

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO: ABU0010U OF 1995S  
(High Court Judicial Review No.11 of 1993)BETWEEN:THE MINISTER FOR LABOUR AND  
INDUSTRIAL RELATIONS  
THE REGISTRAR OF TRADE UNIONSAPPELLANTS-AND-FIJI BANK EMPLOYEES UNIONRESPONDENTMr. D. Singh for the Appellants  
Sir Vijay R Singh for the RespondentDate and Place of Hearing : 23 February, 1998, Suva  
Date of Delivery of Judgment : 27 February, 1998JUDGMENT OF THE COURT

This appeal arises out of the result of a secret ballot in favour of striking conducted by the respondent union among its members on 1 April 1993 under regulation 10(1) of the Trade Unions Regulations (Amendment Regulations) 1991. On 16 April 1993 the result of that ballot had been declared null and void under reg 10(4) by a person alleged to be the Registrar of Trade Unions and in consequence of that declaration the Minister for Labour and Industrial Relations declared the resulting strike unlawful and ordered its discontinuance in accordance with his powers under s.10A of the Trade Disputes Act (Cap 97).

These decisions were challenged by the Union in judicial review proceedings in the High Court at Suva in August 1994 and on 16 January 1995 Byrne J. quashed them. The Registrar and the Minister appeal against his decision.

The ballot in question was of employees of the Suva branch of the Bank of Baroda, and 21 days notice of the Union's intention to conduct it was duly given to the Registrar in terms of reg 10A(a). Regulation 10(1) required it to be conducted by the returning officer appointed by the Union (in this case it was the Secretary) under the supervision of the Registrar or some other person designated by him to be present and to supervise the ballot. Mr Lesi was duly designated to carry out those tasks at the Bank's premises on the time and date notified. There were differences between the Union Secretary and the Bank management which it is not necessary to go into in this judgment, the upshot being that the employees decided to hold the ballot in the area outside the front of the Bank's premises.

Mr Lesi formed the view after consultation with his superior in the Ministry of Employment and Industrial Relations that he was not authorised to supervise a ballot conducted outside the Bank, and he withdrew. As to when his withdrawal took place, there was a difference between the Union Secretary's account in his supporting affidavit; and that given by him in his letter to the Ministry of Labour annexed to that affidavit, and in the reports given by Mr Lesi to his superiors and exhibited to the appellants' affidavit in reply. While Byrne J did not say specifically which version he preferred, he clearly accepted that Mr Lesi had refused to supervise the ballot in his finding that his action was wrong in law. He made that finding in the light of the provision in reg 10B(1)(f) stating that so far as is reasonably practicable, all those

entitled to vote shall be supplied with a voting paper either at the work place or at a place convenient to them, and similarly in those places shall be given a convenient opportunity to vote. His Lordship rightly held that the employees were entitled to chose the area outside the Bank's premises as a "convenient place" for the ballot, and that Mr Lesi had no right to determine where it should take place; and that in purporting to do so he had acted in excess of his powers. His Lordship went on to find that both the Registrar and the Minister had similarly misconstrued the provisions of the Act and regulations and quashed their decisions. With respect, we have difficulty over the way in which he seems to have made those officials responsible for Mr Lesi's breach of duty.

Regulation 10(4) provides that -

*"(4) Any irregularity identified shall be reported by the person designated to supervise the election to the Registrar of Trade Unions who if satisfied that the irregularity actually existed shall declare the result of the ballot null and void."*

Clearly there was an irregularity of a serious kind in the failure to supervise by the designated person who, under cl.(3) is given wide power to prevent the occurrence of any irregularity in or in connection with the ballot. The importance of his function in the scheme of union elections is obvious. Once the irregularity has been identified and reported under cl.(4) to the Registrar, he must declare the result of the ballot null and void if satisfied that it actually existed. In his letter to the Union of 16 April 1993 advising that he declared the result of the ballot null and void, the Registrar made it clear that he based his decision on the irregularity constituted by the lack of supervision. He made no reference in it to Mr Lesi's mistaken view that the ballot could not be held in front of the Bank building.

This is not a situation in which it is open to the Court to consider whether, in spite of the mistaken refusal to supervise, the ballot might still be regarded as valid on the principle frequently referred to in administrative law that the requirement for supervision was not mandatory so that action taken in its absence would still be valid. The language of reg 10(4) leaves no room for such an outcome. We also reject the submission of Respondent's Counsel that it should be construed simply as an enabling provision. It follows that the Minister was entitled to declare the strike illegal in accordance with s10A of the Trade Disputes Act. Accordingly, on this aspect we are unable to accept the reasons adopted by His Lordship for quashing the decisions.

The foregoing remarks and conclusions are made on the assumption that the Registrar involved had been validly appointed. However, the Union challenged the validity of the appointment of the person described as the Registrar responsible for making the declaration of nullity, namely Mr Nand. The duly appointed Registrar at all relevant times was Mr Katonivualiku ("Kato"), but he was absent from Fiji for a period from 6 April 1993 and unable to act. By notice dated 28 April 1993 published in the Fiji Gazette, the Minister of Labour and Industrial Relations purported to appoint Mr Nand "to be the Registrar of Trade Unions from 6 to 30 April 1993."

Section 3(1) of the Trade Unions Act (Cap 96) states that the Minister shall appoint a Registrar of Trade Unions and, as noted above, Mr Kato held this office over the relevant period. Under s.4 the Minister may appoint one or more Assistant Registrars as may from time to time be required for the purposes of the Act. The definition of "Registrar" in s.2

includes persons appointed to be Assistant Registrars, and it might be supposed that such a person would have been the logical choice to act in Mr Kato's absence. The problem seems to have arisen because when he made the declaration of nullity and signed the documents recording this, Mr Nand claimed to be doing so as the Registrar, at a time when he had clearly not been appointed to that post.

Byrne J. sought to apply s.39 of the Interpretation Act (Cap 7) conferring a power to appoint a person to act in an office during any period the holder thereof is unable to perform its functions. However, he would appear to have overlooked the qualification in s.3 (1) that it does not apply to a public office, which the Registrar's office undoubtedly is, a "public office" being defined in s.149 (1) of the Constitution 1990 as an office of emolument in the public service.

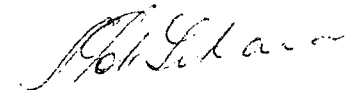
There is no provision in the Act enabling the Minister to appoint another Registrar as well as Mr Kato, but His Lordship took the view that it was logical for him to appoint in effect an Acting Registrar. We have already expressed the opinion that the logical course was to leave the matter in the hands of an Assistant Registrar. Even if the Minister had been able to appoint Mr Nand as Registrar or "Acting" Registrar, there is no evidence that the appointment had been made at the time he made the declaration of nullity and reported it to the Minister.

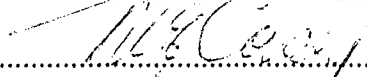
The Union also submitted that the Minister had no power to make the appointment retrospective. As to this, Byrne J. held that such a power should be implied in the Act if the circumstances warrant it, "lest there should be any unnecessary halt in the functions of the Registrar due for example to his absence abroad on illness". But as already noted,

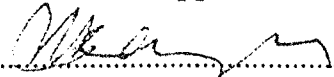
Assistant Registrars are (or should be) there to take care of any contingencies affecting the ability of the Registrar to do his job, so there is no warrant for implying a power of retrospective appointment. The sequence of events does not persuade us that the maxim "omnia praesumuntur" applies in the circumstances of this case.

Our conclusion is that there was no authority for Mr Nand's appointment as Registrar during the currency of Mr Kato's term of office; and that in any event, a power to appoint retrospectively to this position cannot be implied as being necessary for the proper administration of the Act, and there is no specific provision for an appointment to be made in this way. It follows that Mr Nand had no power to declare the ballot null and void under reg (10)4, and there was accordingly no basis for the Minister's order declaring the strike unlawful.

For these reasons (which differ from those relied on by His Lordship) the appeal is dismissed. We think there was some justification for the appellants taking this matter to appeal and in the circumstances award the respondent 50% of the costs to which it would otherwise have been entitled in this Court.

  
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**Sir Moti Tikaram**  
**President, Fiji Court of Appeal**

  
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**Sir Maurice Casey**  
**Justice of Appeal**

  
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**Sir Mari Kapi**  
**Justice of Appeal**