of mixed fact and law, although it is very much one of fact. It is to be ascertained from the evidence adduced before the Court or the relevant tribunal. In this case I must decide the question posed on the evidence before the court.

Before I turn to the evidence presented before this court, I set out what the law says a **"trade dispute"** is. It is defined in the schedule to the Trade Disputes Act 1981 as:

"A dispute between employees and employers, or between groups of employees, which is connected with one or more of the following matters -

(a) terms and conditions employment or the physical conditions in which employees are required to work;

(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment employment, of one or more employees;

(c) allocation of work as between employees or groups of employees;

(d) matters of discipline;

(e) membership or non-membership of a trade union;

and

(f) machinery for negotiation or consultation, and other prodedures relating to any of the matters mentioned above, including the recognition of any trade union by an employer."

The law, thus, makes it clear that for it to be a "trade dispute" within the meaning of the Act, the dispute must be between employees and employers or between groups of employees and that it must be connected with any of the matters set out in paragraphs (a) to (f) in the definition. A dispute connected with any of the matters in paragraphs (a) to (f) but which is not between an employee and employer is not a trade dispute and so is a dispute between an employee and employer not connected with any of the matters in paragraphs (a) to (f).

It is obvious that Counsel for the Board based his argument on this analysis of the definition of the words 'trade dispute'. He argued, as I understand it, that the dispute here was no longer capable of becoming a 'trade dispute' after 11.50 am on 26 November 1993 at which time the striking employees were terminated from their employment and thus, severing the employer - employee relationship between them. Thus the referral by the Union of the Claim of Wage Increase at 2.50 pm on 26 November 1993 to Trade Disputes Panel was, counsel submitted, not valid and thereby did not confer jurisdiction on the Panel to determine the dispute referred to it by the Union.

It is obvious from Mr. Rose's argument that if the court were to find that the employees were terminated on 11.50 am on 26 November 1993 then the dispute

between the parties here ceased to be a trade dispute as from that time and that is the end of the matter. I think that is somewhat too optimistic a view to take of the situation between the parties to the present dispute.

Before this court are the affidavits of Mr. Leslie Teama who is the General Manager of the NPF, Mr. Edward Ronia who is the Assistant General Manager (Finance) of the NPF and Tony Kagovai who is the Assistant General Secretary of the Union. It is not necessary for me to dwell into the contents of those affidavits as they all, in my view, plainly show that the dispute between the employer and employees was over a Claim of Wage Increase. The Union claimed a 12.5% wage increase for its members while the Board decided to offer only 8% increased. No agreement had been reached and so there was therefore said to be a deadlock and a strike action ensued.

It cannot be seriously argued, and Mr Rose did not do so, that the dispute over Wage Increase is not a dispute connected with one of the matters referred to in paragraphs (a) to (f) in the definition of 'trade dispute', in particular paragraph (a). The claim by the employees of Wage Increase was clearly connected with the 'terms and conditions' of their employment. The point of contention, really, taken by counsel for the Board here is that the dispute was, at the time of the referral to the Panel, no longer between the employees and employer because of the termination of employment.

The words "**employee**" and "**employer**" are defined in the schedule to the Act as follows -

"Employee ... An individual who has entered into or work under (or, where the employment has ceased, worked under) a contract of employment.

Employer In relation to an employee, means the person by whom the employee is (or, in a case where the employment has ceased, was) employed."

To follow the argument advanced by Counsel for the Board would mean that if there were employees with whom the employer was in dispute after 11.50 am on 26 November 1993 then it should be those who had not been terminated since they would still be the employees who have entered into or work under contracts of employment and Board would be the person by whom those employees have been

employed. With respect, I feel such a restrictive interpretation of the words "employee" and "employer" is not in accordance with the intended meaning of those words as laid down by Parliament. Parliament intends to include in the definition of "employee" an employee whose employment has ceased. He is an employee "who .. worked" under a contract of employment and the employer who terminated him was the person "by whom he was employed"

The terminated employees in this case were those who, up to 11.50 am on 26 November 1993, worked under contract of employment with the Board. They were, regarded as employees for the purpose of a trade dispute under the Trade Disputes Act. To construe the meaning of "employee" otherwise would be contrary to that laid down by Parliament.

It will also be noted that an employee who worked under a contract of employment and however his employment has ceased, is an employee for the purpose of a trade dispute. The fact that he is terminated does not change the position. Applying that principle to the facts of this case, I come to conclusion without any hesitation that the dispute over the increase of wages in this case was connected with the terms and conditions of employment as stipulated in paragraph (a) and it was between the Board and its employees who worked under contracts of employment up to 10.50 a.m on 26 November 1993. That must be a 'trade dispute' in terms of the Trade Disputes Act 1981.

Was there a valid referral to the Trade Disputes Panel?

When the Union referred the dispute between the parties concerning the 1993/1994 Wage Increase to the Trade Disputes Panel, they were referring a 'trade dispute' to the Panel. That gave the Panel jurisdiction and it was entitled to hear the dispute referred to it. The Panel therefore did not err in law when it held that the dispute referred to it on 26 November 1993 was a trade dispute.

The first ground of the appeal therefore cannot succeed.

The second ground of appeal complains of the lack of adequate notice as required by section 6(2) of the Act as read with r.5(2) of the Trade Disputes Panel Rules. Section 6(2) provide as follows:

"(2) Where the panel decide to enter on an inquiry under subsection (1), they shall forthwith give notice in writing to the Minister and the parties to the dispute of the date on which the inquiry is to begin."

I will set out the whole of r.5 as it refers to section 6(2) of the Act. The provisions of r.5 (1) and (2) are:

"(1) A written notice under section 6(2) of the Act (notice of date on which formal inquiry is to begin) shall, if it is given by post in accordance with section 46 of the Interpretation and General Provisions Act 1978, be treated as given at the time at which it would be delivered in the ordinary course of post.

(2) A notice under section 6(2) shall not specify as the date on which the inquiry is to begin a date that falls less than seven clear days after the date on which the notice is given."

It is contended by Mr Rose on behalf of the Board that r.5 (2) specifically makes mention of the notice required to be given under section 6(2) of the Act and the notice must specify the date when the inquiry is to begin. That date must not be less than seven clear days after the date on which the notice was given.

Mr. Rose further contended that although r.5(2) uses the words "formal inquiry" it must be interpreted so as to conform to the Act, and in particular, section 6(2) which uses the word "inquiry." In this regard, Counsel says, the Panel was wrong in holding that the seven clear days notice only applied to formal or full inquiry and not preliminary inquiry.

As rightly contended by Mr. Rose, rules made pursuant to powers under an Act must conform to and be consistent with the Act. It must be pointed out that such rules made under a statute are subordinate legislations and in the case of a clash between a statute and a subordinate legislation the statute must prevail.

In the present case we have the Trade Disputes Act 1981 and the Trade Disputes Panel Rules 1981. The latter was made pursuant to the powers conferred on the Rules Committee under section 3(3) of the former. The issue in dispute here arose out of the Panel's interpretation of the provisions in the Act as well as in the

Rules regarding the notice required for an "inquiry" under section 6 of the Act and r.5 of the Rules.

It is the Panel's view that the required notice under section 6(2) of the Act refers to a notice of a formal inquiry and has no application to a preliminary inquiry which the Panel had decided to conduct in the first place in this case. Mr. Suri supports the Panel's view and added that when a matter has been referred to the Panel, it has to form an opinion as to whether the matter is likely to be settled or not. In order to form such an opinion the Rules allow the Panel to adopt as part of its own procedures, as authorised by r.2 of the Rules, to conduct a preliminary inquiry into the matter. Once an opinion is reached that the matter would not be resolved by negotiation, then the formal inquiry begins and the requirement of notice under section 6(2) starts to operate.

Having read the provisions of sections 4 and 6 of the Act together with the provisions of rules 5, 6 and 7 of the Rules, I find that despite Mr. Rose's strong argument on the rules on statutory interpretation, Mr. Suri's supporting view for the Panel's decision is more attractive and convincing. It is clearly one that is in line with the spirit which Parliament had breathed into the Act.

In my judgement the Panel was correct in deciding and was perfectly entitled to take preliminary steps in the form of a hearing to ascertain the issues between the parties in order to help it form an opinion as to whether to conduct an inquiry into the matter or not. The conduct of a preliminary inquiry or hearing for that purpose is one that the Panel is entitled to take if one is to accept the intention behind giving the Panel the power to decide its own procedure under r.2 when dealing with a dispute referred to it. In deciding its own procedure, the Panel of course has to bear in mind the Trade Disputes Panel Rules and the rules of natural justice.

There is nothing improper in what the Panel did in this case. Having taken the view that the requirement of section 6(2) and r.5(2) did not yet apply, the Panel under its legal power proceeded to conduct a preliminary hearing or inquiry to sort out the preliminary issues in the dispute between the parties complying with r.3 of the Rules and the rules of natural justice by giving notices of the matter as well as of the preliminary hearing to the parties. The Panel has been applying this procedure all along and this court would be reluctant to interfere with it unless it is shown that

the adoption of such procedure would lead to injustice to the parties or one of the parties to the dispute.

The notice in writing to be given under section 6(2) of the Act only applies where the Panel "**decide to enter into an inquiry**" on the dispute referred to it after forming the opinion that the dispute is not likely to be settled by negotiation. That "**inquiry**" mentioned in section 6(2) of the Act is the same inquiry as that referred to in r.5(2) as "**formal inquiry**," for what else can an inquiry, entered into pursuant to section 6 of the Act be called but a formal inquiry.

I reject the argument that r.5(2) is in conflict with section 6(2) of the Act nor do I accept the suggestion that the use of the word "**inquiry**" in section 6(2) is ambiguous. I do not suggest that the words used in r.5(1) and (2) should be used to construe the meaning of the word "**inquiry**" in section 6(2) of the Act as that would amount to "**putting the cart before the horse**", to use Lord Diplock's words in *Lawson -v- Fox* [1974] 2 WLR 247 at 252. However I do hold that the languages of r.5(1) and (2) do reflect the understanding of the maker of those rules of what section 6(2) of the Act means. The Rules Committee has been empowered under section 3(3) of the Act to make rules "**as appears to them to be necessary or expedient**" with respect to the proceedings of the Panel in exercise of their powers under the Act. The Rules Committee had done that by making the Trade Disputes Panel Rules 1981.

In those circumstances ground 2 of the appeal also cannot succeed.

The third ground of appeal really complains of that part of the statement made by the Panel in the course of its ruling. That part of the statement reads:

"It is also to be noted that irrespective of whether a referral is made under section 4 or 6 of the 1981 Act ..."

This ground can be disposed of immediately. Even if as Mr. Rose rightly pointed out that a trade dispute is referred to the Panel under section 4 of the Act and not under section 6, it could hardly be a cause of complaint against the ruling of the Panel on the basis of such remarks. The comments do not affect the ruling complained of in this case and the merit of pursuing such a complaint is pointless. I

do not think that those who are familiar with the Act and work of the Trade Disputes Panel would be taken aback by such comment as that made by the Panel in this case since it would be simply regarded as a comment by-the-way. This ground does not advance the appeal any further.

In the circumstances as I have found and for the reasons I have stated the appeal lodged by the Board against the Panel's decision cannot succeed and must be dismissed.

Civil Case No. 438 of 1993

I now turn to consider the issue raised in the Originating Summons filed by the Union which seeks the various orders mentioned in paragraphs 1 to 9 of the Originating Summons. It is obvious that the last five orders are really consequential to the first four. I shall deal with the issues raised in the order they appear in the Originating Summons.

The first of these is a declaration that the striking employees of Solomon Islands National Provident Fund Board did not breach their contract of employment when they went on strike on 26 November 1993.

In support of his contention Mr. Suri argued that there was no clause in the employees' individual contracts which prohibited or restricted strikes. As such the striking employees could not be said to be in breach of their contract of employment when they took the strike action. In addition Mr. Suri relied on Clause 12 of Appendix I (Recognition Agreement) of the Collective Agreement which provides:

"Cl. 12. The parties shall not resort to strike or lockout or any other direct industrial action until all negotiations have been completed and exhausted. Where applicable the Employer and the Union must comply with the provisions of the Essential Services Act."

That Clause, Mr. Suri says, recognises the freedom of the employees to carry out a strike action which is not prohibited by the Clause. As such, it is argued, when the employees took the strike action they could not be said to be breaking their contract of employment.

Mr Suri further argued that there is no requirement for tendering of notices of strike action. All negotiations had been completed and exhausted in this case, a dead lock had been reached. As such Mr. Suri submitted the only action left to be done was to taken the strike action without notice. It is further argued by Mr. Suri that in any case, a 14 days strike notice had been issued by the Union on 4 October 1993 and that notice was withdrawn after the request from the National Provident Fund Management on 7 October 1993. As an impasse had been reached between the parties, a further notice was said to be unnecessary. In the course of his argument Mr. Suri cited a number of authorities: *Rooks -v- Barnard* [1964] 1 A11 ER 367, [1964] AC 1129, [1964] 2WLR 269; *SINUW -v- H.T.C* (1988/89) SILR 43; *Simmons -v- Hoover* [1977] 1 A11 ER 775, [1977] QB 248; [1976] 2WLR 901; [1977] ICR 61.

The position as clearly stated in the cases cited is that the act of going on strike constitutes a fundamental breach by an employee of his contract of employment. It is on the employer to decide whether to accept the breach as an end to the contract or to allow the contract to continue despite the breach. See *Simmons -v- Hoover (supra)* and *SINUW -V- H.T.C.(supra)*. As such an employer is entitled to dismiss all the employees who take part in a strike even without notice and for the purpose of the law relating to dismissal, the chances are that the employer will be held justified in treating the act of going on strike as sufficient ground for dismissing those employees. Of course if the employer dismisses only some of those employees who took part in the strike but not the others who also took part in the strike, then a different consideration comes into play. But that does not concern us here. That is a matter properly for the Panel to consider.

In the present case Mr. Suri argued that despite the general rule as laid down in the cases cited, there was no breach of contract of employment in this case since no individual contracts had been entered into by the employees. Reliance have also been had under Clause 12 of the Collective Agreement.

There can be no doubt that by taking part in a strike the employees commit a breach of contract. So that, in this case, when the members of the Union went on strike on 26 November 1993 they were in breach of their contracts with the employer and the employer was entitled, if it decided to do so (which it did), to dismiss all the employees who took part in the strike. The question as to whether the Board was acting reasonably in treating the strike action as sufficient ground to

justify dismissal is a matter for the Trade Disputes Panel to decide if there was a complaint against the dismissal. In deciding whether the employer acted reasonably in treating the refusal to work (which is really what a strike is) as sufficient ground to justify dismissal the Panel would take into account matters such as the reason for the strike and whether notice has been given. This was clearly pointed out in the *Solomon Islands National Union of Workers -v- Honiara Town Council* case.

When an employee withdraws his labour unilaterally and without notice he is in breach of his contract of employment. It matters not whether the refusal to work occurs because of the strike or not. The fact of going on strike itself constitutes a breach of contract. To accede to Mr. Suri's submission would be to accept the argument that an employee has a right to strike in Solomon Islands where no individual contract existed between employers and employees. There is no right to strike in Solomon Islands. The Constitution (s.13(1)) only provides for the protection of the rights of employees and employers to form and join associations for the protection of their interests. It does not give the right to strike. In this regard, clause 12 of the collective Agreement referred to by Mr. Suri cannot be construed as giving the employees the right to be free to strike whenever there is a breakdown in negotiation.

The suggestion that there is no individual contracts between the Board and the employees in this case cannot be looked at in isolation of the Collective Agreement. By Appendix II of the Collective Agreement the terms and conditions as set out therein:

"apply to all levels of staff unless subsequently modified ... as per Clause 9 of the Appendix I and will be deemed to form part of each employee's contract of service."

The Collective Agreement, comprising Appendices I, II & III are to be read as one document and applied to all financial members of the Union who were employees of the Board. In my view the terms and conditions as set out in the Collective Agreement in this case must be regarded as forming part of the contract of employment of every member of the Union who were employees of the Board. It must follow that the strike action taken by the employees of the Board who were members of the Union constituted a breach by each of them of their contracts of employment. In *Rookes -v- Barnard (supra)*, Lord Evershed commenting on an

agreement made between the employers' and employees' sides of the Draughtsmen, Planners and Tracers Panel said at page 290:

"On April 1, 1949, an agreement in writing was made between the employers' and employees' sides of the Draughtsmen, Planners and Tracers Panel, clause 4 of which provided that in the event of any relevant trade dispute, there should not be a strike or a lock out but that the dispute should be resolved in the manner therein indicated. It has been conceded throughout these proceedings on the part of the defendants and respondents that the terms of this clause should be regarded as incorporated in and forming part of the contract of service with B.O.A.C. of every member of A.E.S.C. It follows accordingly that strike action or threats of strike action by employees of B.O.A.C. who were members of the A.E.S.D. would constitute breaches or threats of breaches by them of their service contracts."

I conclude that, in the present case, although each of the employees did not individually sign a contract of employment with the Board, they and each of them did have a contract of employment with the Board, the terms of which were those derived from the Collective Agreement.

I have already stated that Clause 12 of the Collective Agreement (appendix I) did not confer the freedom of taking strike action to the Union or its members. Rather, it provides a restriction on taking strike action. That is shown by the words **".... shall not resort to strike or lockout until"** I have also stated that there is no right to strike under our law and that the act of going on strike is a fundamental breach by an employee of his contract of employment. It is therefore plain that to say that Clause 12 gives the right to be free to take strike action would be giving the employees a right which otherwise they would not have, that is to say, to participate in a strike without breaking their contracts of employment.

The additional argument that under Clause 12 the employees have the right to take action because **"all negotiations have been completed and exhausted"** is again one that is not supported by the authorities. Those words do not confer the right to strike but rather, they have the effect of giving the individual employees and their Union an additional 'shield' to the protection enjoyed by them when organising or calling strikes.

On the question of notice before the strike, Mr. Suri argued that there was no such requirement. It is unarguable that a strike is a cessation of work in a manner constituting a breach of contract and a strike notice must therefore be a notice that the employees will breach their contract. To follow Mr. Suri's argument, it will mean this, that if as a result of the strike (which is a breach of contract) the employer wants to terminate the employees' employment, the employer would have to give one month's notice in accordance with Clause 3.3 of the Collective Agreement (appendix II) but that the striking employees need not. Alternatively Mr. Suri's argument would mean that the employees can walk out of their job at anytime lawfully without giving notice. I do not think such a situation can be accepted in any employment relationship and indeed the law would not sanction such a situation.

Clearly therefore, for a strike to be lawful it must be so done on proper notice. A 'lightening strike' as Lord Denning called it in *Morgan -v- Fry* [[1968] 2 QB 710 is not lawful, either because it is done without notice or with very short notice. In such a case those who organise or call such a strike may well find that they stand to lose the protection accorded to them under section 24 of the Trade Union Act (cap. 76).

On the subject of 'lawful strike' Cyril Grunfeld in *Modern Trade Union Law*, London, Sweet & maxwell, 1966, said at page 321:

"The legal period of notice for many employees is longer than seven days, whether because of an express notice clause to that effect incorporated in the employees' written contracts, like the three months' notice period in the contracts of school teachers, or because of a notice term implied in the employment contracts from custom."

The learned author went to state what is "custom" in labour relations. He said again at page 321:

'custom' in labour relations does not connote ancient usage. The expression simply means either the established practice of a trade or industry or section thereof, or, more usually, the rules and practices of a place of work which were not expressly referred to at the time of the employee's engagement and which, therefore, take legal effect as customary implied terms in his contract of employment. In so far as a newly negotiated collective agreement, once accepted or acted on, modifies a plant's or

industry's custom, to that extent do the collectively bargained terms, or at least those that are appropriate, become customary implied terms in the individual contracts of employment."

At page 322 the learned author again stated:

"The law of strike action has been discussed so far as if all employees have the right to withdraw their labour lawfully provided only that they give the due period of strike notice; as if a strike is unlawful only if labour is withdrawn without due notice."

The learned author was there stating the general rule in England. In my view the general rule equally applies in Solomon Islands labour relations. There must be notice before a strike is carried out. The proper length of notice for a strike action must be that which is at least as long as the notice required to terminate the contract of employment.

There was a mention by Mr. Suri of a 14 days strike notice issued by the Union on 4 October 1993 as referred to in Tony Kagovai's affidavit. That notice was, however, withdrawn following a request by the Board. There was no further strike notice issued following that withdrawal. No notice can therefore be said to be in existence for the strike taken on 26 November 1993.

I do not need to deal with the argument raised by Mr. Suri in relation to the requirements of the Essential Services Act and Mr. Rose did not rely on the requirement of that Act. In my view it is irrelevant to dwell into the argument raised by Mr. Suri on that Act in this case..

For the reasons stated the declaration sought by the Union in paragraph (1) of the Originating Summons is refused.

The second declaration sought by the Union is that the termination notices issued to the striking employees were null and void. Mr Suri also relied on the cases of *Solomon Taiyo Limited -v- SINUW, CC208 OF 1990* and *SINUW -v- Solomon Telekom Company Limited, CC94 of 1991*. The case between Solomon Taiyo and Union (CC208/90) involves the individual employees taking strike action without the Union calling for it. The court has recognised that the parties to the

Collective Agreement are the Union and the company and so the actions of the individual employees in taking the strike action cannot be a breach of the Collective Agreement itself. However, had the Union organised and called the strike it would become the actions of the Union and the actions taken by the individual worker would be evidence of the Union's position as happened in the present case.

The case between the Union and Telekom involves the dispute over the validity of the collective agreement. Nothing has turned on that case as relevant to the present case.

Other matters raised by Mr Suri in support of the second declaration sought, but I do not think they alter the position as have been found in the light of the first declaration sought but which has been refused.

In view of what I have stated in relation to the first declaration sought by the Union, that the Board was entitled to dismiss without notice those who took part in the strike for breach of contract together with the requirement of notice before taking strike action it must follow that in the circumstances of this case, the court must also refuse the second declaration.

The third declaration sought by the Union is that the Board contravened section 10(1) and (2) of the Trade Disputes Act by continuing to carry out a mass dismissal after a trade dispute had been referred to the Panel. The Union contends that the actions of the Board was a continuing dismissal of the employees after the referral was made at 2.50 p.m to the Panel and the notice thereof was served on the Board at 3.30 pm.

Section 10 of the Act provides for restrictions on industrial action where a dispute is before the Panel. Subsection (1) of the section states that "..... no person shall do any of the things mentioned in subsection (2)." So far as relevant, subsection (2) provides:

"2. Those things are -

.....

(c) terminating (for whatever reason) the contract of employment of any employee whose conditions of service are in issue in the dispute."

It is not disputed by Mr Suri that at about 10.20 am on 26 November 1993 the Board met and at about 11.50 am the striking employees were dismissed; that at 12.40 p.m, 12.55 p.m and 1.10 p.m on 26 November 1993 service messages about the terminating of their employment were sent to the striking employees through the SIBC; and that the trade dispute was referred to the Panel at 2.50 p.m on that same afternoon. What Mr. Suri argued, however, is that despite the dismissal of the employees before the referral to the Panel was made, the actions of the Board in formally serving the letter of dismissal dated 26 November 1993, the repetition of the SIBC service message on 29 November 1993 advising the employees that they had already been dismissed, the attempts to serve the dismissal letters dated 26 November 1993 on the sacked employees on 29 November 1993 and the reiteration by the General Manager of the NPF on 29 November 1993 that the sacked employees were no longer employees of the NPF Board and that they should not enter the Board's premises, all constituted "termination activities" and as such they were actions in breach of section 10(1) and (2) of the Act. In the words of Mr. Suri "the material time when the referral became legal" was 3.30 p.m on 26 November 1993.

When one looks at Rule 3(4) of the Trade Disputes Panel Rules 1981, it clearly provides that a dispute is referred to the Panel when the Secretary to the Panel gives notice of the reference to each of the persons named in the notice under Rule 3(1). This was pointed out by Palmer J in *Solomon Islands National Union of Workers -v- Solomon Islands Plantations Limited*, CC317/92. In the present case the dispute must be taken to have been referred to the Panel at 3.30 pm on 26 November 1993. The dismissal of the striking employees occurred more than three(3) hours before 3.30 p.m.

It is also important to note that the dismissal of employees without notice takes effect forthwith. On the other hand if the employees are to be given notice before dismissal, then the employment ends when the notice runs out. In the present case the employees were dismissed without notice and as such it took effect forthwith. The employment ended there and then, that is to say, at 11.50 a.m on 26 November 1993.

To accept Mr Suri's argument that the service of the letter of dismissal and repetition of the service message about the dismissal constituted "continuation of termination activities" (if there was such a thing) is to imply that the employment of the sacked employees was still subsisting. I think this is not correct. There is no such thing as a continuing termination activity. Once a person is terminated from his employment, that is the end of his employment. It ends on the spot, if there is no notice given or it ends at the end of the notice period, if notice is given.

Perhaps the striking employees in this case acted a little too hastily. Had they or their Union taken the most obvious step of referring the dispute to the Panel as soon as they learned that the Board was firm on its rejection of their wage increase claim, the position would have certainly been different.

In the present case I cannot find any breach of section 10(1) and (2) of the Act by the Board. The third declaration sought must also be refused.

The fourth declaration sought is that there had been a *lock-out* in this case committed by the Board. Mr. Suri says, the lock-out occurred when the striking employees were excluded from the offices or places of employment. Further Mr. Suri argued that the re-engagement of the sacked employees under new terms and conditions also constituted a lock-out.

"Lock-out" is defined in the Act as:

"Action which, in contemplation or furtherance of a trade dispute, is taken by an employer, whether a party to the dispute or not, and which consists of the exclusion of employees from one or more factories, offices or other places of employment or of the suspension of work in one or more such places or of the collective, simultaneous or otherwise connected termination or suspension of employment of a group of employees."

Under that definition, for Mr. Suri to succeed in his argument, he must show that at the time of the lock-out (if there was any) those who were locked-out were still employees of the NPF Board. This is so because a lock-out is a *closing of a place of work or refusal by an employer to continue to employ those persons employed by him.*

In this case the facts clearly established that at the material time when the striking employees were refused entry into the offices or places of employment and when they were offered re-employment, they were already dismissed and as such they were no longer employees of the Board at that time. Consequently any refusal to let them into the offices or their previous places of employment cannot be said to constitute a lock-out after they ceased to be employees of the Board.

The declaration sought in paragraph (4) must also be refused.

The answers to the declarations sought in the first four (4) paragraphs have sufficiently disposed of the matters sought in paragraphs (5) to (9) of the Originating Summons. The orders sought in those paragraphs are really in consequence of the answers to the declarations in paragraph (1) to (4). As the orders sought by the Union in paragraphs (1) to (4) have been refused, it must follow that the orders sought in paragraphs (5) to (9) are also refused.

In the circumstances, each party to bear its own costs in these proceedings.

(G.J.B. Muria)

CHIEF JUSTICE