IN THE HIGH COURT OF FIJI
AT LAUTOKA
EMPLOYMENT JURISDICTION

ERCC No: **07** of **2020**

BETWEEN : **FEDERATED ARILINE STAFF ASSOCIATION**

PLAINTIFF

AND : **AIR TERMINAL SERVICES**

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. N. R. Padarath with Mr. M. Anthony for the Plaintiff

: Mr. D. Sharma with Ms. G. Fatima for the Defendant

Hearing : 21 August 2020

Date of Decision : 30 November 2020.

DECISION

EMPLOYMENT LAW: ORIGINATING SUMMONS Collective agreement – Whether termination of all employees terminates collective agreement – Whether frustration or act of God terminates collective agreement – Sections 6, 24, 41, 144 & 160 (3) of the Employment Relations Act 2007 – Employment Relations (Amendment) Act 2020

The following cases are referred to in this decision:

a) *Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salwage and Towage) Ltd, "The Sea Angel [2007] EWCA Civ 547*
b) *McGavin Toastmaster Ltd v Ainscough Et Al [1976] 2 S.C.R 718*
c) *London Transit Commission v ATU [1983] 10 LAC 348*
d) *Fiji Public Services Association v Board of Fire Commissioners of Suva (1991) FJHC 52, HBC 01451.88s (28 August 1991)*
e) *Huron (County) v Service Employees Union Local 210, 2000 Canlii 16893 (ON CA)*

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1. The plaintiff filed an originating summons on 30 June 2020 seeking to determine the following questions of law which are reproduced verbatim:

a. *"Whether the recent amendment passed under the Employment Relations (Amendment) Act to section 24 of the Employment Relations Act 2007 gives a right to an employer to terminate a collective agreement and/ or member of a part to a collective agreement?*

b. *Whether an employer can rely on section 41 of the Employment Relations Act 2007 elect to terminate an employee who is a member of a Union which is a party to a collective agreement?*

c. *Whether the doctrine of frustration and/ or the statutory exception of Act of God as provided for under the Employment Relations Act 2007 apply to collective agreement?*

d. *Whether section 24, section 41 and the doctrine of frustration and/ or statutory exception of Act of God is available to the defendant to terminate the collective agreement in the circumstances and particularly when they have advertised for all the position purportedly terminated in the Fiji Sun dated 27 June 2020 being within 8 days of the purported termination*?"

2. The plaintiff sought the following orders:

a. A declaration that the defendant's termination letter dated 19 June 2020 is unlawful and is in breach of the collective agreement dated 22 January 1998.

b. An order that the termination letters dated 19 June 2020 addressed to all members of the plaintiff be withdrawn forthwith.

c. A declaration that the doctrine of frustration and/or the statutory exception of act of god do not apply to collective agreement.

d. An injunction that the defendant and/or servants and/or their agents be restrained from terminating the collective agreement.

e. An injunction that the defendant and/or servants agents be restrained from terminating the members of the plaintiff association.

f. An injunction that the defendant and/or servant and/or their agents be restrained from recruiting and/or acting upon the advertisement published in the Fiji Sun dated 27 June 2020.

g. An order that the employees who were purportedly terminated by letter dated 19 June 2020 and whose position has been advertised in the Fiji Sun dated 27 June 2020 be forthwith reinstated to their original position under the collective agreement.

3. Prior to filing the originating summons, the plaintiff, which is described as a registered trade union of the defendant, and whose members, comprising large

numbers, were served with letters of termination on or about 22 June 2020, filed an *inter partes* summons dated 23 June 2020 and sought orders to restrain the defendant from terminating the employment of members of the plaintiff association and from terminating the collective agreement dated 22 January 1998 between the parties. The plaintiff filed a second *inter partes* summons dated 30 June 2020 seeking to restrain the defendant from recruiting and/or acting upon an advertisement published in the Fiji Sun dated 27 June 2020. The defendant countered that it terminated the employment of the workers as it could not provide work after suffering a 95% reduction in revenue due to the Covid-19 pandemic. By ruling dated 13 July 2020, the court declined to grant the orders sought by the plaintiff.

4. Subsequently, the parties were heard concerning the matters raised in the plaintiff's originating summons (expedited form) filed on 30 June 2020. The questions raised in the originating summons bear closeness to the matters raised by the plaintiff's *inter partes* summons, and my ruling in that matter would appear to have traversed some of the matters raised at this stage; the material facts in both proceedings being the same.

Whether the recent amendment passed under the Employment Relations (Amendment) Act to section 24 of the Employment Relations Act 2007 gives a right to an employer to terminate a collective agreement and/ or member of a part to a collective agreement?

5. The amendment to section 24 of the Act, which was introduced by Act No.11 of 2020, states an "act of God" includes a pandemic declared by the World Health Organization. Section 24 (1) of the Act states that an employer must, unless the worker has broken his or her contract of service or the contract is frustrated or its performance prevented by an act of God, provide the worker with work in accordance with the contract during the period for which the contract is binding. These are exceptional situations recognised by the legislature.

6. The plaintiff, though agreeing that sections 24 and 41 of the Employment Relations Act did not apply to a collective agreement, submitted that the actions

of the defendant amounted to treating the collective agreement as terminated. Neither party has taken the position that the collective agreement was expressly terminated. The defendant's position is that the collective agreement may have become ineffective, but it is not terminated.

7. In my previous ruling of 13 July 2020, in regard to the question of termination of the collective agreement, I held the view that the termination of employees will not result in bringing the trade union to an end or in terminating the collective agreement, which will continue in force until the expiry of the term as provided by the collective agreement, and while it is in force, it will bind the defendant employer and the plaintiff union, a body corporate with perpetual succession[1].

Whether an employer can rely on section 41 of the Employment Relations Act 2007 elect to terminate an employee who is a member of a union which is a party to a collective agreement?

8. Section 41 (a) of the Employment Relations Act provides that if the employer is unable to fulfill the contract, the contract may be determined, subject to conditions safeguarding the right of the worker to wages earned, compensation due to the worker in respect of accident or disease and the worker's right to repatriation.

9. The plaintiff rightly submitted that sections 24 and 41 of the Employment Relations Act do not apply to a collective agreement. In the prescribed circumstances, the enactment must be taken as entitling an employer to terminate an employee's employment in accordance with the law whether or not he is a member of a union that is a party to a collective agreement. My attention has not been drawn to anything in the collective agreement which state that its terms are insulated from statutory changes subsequent to the making of the agreement. Moreover, the collective agreement itself permits the employer to terminate the employment of a worker[2].

[1] Section 144 of the Employment Relations Act 2007
[2] Article 2B of the collective agreement

10. Section 41, however, gives no right to an employer to terminate on the ground of an employee's membership of a union (whether or not it is a party to a collective agreement). The law prohibits such conduct by an employer[3]. A worker is not obliged to join a union[4], to reiterate what was stated in the previous ruling, and no employer may make it a condition of employment that a worker must not be or become a member of a trade union[5]. A collective agreement is sanctified by law, and an employer who terminates employment for the reason that an employee is a member of a union that is party to a collective agreement may be made answerable. In such circumstances, an aggrieved workman is entitled to provide evidence of the nature of his dismissal and seek relief under the Employment Relations Act.

Whether the doctrine of frustration and/ or the statutory exception of act of God as provided for under the Employment Relations Act 2007 apply to collective agreements?

11. The question whether a collective agreement is frustrated is a matter to be ascertained by court in the context of the relevant factual background, and not in a general sense. The court's opinion to the next issue should deal with this question. It needs mention that the surrounding facts are not without dispute, and, consequently, the court, in these proceedings is restricted in forming an opinion.

Whether section 24, section 41 and the doctrine of frustration and/ or statutory exception of Act of God is available to the defendant to terminate the collective agreement in the circumstances and particularly when they have advertised for all the positions purportedly terminated in the Fiji Sun dated 27 June 2020 being within 8 days of the purported termination?"

12. The plaintiff persistently submitted that the collective agreement was terminated by the defendant. The plaintiff's contention is on the basis that the employment of all employees – who are also members of the plaintiff – was terminated, and

[3] Section 6 (2) *supra*
[4] Section 6 (5) *supra*
[5] Section 6 (6) *supra*

soon after the defendant advertised for all terminated positions in the Fiji Sun dated 27 June 2020, within 8 days of such termination. The termination of all employees is proof of the termination of the collective agreement, and by so terminating their employment, the plaintiff submitted, the defendant used section 41 to determine the collective agreement, and thereby compromised the collective bargain that had taken place between the parties.

13. The plaintiff referred to article 1 of the collective agreement which requires that any changes in staff rules, rates of pay, conditions of employment, increase or decrease in the workforce and the creation of new classification whether or not specifically contained in the collective agreement to be referred by the defendant to the plaintiff for discussion and mutual agreement.

14. According to the plaintiff there was no discussion or mutual agreement on the issue of termination of the entire workforce. The plaintiff argued that the termination of the employment of the workforce was not denied and that this was evidence of ending the collective agreement by terminating the employment of the entire workforce. It contended that the defendant acted contrary to the collective agreement, and that there was an alternative remedy available other than to terminate the employment of the workers.

15. The defendant claimed that it informed all its employees as early as 24 March 2020 including the plaintiff's members of the drastic impact of the pandemic on its business. The plaintiff, it said, was kept informed of developments throughout the period 19 March 2020 to 18 June 2020. The defendant contended that its revenue plunged by 95%, and that as at May 2020 the company recorded a loss of $2.5 million dollars. These matters, however, are in contention and the court is in no position to make findings on those controversies.

16. The defendant denied having terminated the collective agreement, and claimed that the advertisement did not contravene the agreement. Its position is that it was entitled to terminate the workers' employment in terms of Article 2 B of the collective agreement, section 41 (a) of the Employment Relations Act 2007 and section 24 as amended by the Employment Relations (Amendment) Act 2020.

The defendant submitted that it has complied with section 41 in that it was unable to provide work to its workers and it has paid the workers all dues required by law upon their termination of employment.

17. The court agrees with the plaintiff that collective agreements cannot easily be terminated or ended. Section 160 of the Act makes provision for the cessation of the collective agreement. As submitted by the plaintiff the parties agreed that the collective agreement will continue in force until amended or replaced by a further agreement. The parties' agreement will keep them bound until it expires according to law. Any breach by a party will be actionable in law in the appropriate forum.

18. The contention of the plaintiff, however, is that the mass termination of the entire workforce has resulted in the termination of the collective agreement. I have dealt with this aspect in my ruling dated 13 July 2020. A collective agreement expires on the date specified in the agreement[6]. As reasoned there, the termination of employees *per se* will not necessarily result in terminating the collective agreement, which will continue in force until the expiry of the term as provided by the collective agreement and in terms of the Employment Relations Act.

19. The plaintiff referred to the decisions in *McGavin Toastmaster Ltd v Ainscough Et Al*[7]*,London Transit Commission v ATU*[8]*, Fiji Public Services Association v Board of Fire Commissioners of Suva*[9] and *Huron (County) v Service Employees Union Local*[10] in support of its contention that the doctrine of frustration does not apply to collective agreements. In *McGavin Toastmaster Ltd*, the Supreme Court of Canada held that common law concepts such as repudiation and fundamental breach should not apply to collective agreements. This is understandable. Collective agreements are in a league of their own. As recognised by the Canadian Supreme Court, common law relations of employer and employee have been altered by

[6] Section 160 (3) *ibid*
[7] [1976] 2 S.C.R 718
[8] [1983] 10 LAC 348
[9] (1991) FJHC 52, HBC 01451.88s (28 August 1991)
[10] 210, 2000 Canlii 16893 (ON CA)

labour legislation. Quoting with approval from another Canadian case, the Supreme Court said, "The collective agreement is not that sort of contract that can be terminated by repudiation by one party because the other party has broken one of its terms". There is relevance in this observation to the present matter.

20. The plaintiff submitted that the actions of the defendant have led to the end of the collective agreement by frustration. If that is so the collective agreement has come to an end. In the same breath the plaintiff seeks a declaration that common law concepts such as frustration and act of God do not apply to collective agreements. I do not think this is a fit case in which to make such a declaration. The defendant has not claimed termination of the collective agreement by frustration, and the material facts are in issue. In my view, the court would have to venture to an extreme to state that the statutorily regulated collective agreement between the plaintiff and the defendant has reached its end by frustration.

21. Frustration was explained by Lord Radcliffe in this way in *Davis Contractors Ltd v Fareham UDC*[11]: "…frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract……It was not this that I promised to do."

22. The importance of the considering the factual background was explained in Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salwage and Towage) Ltd, "The Sea Angel"[12], by the English Court of Appeal in this way where the doctrine of frustration is an issue: "*In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract…".*

[11] [1956] 1 AC 696 at 729
[12] [2007] EWCA Civ 547

23. The defendant submitted that there was a serious issue about the validity of the collective agreement. In terms of section 160(3) of Employment Relations Act a procedure was in place for replacement of the collective agreement that expired on 31 August 1998. This procedure, it was contended, has not been followed. It was submitted that in terms of the amended law, a collective agreement could continue in force for a further twelve months from the date of expiry mentioned in such agreement. Within that period the union must initiate collective bargaining to replace the old agreement. The amended law, the defendant submitted, no longer allowed a collective agreement to continue forever. At the hearing, Mr. Sharma did raise the question of the collective agreement's validity on the ground of non-registration, but did not pursue the matter. Mr. Semisi Turagabaleti clarified the matter in his supplementary affidavit filed on 20 August 2020 that the collective agreement dated 22 January 1998 was registered on 16 February 1998 under the Trade Disputes Act. It was indicated to the parties that this was not a matter that would be gone into, and the court would only determine the matters in the originating summons.

24. The orders sought by the plaintiff are declined for the reasons stated above. Some of the reliefs are the same as those sought in the *inter partes* summons that have been ruled upon, and are dismissed for the reasons stated in my ruling dated 30 July 2020. This decision makes no finding as to whether or not the terminations of the employees were lawfully carried out. There are appropriate mechanisms in the law for that inquiry alongside remedies. There is also no evidence of an imminent threat of the defendant taking steps to terminate the collective agreement so as to warrant injunctive relief.

ORDERS:

A. The orders sought in the plaintiff's originating summons dated 30 June 2020 are declined.

B. Parties are to bear their own costs.

Delivered at **Suva** this **30th** day of **November, 2020.**

M. Javed Mansoor
Judge