IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO: ABU0059U OF 1997S
(High Court Judicial Review No.HBJ15 of 1997)

BETWEEN:

FIJI AIRLINE PILOTS ASSOCIATION — APPELLANT

- AND -

THE PERMANENT SECRETARY FOR LABOUR AND INDUSTRIAL RELATIONS — RESPONDENT

Mr. B.C. Patel for the Appellant
Mr. D. Singh Respondent

Date and Place of Hearing	:	**19 February, 1998, Suva**
Date of Delivery of Judgment	:	**27 February, 1998**

JUDGMENT OF THE COURT

The Fiji Airline Pilots Association (the Association) appeals by leave against the decision of the High Court (Fatiaki J.) given at Suva on the 24 September, 1997, refusing an application for leave to issue judicial review proceedings quashing decisions of the Permanent Secretary for Labour and Industrial Relations (the Secretary). In those decisions promulgated by letter of 6 May 1997 he had accepted, pursuant to the provisions of s.4(1) of the Trade Disputes Act (Cap. 97), a report by Air Pacific Limited (the Company) that a "trade dispute" existed between it and the Association, and in terms of s.4(1) (d) thereof he appointed a conciliator.

A "trade dispute" as defined in s.2 (as amended by Decree No.27 of 1992) means a dispute or difference between any employer and a trade union recognised under

the Trade Unions (Recognition) Act connected with the employment or terms of employment of any employee. It was accepted in the Judgment that the Association is a recognised trade union. Section 2 also provides that the dispute may be a "dispute of interest", which means one created with the intention of procuring a collective agreement or amendment to settle a new matter. Other disputes are called "disputes of rights." There was a collective agreement between the parties dated 20 July 1990 which was duly registered under s.34(1) of the Act.

Section 3(1) provides that any trade dispute, whether existing or apprehended, may be reported to the Secretary by an employer or a recognised trade union of employees which is a party to the dispute. Under subsection (2) that report is to be made in writing and must specify (inter alia) the parties and subject matter of the dispute and the steps which have been taken by them to obtain a settlement under any arrangements existing by virtue of any registered agreement between the parties. Under s.4(1) the Secretary is required to consider any trade dispute of which he has taken cognizance and may take any one of a number of steps set out in subsections 4(1)(a)-(g), as seem to him expedient for promoting a settlement. (In the present case he acted under subparagraph (d) to appoint a conciliator.) Section 6(1) goes on to provide that where the Secretary or any person appointed by him is unable to effect a settlement, he shall report the dispute to the Minister who may authorise him to refer the dispute to an Arbitration Tribunal constituted under the Act for settlement. That body is to make an award binding on the parties to the dispute.

The following narrative of events is taken from the Association's supporting affidavit and exhibits. No affidavit had been filed by the Company.

In 1994 the Association had submitted to the Company a "log of claims" dealing with employment conditions relating to the period of four years to 31 July 1994. Negotiations followed, and in February 1996 the Association reported a " trade dispute" over these matters to the Secretary. Conciliation was unsuccessful and eventually steps were taken to have it referred to an Arbitration Tribunal in accordance with s.6(1). In the meantime the Association submitted an additional log, bringing its claims up to date for the period 1 August 1994 to 31 July 1997.

The Company had submitted a log of its claims to the Association on 8 April 1994, and another on 21 January 1997, the latter (as amended) covering the period 1996-97. In its covering letter to the Association the Company sought an indication of dates suitable for negotiation.

In its letter of 14 April 1997 to the Secretary reporting the existence of a trade dispute, the Company stated it had arisen as a consequence of the parties' inability to reach agreement in its logs of April 1994 and January 1997, as well as on additional claims introduced in the course of negotiations, detailed in an attached statement of the company's "final position." Also attached was its log of claims, and a note of the issues on which no settlement had been reached in negotiations stated to have been on-going since 26 April 1994. The letter went on to state that approximately 20 meetings had taken place since then, centering on both parties' logs of claims, the most recent having been held on 14, 19 and 26 March 1997, and that the company's final offer made on the last date was not accepted.

The Association's response was in a letter of 21 April 1997 to the Secretary inviting him to "apply the law and limit the Company to considerations of the Association's Log of claims only, and not permit the Company to lodge a counter Log." It went on to state that the Company had included additional items "not associated in the current dispute which have not even been discussed," and it asked that the "application" be denied as normal processes of negotiation "have not been exhausted on those additional matters which can only be activated once the current dispute is resolved."

This letter brought a strong response from the Company, which wrote to the Secretary re-iterating that the negotiations since 26 April 1994 included its own claims, and it went on to describe the conciliation hearings set in train in respect of the dispute over the Association's 1994 log of claims. It said these hearings had carried on with adjournments to allow further negotiations, during which the up-dated logs by both parties were lodged and discussed. As noted above, no resolution was reached and the Company felt it had no alternative to reporting a fresh dispute in respect of its log of claims. It condemned as a "blatant fabrication" the Association's allegation that the items in it had not been discussed.

The Association responded by a letter of 2 May 1997 to the Secretary confirming that there was insufficient common ground between them to reach an early resolution of outstanding issues. It criticised the Company's attempts to "propagate a dispute where none exists" by seeking to introduce its own log of claims, repeating its earlier contention that the latter had no right in terms of the collective agreement to lodge that log. It asked the Secretary to ignore "all subsequent correspondence" dealing with the Association's further log of claims

and the Company's attempt to file its own log, and asked that the dispute on the Association's 1994 log be referred to arbitration. As noted above, this was done in terms of s.6(1) and had not been completed at the time the present application for leave was heard in the High Court on 26 June 1997, but we were informed by Counsel that by the date of judgment on 24 September it had been concluded and an award issued in respect of that 1994 log.

In the Association's supporting affidavit it was deposed in para. 7 that representatives of the parties had held numerous meetings and discussions in respect of its 1994 log of claims "over the past several years"; and in para.13 that there were discussions on 14 and 19 March 1997 over that log (reported on 18 February 1996 as a trade dispute); and in para 14 that part of the Association's 1996 log was also discussed at those meetings, but that "no formal discussion" was held on the Company's log of claims. Apart from the above reference to the absence of formal discussion the affidavit did not traverse the forthright statements by the Company in its letters about the extent and scope of the discussions covering both parties' claims. In the main, it reflected the Association's views that the Company had no right to lodge any claims.

As recorded above, the Secretary decided to accept the Company's report of the existence of a trade dispute and appointed a conciliator. He said he reached his decision after considering the Association's submissions.

A number of grounds were advanced in support of the Association's application for leave to challenge these decisions, but in the High Court they were reduced to two main

issues. First, it was submitted that the collective agreement between the parties did not permit the company to submit a log of claims or a cross-claim on the Association, this argument being based on the wording of clause 5.2 of that agreement dealing with time limits in which logs of claims may be submitted by the Association, there being no reference to claims by the company. Clause 5 reads:

> *5.1 This Agreement shall operate from 05 July, 1989 up to and including 04 July, 1990 or until replaced by another Agreement or Award and provided that leave is reserved to either party to re-open any clause during the currency of this Agreement solely for the purpose of resolving any problem arising therefrom in respect of interpretation or application but not in respect of the reduction of any benefit therein specified.*
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> *5.2 The Association shall ensure that its Log of Claims is submitted not less than ninety (90) days before the expiration of this Agreement. The Company, on the other hand, shall ensure that negotiations commence not less than thirty (30) days before this Agreement expires.*

Although there are no details of the Association's logs of claims in the record, it can be inferred from the correspondence that they were not made solely for the purpose of resolving problems arising from the agreement, or in respect of its application or interpretation (vide Cl 5.1 above). The logs presented by the Company sought changes to the conditions of employment and the introduction of new matters, according with the definition of "dispute of interest" in s2 - namely, a dispute created with intent to procure a collective agreement or amendment to settle new matters.

Fatiaki J, noted that the definition of a "trade dispute" was not limited by any reference to collèctive agreements, nor was the right of the Company to report it, and nor were

trade disputes necessarily confined to differences arising under such agreements. We think these observations were plainly correct, as was his conclusion that the Company had a statutory right to report a trade dispute in respect of the unsettled issues of its log of claims, but we add that each of these issues must amount to a "dispute or difference," either existing or apprehended.

This gave rise to the second main issue. The Association contended that the Act was directed at the settlement of claims by negotiation and agreement between the parties, and before they could be reported as a dispute there had to be a genuine attempt at settlement. Its counsel submitted that this had not occurred with the Company's logs of claims, and in effect it was attempting to by-pass the negotiation stage by simply reporting its claims as a dispute, with a view to obtaining the immediate appointment of an arbitrator. If that was what the Company was attempting to do, then we would agree that there was no dispute or difference within the definition of "trade dispute" capable of being reported as such under the Act.

Although observing that there appeared to be some disagreement on the point, *Fatiaki J,* seems to have accepted that both logs of claims were discussed during the meetings which took place up to the end of March 1997, leading to the report by the Company. We have set out at some length the latter's account of the negotiations in the correspondence exhibited to the supporting affidavit filed on behalf of the Association. This was put forward as part of the case in support of its application, and we have already remarked on the absence of any rebuttal in the body of its affidavit, beyond the vague reference to the lack of "formal" discussions. Our perusal of that correspondence leads us to the firm conclusion that there must

indeed have been extensive discussions between the parties about the Company's claims, and that the unsettled items were quite properly regarded by it as disputes or differences within the meaning of "trade dispute" and capable of being reported as such under the Act.

The Association also raised the question of delay. Section 4(1) imposes a time limit prohibiting the Secretary from accepting a report of a trade dispute which arose more than one year from the date it was reported, unless the delay or failure was occasioned by mistake or other good cause. In the present case the Company's report was made well within that time, as we are satisfied the "dispute" arose when it realised that its unsettled claims could not be resolved after the March 1997 meetings.

His Lordship concluded that the Association's application lacked merit and could not succeed, and dismissed it accordingly. For the reasons referred to above we have reached a similar conclusion.

The first ground of appeal, however, raised an important question on the Judicial Review procedure. It is clear that *Fatiaki J,* went into the merits of the Association's case in some depth. The Appellant submitted that this was inappropriate in what was merely an application under Order 53r.3(1) of the High Court Rules for leave to issue Review proceedings. The basic principle is that the Judge is only required to be satisfied that the material available discloses what might, on further consideration, turn out to be an arguable case in favour of granting the relief. If it does, he or she should grant the application - per *Lord Diplock* in Inland Revenue Commissioners v National Federation of Self Employed, [1982]

AC617 at 644. This principle was applied by this Court in National Farmers' Union v Sugar Industry Tribunal and Others (CA 8/1990; 7 June 1990). In R v Secretary of State for the Home Department ex p. Rukshanda Begum (1990) COD 107 (referred to in 1 Supreme Court Practice 1997 at pp.865 and 868) *Lord Donaldson MR* accepted that an intermediate category of cases existed where it was unclear on the papers whether or not leave should be granted, in which event a brief hearing might assist, but it should not become anything remotely like the hearing which would ensue if the parties were granted leave.

In the High Court the appellant, the respondent and the Company were heard, although the latter did not appear in this Court. It is difficult to escape the conclusion that this was hardly a brief intermediate hearing of the kind envisaged by the Master of the Rolls, but we can appreciate the problem faced by the Judge in being presented with what on the record were extensive submissions by all 3 counsel. The area of dispute was adequately covered in the Association's affidavit, and the issues were reduced to the two main points discussed in this Judgment. They were quite straightforward. His Lordship was able to reach the firm conclusion that there was no arguable case warranting the grant of leave.

As we have come to the same conclusion, the appeal must be dismissed, with costs to the Respondent.

Before parting with the case we would observe that the requirement for leave can lead to delay and uncertainty for which there is dubious justification in the assured need to

filter out vexatious or hopeless claims. Other jurisdictions appear to have no difficulty in allowing review applications to proceed without leave.

We must also emphasise that this judgment is one given in the special circumstances of the case and is not to be regarded as a precedent for judges dealing with leave applications to embark on a full hearing of the merits.

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Sir Maurice Casey
Justice of Appeal

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Sir Mari Kapi
Justice of Appeal

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J.D. Dillon
Justice of Appeal

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