

THE STATE

v.

THE ACTING PERMANENT SECRETARY FOR
LABOUR AND INDUSTRIAL RELATIONSex-parte
CARPENTERS FIJI LIMITED

[HIGH COURT, 1996 (Fatiaki J). 20 November]

Revisional Jurisdiction

Employment- trade unions- whether a recognised trade union's right to represent a member in dispute with the employer is fettered by the lack of a collective agreement extending to the member. Trade Disputes Act (Cap. 97) as amended by Trade Disputes Act (Am) Decree 27/92.

The Permanent Secretary for Labour and Industrial Relations accepted a trade dispute referred to him by a union one of whose members was in dispute with his former employer. The employer moved to quash the Permanent Secretary's acceptance on the ground that the collective agreement between itself and the union did not extend to the member. Declining to interfere with the Permanent Secretary's decision the High Court HELD: a recognised trade union has the right to represent and act for any of its members in dispute with the employer.

Cases cited:

Air Pacific Ltd. v. Attorney-General Civ.Action 33/84
N.B.F. v. Kishore Sami JR No. 18/93

Motion for judicial review in the High Court.

H. Lateef for Applicant
D. Singh for Respondent

Fatiaki J:

On the 11th of April 1995 the applicant company was granted leave to issue judicial review proceedings against the decision of the Permanent Secretary for Labour and Industrial Relations ('PSL') accepting a trade dispute referred to him by the National Union of Factory and Commercial Workers (the Union).

There was at the relevant time a collective agreement between the applicant company and the Union which contained the following Recognition Clause :

"The employers hereby recognise the union as the representative of and the bargaining agent for all their employees paid at hourly rates engaged in their Sales and Distribution of Goods Operations ... at all branches on Viti Levu, Labasa and Levuka, below the position

of supervisor or foreman ... on any matter relating to the engagement, promotion, or dismissal of employees, in respect of all matters pertaining to the wages paid to such employees, and their conditions of employment.”

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The facts which gave rise to the application are not in dispute and may be briefly stated. By letter dated 31st August 1993 the Labasa Branch Manager of Carpenters Motors, a division of the applicant company, wrote to a long-serving employee Krishna Kumar advising him that “... (his) employment with the company is to cease immediately”.

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The Union of which the dismissed employee was a member came to learn of the dismissal and made representations on behalf of the employee but these were rejected by the applicant company on the ground that the Union could not be recognised as representing the employee as he held the position of a supervisor at the time of his dismissal and was therefore not covered by the collective agreement in force between the Union and applicant company. The Union disagreed on the ground that the dismissed employee was and had always remained a Union member notwithstanding the collective agreement.

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This difference of opinion was by letter dated 2nd February 1994 reported to the PSL by the Union as a trade dispute and was rejected by the PSL in a letter dated 16th February 1994. The dispute was reported a second time to the PSL by the Union’s letter of 30th February 1994 (sic). The PSL without accepting the dispute merely referred it back to the parties on 12th September 1994 to await the outcome of an appeal then pending before the Fiji Court of Appeal in a case in which a similar issue had arisen.

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Four months later on 18th January 1995 the Union upon learning of the withdrawal of the appeal before the Fiji Court of Appeal referred the dispute back to the PSL and this time, despite the written opposition of the applicant company, the PSL accepted the Union’s report of the trade dispute and referred it to a Disputes Committee in terms of Section 5A(1) of the Trade Disputes Act (Amendment) Decree No. 27 of 1992 (the Amendment Decree).

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On 22nd March 1995 the applicant company issued papers seeking leave to apply for judicial review of the PSL’s decision accepting the Union’s report and conveyed in his letter of 15th February 1995. Leave was granted and after all procedural matters were attended to, the application was listed before me for argument on 13th September 1995. Part-way through the argument it became clear to me that the Union ought to be heard in the proceedings and accordingly the matter was adjourned to allow the Union to be served and to appear.

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On 22nd September 1995 despite having been served with all the relevant papers, the Union did not appear. After several long adjournments the matter was orally argued before me on the 6th of February 1996 without there being any representative or representation from the Union.

The central issues raised by the submissions of learned counsel for the applicant company are two-fold :

- A firstly, whether or not the Union has standing (for want of a better term) to represent the dismissed employee having regard to the express limitation contained within the relevant collective agreement between the Union and the applicant company; and
B secondly (a supplementary/related question) given the above, was the PSL correct in accepting the Union's report of a trade dispute ?

In other words counsel's argument is that by definition a trade dispute must exist between an employer and a recognised trade Union or Union of employees and "be connected with ... the terms of employment or with the conditions of labour of (an) employee", but, in this case there is no such dispute; the relevant dispute or difference in this case exists purely between the applicant company and its dismissed (albeit unionised) employee, and therefore, there is no trade dispute in existence of which the PSL can take cognisance.

Furthermore the Union is not empowered in terms of Section 3(1)(b) of the Amendment Decree to make any report to the Permanent Secretary since it is not a party to the dispute as defined in the Amendment Decree.

- D In this latter regard if I understand counsel's submissions correctly, the dispute (if any) that can be said to exist between the Union and the applicant company relates to the Union's right as a separate legal entity to make representations on behalf of its member. Such a dispute counsel concedes could at best amount to a dispute of rights i.e. in the interpretation of the Recognition Clause of the collective agreement.

- E However, since the Recognition Clause itself expressly withholds recognition of the Union in the case of the dismissed employee (a Supervisor), therefore the Clause and indeed the entire collective agreement forms no part of the terms and conditions of employment of the (dismissed) employee. Accordingly there is no dispute between the applicant company and the Union which amounts to a trade dispute.

- F In Air Pacific Ltd. v. A.G. Civil Action No. 33 of 1984 in which a Union which was not a party to a collective agreement reported a trade dispute between the employer airline and an employee/member of the Union, Kearsley J. in upholding the Union's right to report the matter and in holding that a trade dispute existed said, at p.6:

"Was that a trade dispute ? In my view, the fact that (the Union's) contention and the company's counter-contention were based on a collective agreement made between the company and another Union ... has nothing to do with that question."

and later at p.9 his lordship said :

“... 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 the Union ... 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.”

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I accept the above reasoning and would only add that the definition of a trade dispute under the Trade Disputes Act makes no reference to a collective agreement nor in my view, is the existence of such an agreement a pre-requisite to a trade dispute.

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Having said that however, the definition of a trade dispute which Kearsley J. had to consider in the Air Pacific case (op.cit) was significantly longer and I might add clearer, than that to be found under the Amendment Decree and which reads:

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“trade dispute means any dispute or difference between any employer and a trade union recognised under the Trade Unions (Recognition) Act or between a union of employers connected with the employment or terms of employment, or with the conditions of labour, of any employee.”

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In this case even accepting that the applicant company was not obliged by contract to recognise the Union as a representative of its dismissed employee, that recognition is necessarily confined in my view to matters of collective bargaining.

It does not further extend to deny recognition of the Union by the PSL for the purposes of accepting a report by the Union of the existence of a trade dispute between the applicant company (an employer) and one of its members (the dismissed employee).

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Needless to say in terms of Section 3(1) of the Amendment Decree an individual employee (as opposed to an employer) is incapable of reporting a trade dispute to the PSL however much in dispute he may be with his employer, and notwithstanding that the dispute is exclusively connected with (the) employment or terms of employment of the employee.

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Learned counsel for the PSL in seeking to support the PSL's decision submitted that there was undisputed evidence before the Court that the dismissed employee although a supervisor in the applicant company was nevertheless, a member of the Union at the relevant time and therefore, the Union had the necessary standing, to report a trade dispute on his behalf, but in any event, the statutory definition of a trade dispute clearly covered the matters reported to the PSL.

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In other words counsel submits, that all that is required in terms of the definition of a trade dispute is that there be (1) an employer : (2) a recognised trade union;

- A (3) a unionised employee ; and a dispute or difference between the employer and the recognised trade union which relates to the terms and conditions of employment of the (unionised) employee, and in this case all four requirements of the definition were met.

Furthermore counsel urged the Court to follow the decision of Byrne J. in N.B.F. v. Kishore Sami Judicial Review No. 18 of 1993 where his lordship decided a similar issue against the applicant employer.

- B In particular it may be noted that in refusing leave in that case Byrne J. rejected the applicant company's argument that "... because Mr. Samy was a Management employee he was not entitled to representation by the Union and accordingly there was no industrial dispute existing between the applicant and Mr. Samy and the Union and that the Permanent Secretary had not acted properly in accepting the dispute".

- C Having carefully perused the judgment I am satisfied that it is distinguishable on the following grounds from the case before me :

- D (1) The Recognition Clause in the N.B.F. case is much wider in its coverage of employees (viz : "all locally recruited staff employed in the Bank.") with the exception of certain designated managerial positions, whereas the clause under consideration is limited to "... employees paid at hourly rates engaged in (the) Sales and Distribution of Goods Operations ... below the position of supervisor or foreman ...";
- E (2) The Recognition Clause in the N.B.F. case limits recognition to "... the matter of collective bargaining relating to salaries and conditions of employment", whereas the present clause specifically mentions dismissal of employees Furthermore Clause 36 of the collective agreement refers to discipline and Clause 37 sets out a comprehensive dispute and grievance procedure for the resolution of any dispute or grievance that may arise between an
- F employee or group of employees and the employer.

This latter limitation enabled Byrne J. to say (at p.12 of his judgment) :

- G "... Clause 2 of the Agreement does not mention disciplinary offences of which dismissal is obviously one and I therefore hold that even under the Agreement Mr. Samy as a Manager was entitled to ask the Union to represent him and the Union was thus entitled to notify the Permanent Secretary of the existence of an industrial dispute ..."

Having said that however I am satisfied that the submissions of counsel for the applicant company is based upon a fundamental misapprehension about the nature of an employee's right to belong to a trade union (which may not be curtailed)

and between a union's right to represent an employee in collective bargaining (which may be limited by agreement) and a union's right to report a trade dispute on behalf of a member (which is granted by statute and may not be contracted out of).

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There is a further misconception arising from a failure properly to distinguish between a party to a collective agreement (which is a matter of agreement) and a party to a trade dispute (which is a matter of statutory definition).

In this latter regard Section 3(1) of the Amendment Decree provides :

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“Any trade dispute, whether existing or apprehended may be reported to the Permanent Secretary by :

- (b) a trade union of employees recognised under the Trade Unions (Recognition) Act which is a party to the dispute”; and

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a party with reference to a trade dispute is defined as :

“a trade union of employees recognised under the Trade Unions (Recognition) Act acting for all or any number of its members in the trade dispute ...”

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In this case it is common ground that differences exists between the applicant company and its dismissed employee and the Union, as to the circumstances giving rise to the employee's summary dismissal.

Furthermore, there can be no denying that in terms of the Recognition Clause of the collective agreement between the Union and the applicant company, the Union has been granted voluntary recognition by the applicant company in terms of the first limb to Section 3(1) of the Trade Unions (Recognition) Act (Cap.96A) and the mere fact that the Recognition Clause limits recognition to a certain class or category of employees does not in my view, alter the fact that the Union is : a trade Union recognised under the Trade Unions (Recognition) Act.

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In other words recognition of a trade union once voluntarily granted by an employer or compulsorily acquired under a recognition order of the PSL, qualifies such trade union to be treated for all purposes under the Trade Disputes Act as a trade union recognised under the Trade Unions (Recognition) Act.

If I should be wrong however in that view then I would have no hesitation in holding that any dispute or difference between an employer and an employee who is a member of a recognised trade union concerning the employment or terms of employment of such employee is a trade dispute with the trade union not in its capacity as a contractual party to a collective agreement (should one exist), but rather, by virtue of the trade union exercising its right to represent and act for its member.

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A I am fortified by the new and shorter definition of a trade dispute in the Amendment Decree (op. cit at p.6) which, in my considered opinion, limits the proper parties to a trade dispute to an employer and a trade union recognised under the Trade Unions (Recognition) Act. This may be contrasted with the earlier definition of a trade dispute which could theoretically exist between an employer and an (individual) employee. Quite plainly this latter circumstance is no longer possible.

B In my view acceptance of the submissions of Counsel for the applicant company would represent a serious curtailment of the rights of a trade union to represent its members in industrial relations but would also render several provisions of the Amendment Decree unworkable. That cannot be right.

C For the foregoing reasons the application to judicially review the decision of the PSL in accepting the trade dispute and conveyed in his letter of 15th February 1995 is refused, with costs to be taxed if not agreed.

(Motion for judicial review dismissed.)

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