IN THE EMPLOYMENT RELATIONS COURT
AT SUVA
EMPLOYMENT JURISDICTION

Employment Action # ERCC 15 of 2024

BETWEEN: **THE UNIVERITY OF THE SOUTH PACIFIC**

Plaintiff

AND: **THE PERMANENT SECRETARY of the MINISTRY OF EMPLOYMENT, PRODUCTIVITY & WORKPLACE RELATIONS**

1st Defendant

AND: **THE MINISTRY OF EMPLOYMENT, PRODUCTIVITY & WORKPLACE RELATIONS**

2nd Defendant

AND: **ASSOCIATION OF THE UNIVERSITY OF THE SOUTH PACIFIC STAFF (AUSPS)**

3rd Defendant

AND: **UNIVERSITY OF THE SOUTH PACIFIC STAFF UNION (USPSU)**

4th Defendant

AND: **THE ATTORNEY GENERAL OF FIJI**

5th Defendant

Representation/Appearances

Plaintiff: **Mr. W. W. Clarke & Mr. K Chang** (Howards Lawyers)
1st, 2nd & 5th Defendant: **Mr. A. Bauleka** (Office of Attorney General).
3rd & 4th Defendant: **Mr. S Nandan & Mr. S Kumar** (Reddy & Nandan Lawyers)

Date of Hearing: 21st November 2024

Ruling

A. Introduction

[1] The Plaintiff, University on 22nd October 2024 filed ***Ex-parte Notice of Motion*** for interim injunction to discontinue the strike by the 3rd and 4th Defendants, the Unions. The Plaintiff sought to restrain and prohibit the Unions, by themselves and or by their servants, members and by their agents from continuing with strike action against the Plaintiff commenced on 18th October 2024 at the Laucala Campus and from commencing strike action against the University in any other location within Fiji. The ***Ex-parte motion*** was filed with an affidavit in support of Ms. Agnes Kotoisuva. Upon the filing of the motion I directed that it would be heard ***Inter-parte***. The other parties were given time to respond. In response, an affidavit of Ms. Rosalia Fatiaki, the General Secretary of AUSPS was filed. The University filed Supplementary Affidavit and Affidavit in Reply of Ms. Kotoisuva.

[2] Apart from the Motion, an Originating Summons (for injunction to discontinue strike) has been filed. The 3rd and 4th Defendants have filed an acknowledgment of service of the originating summons and indicated that they intend to contest the proceedings.

B. The Background

[3] The University of the South Pacific (USP) is established under the University of the South Pacific Charter 1970. On 12th July 2024, the two Unions (AUSPS and USPSU) wrote to the Vice-Chancellor and President of USP (VCP), Professor Pal Ahluwalia seeking that he reconsider the termination of Dr. Tamara Osbourne-Naikatini who was the President of AUSPS at the time. On 18th July 2024, the VCP responded to the Unions. On 23rd July 2024 the Unions gave Notice of Intention to Undertake Strike Actions to USP and the Registrar of Trade Unions requesting a secret ballot for industrial action including strike.

[4] The Office of the Registrar of Trade Unions on 12th August 2024 responded, giving approval for a strike ballot to be conducted in relation to the removal of the VCP. On 14th August 2024 a secret ballot was conducted and resulted in favor of the Union members going on strike against the USP. The Union Members went on strike on 18th October 2024.

C. The Submissions

[5] In brief the submission for the **University** is that the application is pursuant to Section 181 of the Employment Relations Act 2007 (ERA). The need is for the Court to consider whether Section 179 ERA applies to oust the jurisdiction of the Court to grant orders sought. Section 179 provides that no action, including injunction can be brought provided that the participation in the strike is lawful. For the University it is submitted that the strike is unlawful for three reasons:

(a) the decision of the Permanent Secretary to reject the notice of dispute was wrong in law,
(b) strike is outside the mandate of the approval given by the Registrar of Trade Unions, and
(c) mandate to remove VCP is itself unlawful.

[6] It was further submitted on behalf of the University that the Court consider the following:

(a) serious/arguable case;
(b) balance of convenience; and
(c) overall justice.

The cases that were relied upon by the University were:

Eagle Airways Ltd v. New Zealand Air line Pilots Association Industrial Union of Workers Inc AEC 126/97 [1997] NZEmpC 358 (31st October 1997),

Lyttelton Port Company Limited v Maritime Union of New Zealand Incorporated [2016] NZEmpC 173 (20th December 2016),

National Union of Workers v Permanent Secretary for the Ministry of Employment, Productivity and Industrial Relations [2022] FJHC 268; ERCA 23. 2019 (1st June 2022)

New Zealand Professional Firefighters Union v New Zealand Fire Services Commission [2011] NZCA 595

British Airways Plc v British Airline Pilots Association [2019] EWCA Civ 1663.

[7] In brief the submission for the **Unions** is that the University makes important admission that the strikes are lawful (referring to Paragraph 19 of Affidavit of Ms. Kotoisuva) which supports Section 179 (b) of the ERA that lawful strike does not give rise to an action for the grant of an injunction. The principles guiding the Court in considering whether an interlocutory injunction be granted is to be satisfied the claim is not frivolous or vexatious or in other words, there is a serious issue to be tried. They relied on **American Cyanamid Co v. Ethicon Ltd [1975] A.C 396; [1975] 1 All E.R. 504 H.L** and **Northern Drivers Union v Kawau Island Ferries Ltd (1974) 2 NZLR 61.** They submitted that the factors to be considered by the Court were:

(a) is there a serious question to be tried,
(b) are damages an adequate remedy, and
(c) where does the balance of convenience lie.

D. Interim Injunction

[8] The hearing of an interim injunction is not a trial on merits. It is based on oral submissions and affidavit evidence. There is no cross-examination. The function of an interim injunction is often described as a process which is designed to "*hold the ring*" (per **United States of America v Abacha [2015] 1 W.L.R 1917**) pending final determination of the merits or other disposal of the dispute.

[9] The effectiveness of an interim injunction depends on the area of law involved. Cases involving rights of owners of real property, often reach final judgment because dispute is permanent. The grant of an interim injunction in an industrial dispute is usually the end of the matter, as by the time the claim comes for trial months later the factual position may have changed substantially and the assistance of the Court may no longer be required.

E. Determination

[10] I am informed that the University has appealed the decision of the 1st Defendant (PS EPWR) to dismiss notices of employment dispute filed by the University, It is before the Employment Relations Tribunal. I would not venture onto that. That appeal is a matter for the Tribunal.

[11] Part 18 of the ERA 2007 deals with strikes and lockouts. The objects of this part of the Act are set out in Section 174 of the ERA 2007 as "*(a) to recognize that the requirement that a union and employer must deal with each other in good faith does not preclude certain strikes and lockouts being lawful; (b) to define lawful and unlawful strikes and lockouts; and (c) to ensure that where a strike or lockout is threatened in an essential service that there is an opportunity for mediated solution to the problem.*" The objects need to be revisited by the parties. Section 177 ERA provides for unlawful strikes. The effects of lawful strikes are set out in Section 179. Section 179 (b) provides that "*lawful participation in a strike or lockout does not give rise to an action for the grant of an injunction*".

[12] The role of a Court in such matters has been eloquently set out by Sir John Donaldson MR in **Mercury Communications Ltd v Scott-Garner and another [1984] 1 All ER 179**, which I would like to highlight:

> "*Disputes of this nature give rise to strong, and indeed passionate, feelings on each side. This is understandable and it makes it all more important that everyone should know where the court stands. They are on neither side. They have an independent role, akin to that of a referee. It is for Parliament and not for courts to make rules which determine what action is and what is not permissible in the course of industrial dispute. It is for the courts, and not for Parliament, to interpret those rules and to uphold the freedom of both sides from taking action which, however appropriate within those rules, whilst restraining both sides from taking action, which however appropriate it might otherwise be, is outside those rules. In a word, parliament makes the law and is solely responsible for what the law is. The duty of the courts is neither to make nor to alter nor to pass judgment on the law. Their duty is simply to apply it as they understand it.*"

I will approach this task on the basis as outlined above, nothing else will suffice.

[13] The principle to be applied in applications for interlocutory injunctions have been authoritatively explained by Lord Diplock in **American Cyanamid Co v. Ethicon Ltd [1975] A.C 396; [1975] 1 All E.R. 504 H.L.** I do not see any reason to deviate from it. They are summarised as follows:

(i) *The Plaintiff must establish that they have a good arguable claim to the right they seek to protect;*

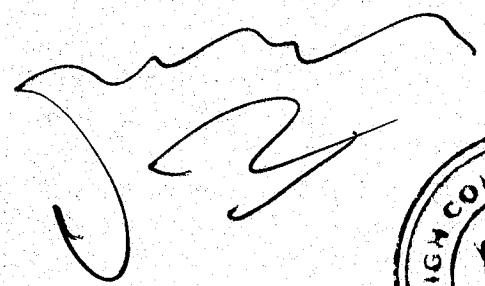
(ii) *The Court must not attempt to decide this claim on the affidavits; it is enough if the Plaintiff shows that there is a serious question to be tried.*

(iii) *If the Plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the court's discretion on the balance of convenience.*

[14] There is no dispute that proper and lawful strike ballot was held in which the members of the Unions voted to strike. The argument on behalf of the University is based on the appeal that is before the Employment Tribunal. I will not usurp the role of that Tribunal. The Tribunal has to determine the appeal. An appeal from the Tribunal lies to this Court. The issue of the lawfulness of the strike is also before the Tribunal. On the materials that is available before me I conclude that there is no arguable case. The balance of convenience does not favour the granting of an interim injunction.

[15] I have also noted **Mercury Communications Ltd (Supra)** and **Ryanair DAC v British Airline Pilots' Association, [2019] EWHC 3882 (QB); [2020] IRLR 698** where the Courts refused injunction where there was substantial compliance with the statutory regime. I am of the view that the Employments Relations Act 2007 is to ensure fair dealing between employer and union, therefore minor and inconsequential infringements, if any, should not result in a strike injunction. I further remind myself that at this stage that I am not concerned with the question whether a final injunction should be granted, but only whether it should be granted as an interlocutory measure pending trial.

[16] For the given reasons the interim injunction sought by the University (Plaintiff) is refused. The University is ordered to pay each Defendant $1000.00 as costs. The costs have been summarily assessed.



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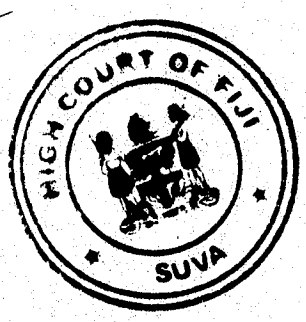
Chaitanya S.C.A Lakshman

Puisne Judge



27th November 2024