IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 112 OF 2006
(High Court Civil Action No. 13 of 2002)

BETWEEN : FIJI SUGAR AND GENERAL WORKERS UNION

Appellant

A N D : THE FIJI SUGAR CORPORATION LIMITED

Respondent

Coram: Byrne, AP
Calanchini, JA

Date of Hearing : 8 March 2010

Counsel : Mr S Valenitabua for Appellant
Mr J Apted for Respondent

Date of Judgment: 27 September 2010

JUDGMENT OF THE COURT

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[1] This is an appeal against a decision of the High Court (Finnigan J) handed down on 20 October 2006. The Court quashed that part of the decision of the Sugar Industry Tribunal (the Tribunal) which defined rest day as a calendar day from midnight to midnight. The Tribunal's decision had been handed down on 28 June 2002.

[2] The matter proceeded as an appeal from the Tribunal to the High Court pursuant to section 123 of the Sugar Industry Act Cap 206. So far as is relevant the section states that any person or organisation bound by an award may appeal to the High Court against the award or any of the terms of the award on the ground, amongst others, that the decision of the Tribunal was erroneous in point of law.

[3] The issue had initially come before the Tribunal as one of a number of disputes between the Fiji Sugar Corporation (the Corporation) and the Fiji Sugar and General Workers Union (the Union). The Tribunal was required to determine, amongst other things, the meaning of "a day of rest" in Rule 8 (1) of the Manufacturing Industry Order 1993 (the Order). Rule 8 (1) states:

> ***"A worker who is normally required to work for six days per week shall in each week be entitled to one rest day, hereinafter referred to as "a rostered day off."***

[4] There was no definition of "rest day" or "rostered day off" in the Order.

[5] For reasons that are not relevant to the present proceedings, the Fiji Court of Appeal in ***The Fiji Sugar Corporation Limited -v- Fiji Sugar and General Workers Union*** (unreported Civil Appeal No. 4 of 1998 delivered 25 February 2000) had decided that the Order did apply to workers employed by the Corporation.

[6] The background facts to the dispute may be stated briefly. The Corporation and the Union are parties to a collective agreement which came into effect in August 1962. The following clause in the collective agreement is relevant to the present proceedings:

> ***"7. Overtime – Double time.***
>
> ***(a) With the exception listed in Section 10 below, work done on Sundays or Paid Holidays (not being ordinary working days for particular workmen) and***

on an employee's day of rest is paid for at double time, irrespective of hours worked during the rest of the week.

Note: "Day of rest" is the 24 hours before a shift worker resumes work on a change of shift.

(b) An employee on Essential Service Work receives double time for as many hours as he may work on this "day of rest."

[7] Under the collective agreement shift workers worked under a shift roster structure that consisted of three daily shifts of eight hours per shift. The morning shift was from 7.00am to 3.00pm. The afternoon shift was from 3.00pm to 11.00pm. The night shift was from 11.00pm to 7.00am. The roster was not based on a calendar day nor a calendar week.

[8] Workers were placed in groups to work on a particular shift for 6 consecutive days for 2 weeks at a time. Workers received a day of rest after the first six days and then resumed work on the same shift. At the end of the second week, after a day of rest, workers then resumed work on a different shift for the next two weeks.

[9] It should be noted that a worker always changed to his new shift (i.e. each two weeks) 32 hours after the end of the previous shift. There was always a 32 hours break at the end of each fortnightly change of shifts.

[10] For example, a worker engaged on the morning shift would work for six days from 7.00am to 3.00pm. He would then have a rest day. Although not expressly stated we assume that this meant that on the seventh day he was not required to report to work at 7.00am. He then resumed work at 7.00am on the eighth day and continued until the thirteenth day being the second week of the fortnightly shift. In each week of the shift a worker worked 6 days of 8 hours per day. Each week a worker worked 48 hours.

[11] In practical terms the arrangement operated so that a worker on the morning shift ceased work at 3.00pm on the thirteenth day. He was then rostered to work on the night shift 32 hours later. This meant that the worker not only received a rest day but also an additional 8 hours off before starting on the next fortnightly shift roster. Furthermore for those workers who were rostered on the afternoon shift which ended at 11.00pm on the thirteenth day then rostered on the morning shift commencing at 7.00am, the break of 32 hours also included a 24 hour calendar day from midnight to midnight. Workers rostered on the night shift finished work at 7.00am on the thirteenth day and resumed work 32 hours later at 3pm on the afternoon shift.

[12] However this arrangement could no longer operate when the Corporation and the Union entered into a memorandum of agreement (MOA) dated 19 December 2000.

[13] Clause 11 of the MOA stated:

> ***"Working hours for shift workers will also be adjusted from the commencement of the 2001 crushing season which will have one (1) week worked at 48 hours and the following week at 40 hours without any consequent reduction in take home pay."***

[14] It would appear that to comply with this clause, the Corporation decided to maintain the existing shift structure but to roster each shift worker for one less shift of eight (8) hours, every second week. This meant that in the second week of each shift a worker now worked only 5 days at 8 hours a day for a total of 40 hours.

[15] The Union claimed that the new roster was in breach of clause 8 (1) of the Order.

[16] It is noted that for years under the collective agreement the 32 hours break in respect of each of the three shifts had been accepted by the Union as including a 24 hours day of rest although only one 32 hours break in fact involved a clear calendar day of 24 hours from midnight to midnight.

[17] Under the new roster with the removal of a shift in every second week, there was an 8 hour increase in the hours off following a shift change from the morning and afternoon shift allowing for 24 hours from midnight to midnight during the hours off. However the night shift that finished at 7.00am did not receive a clear calendar day of 24 hours from midnight to midnight when they moved to the afternoon shift commencing at 3.00pm.

[18] The Union argued that these workers were not receiving a day of rest since a day of rest should be interpreted as a 24 hour period from midnight to midnight. The union relied on the definition of day in section 2 of the Employment Act Cap 92 (now repealed) which was the legislation in force at the time. Section 2 stated:

> ***"2 In this Act, unless the context otherwise requires:***
>
> ***'day' means a period of twenty-four hours beginning and ending at midnight."***

[19] In response to the Union the Corporation claimed that the definition in the Employment Act did not apply.

[20] In its decision the Tribunal concluded that the day of rest referred to in Clause 7 of the Collective Agreement was not meant to prescribe a day of rest but was for calculating overtime rates. The Tribunal also concluded that Rule 8(1) of the Order did prescribe a day of rest. This left the Tribunal to decide what constituted a day of rest. The Union claimed that it meant calendar day from midnight to midnight. The Corporation claimed that it meant any 24 consecutive hours.

[21] The Tribunal stated that, since the Employment Act is binding on both employers and employees, the day of rest referred to in Rule 8 (1) of the Order should be given the same meaning as "day" in the Employment Act. For the purposes of Rule 8 (1) a day of rest was to be a calendar day from midnight to midnight.

[22] The Corporation appealed to the High Court and sought to have the Tribunal's decision set aside on the following grounds:

> ***"That the said decision was erroneous in law in finding:***
>
> ***(a) the phrase "day of rest" where it appears in clause B7 of the Collective Agreement between the Corporation and the Union to mean a period of rest of 24 consecutive hours beginning at midnight and ending the following midnight;***
>
> ***(b) Rule 8 (1) (of the Order) to have application to shift work pertaining in parts of the sugar industry is not based on weeks of seven days duration or days of 24 hours duration beginning and ending at midnight;***
>
> ***(c) the word "day" where it appears in the (Order) to be capable of having only the meaning attributed to it by the Employment Act;***
>
> ***(d) the definition in the Employment Act of the word "day" to be exhaustive; and***
>
> ***(e) the Corporation's shift roster for the 2001 crushing season to be bound to provide the Corporation's relevant employees with a weekly day of rest of a period of 24 hours beginning and ending at midnight."***

[23] The learned trial judge approached the appeal as one involving the interpretation of an agreement made between the parties. He stated that the starting point was the "commonsense rule" whereby words were to be given their ordinary and natural meaning if that can be done and if the result

makes commonsense. His Lordship also stated that any history of prior agreed actions between the parties should also be considered.

[24] The trial judge found that the Tribunal had made two errors. The first was that Rule 8 (1) of the Order had been slightly but significantly amended in 1995 and in 1999. Therefore for the purpose of the MOA of December 2000, the wording of the 1993 Order was no longer applicable.

[25] Secondly, in applying the definition of "day" in the Employment Act, the Tribunal failed to note that the definition was only a meaning for that word "in this Act". He noted that the dispute had not much to do with any provision dealing with "days".

[26] At paragraph 17 of his judgment the trial judge states:

> ***"Without the aid of the statutory definition, one must interpret the meaning of a "rest day" in the context of previous agreed interpretations of a "rest day" plus the context of the words. The context is first the words of the new provision in the 2000 MOA and second the words in those parts of the Collective Agreement that relevantly co-exist and have gone along with the new words."***

[27] The learned trial judge found that the Tribunal erred in its definition of "rest day" for the purposes of the 1962 Collective Agreement and the December 2000 MOA. He also found in relation to the implementation of the Order in its 1999 version that the Appellant complied with the requirements for a rest day when it gave each shift worker in the circumstances outlined in the appeal a period of at least 24 hours rostered off even if this period does not include 24 hours from midnight to midnight.

[28] It was against that decision that the Union appealed to this Court. The Union seeks orders that the judgment be set aside in relation to the interpretation

of "rest day" and that the decision of the Tribunal be restored. The grounds of appeal are:

> "1. ***The Learned Judge erred in law in quashing part of the decision of the Sugar Industry Tribunal which contains his conclusion that a rest day should embrace the hours from midnight to midnight.***
>
> 2. ***The Learned Judge erred in law in not properly defining and/or interpreting the meaning of a "rest day"***
>
> 3. ***The Learned Judge erred in law when he held that the definition of "Day" contained in the Employment Act should not be applied to the Collective Agreement."***

[29] It is convenient to deal first with ground three of the grounds of appeal. The definition of day in the Employment Act is to be found in section 2 of that Act. Section 2 is the interpretation section. The section commences with the words "In this Act, unless the context otherwise requires ...."

[30] However this appeal is not concerned with the meaning of the word "day" as it appears in any section of the Employment Act. In this appeal the issue concerns the meaning of "rest day" as it appeared in Rule 8 (1) of the Order

[31] We therefore reject ground three for the reason that the definition of day in the Employment Act had no application to the present case. There is no provision of the Employment Act that is the subject of any dispute between the parties in this appeal.

[32] As to the meaning that should be given to the expression "rest day" as it appears in Rule 8 (1) of the Order, we see no reason why it should not be given the same meaning as appears in clause 7 of the 1962 Collective Agreement between the parties. The note that appears after clause 7 (a) of the Agreement states that "day of rest" means the 24 hours before a shift

worker resumes work on a change of shift. As already noted, the Order did not contain a definition of "rest day". The MOA of December 2000 also did not contain a definition of "rest day".

[33] The only guide as to what "rest day" means in the context of the dispute between the parties is that which appears as a note to clause 7 (a) of the Collective Agreement.

[34] To the extent that it may be argued that the words "day of rest means the 24 hours before a shift worker resumes work on a change of shift" are ambiguous or uncertain in meaning, then it is necessary for this Court to consider whether the learned trial judge correctly applied the accepted principles of interpretation.

[35] In ***Hassan Din and Another -v- Westpac Banking Corporation*** (unreported Civil Appeal No. 66 of 2003 delivered on 26 November 2004) the Fiji Court of Appeal discussed the principles that were to be considered when interpreting a clause in a collective agreement. On page 8 of its decision the Court adopted the approach taken by Lord Hoffman in ***Investors Compensation Scheme Ltd -v- West Bromwich Building Society*** [1998] 1 All ER 98 (at 114) and concluded that:

> ***"... the interpretation of the clause is to be approached objectively. It is the meaning that the clause would convey to a reasonable person having the relevant background knowledge that is to be determined, not the meaning that the parties to the agreement thought the clause would have."***

[36] The question then becomes what is the meaning that would be conveyed by the words used in the note to clause 7 (a) to a reasonable person with the relevant background knowledge? Such a person would be aware that the words had been part of the collective agreement since 1962. Such a person would also be aware that over the years since 1962 a method of

implementing that clause had been adopted by the Corporation and accepted by the Union. The 1993 Order did not, once it had been held to be applicable to workers employed by the Corporation, result in a change to the work practices and in particular the implementation of the rest day requirement set out in the Collective Agreement.

[37] Whilst the 2000 MOA had the effect of reducing the total number of hours worked by a worker in a fortnight, it did not in any way either expressly or by implication invalidate the implementation of the rest day requirement adopted by the Corporation and accepted by the Union since 1962.

[38] For the reasons we have given we are satisfied that the interpretation for which the Corporation contended is correct. The Appeal is dismissed. The Corporation is entitled to an order for costs on this appeal which we fix at $4,000.00.

Byrne, AP

Calanchini, JA

Solicitors:

Sherani for the Appellant

Munro Leys for the Respondent