

A

SUGAR MILLING STAFF OFFICERS ASSOCIATION

v.

FIJI SUGAR CORPORATION

B

[SUPREME COURT—Rooney, J., 20 October 1986]

Civil Jurisdiction

J. R. Reddy for the Appellant*B. N. Sweetman* for the Respondent

C

Appeal from a decision of the Sugar Industry Tribunal by the Sugar Milling Staff Officers Association (SMSOA). A Mr Nitya Reddy (Reddy) was the President of SMSOA and a senior accountant employed at the Fiji Sugar Corporation. On 5 June, 1986 Reddy was dismissed. There followed a "confrontation" between SMSOA and the corporation, the former giving notice of its intention to take strike action and to the Tribunal pursuant to the Sugar Industry Act (Cap. 206) s.98(1)(h). The Industrial Commissioner an officer of the Tribunal issued a Certificate of dispute pursuant to s.104 of the Act and referred the matter as an unresolved dispute for determination by the Tribunal under Part IX of the Act.

D

The parties appeared before the Tribunal. It was agreed that a preliminary matter could be argued before any evidence was taken viz:

E

"If the dismissal were found to be unlawful or unfair, whether the Tribunal has power to order reinstatement of Mr Reddy (the officer) or to award him compensation."

The Tribunal did consider submissions and ruled:

F

".....the Tribunal.....has no power in the circumstances of this dispute to order that the officer be reinstated if it finds his dismissal was unfair."

G

The Tribunal expressed the view that the Tribunal had no power to reinstate Reddy because the Corporation had not agreed to any terms of reference which would empower it to order reinstatement if it found the dismissal was unfair or unjust; further he suggested that even if the Tribunal concluded that Reddy had been so dismissed, it would not follow that it would order reinstatement unless the Corporation indicated a willingness to take him back, for reasons then mentioned.

The only proper subject of appeal was the first of those matters set out.

H

The other grounds relating merely to expressions of opinion by the Tribunal upon which the learned trial Judge for reasons given, indicated he would not deal with. A

The learned appeal Judge referred to the Collective Agreement between SMOSA and the Corporation of 1 April 1983 setting out the terms under which members of SMSOA are employed.

Held: There was nothing in the Collective Agreement providing for reinstatement. There cannot (ordinarily) be specific performance of a contract of service: *Redge v. Baldwin* (1963) 2 All E.R. 66 at p.71 relied on. B

The law in Fiji of employment is essentially that found in the Common Law subject to statutory limitations mentioned *Regina v. Air Terminal Services Ltd. & Others* 790/1982. C

The power of the Corporation are those expressly or by implication conferred on it by the Act. The learned appeal Judge referred to certain sections of Act including those specifically relating to the Tribunal i.e. s.26—

- “(a) to hear and determine industrial disputes which have been certified by the Industrial Commissioner to be unresolved disputes under this Act; D
- (b) to register collective agreements and to hear and determine any question as to the making, registration or interpretation of such agreements;
- (c) to hear and determine any question as to the interpretation of this Act and of any award;”

The powers of the Tribunal are much broader than those of a Court of Law. He referred to s.102, s.103, s.104 and s.105, which last section stated that the Tribunal would determine— E

“.....according to.....good conscience.....substantial merits of the case, without regard to legal technicalities.....”

Section 109 authorised the Tribunal to— F

“.....according to.....good conscience.....substantial merits of the case, without regard to legal technicalitie.....”

Section 117 was also referred to by the learned appeal Judge.

The learned appeal Judge noted that the "legislative purpose" of the Tribunal was to enable employers and employees to obtain redress without recourse to industrial action. G

If at the end of its investigation of the merits of the case the Tribunal was convinced Reddy should be reinstated as a "just settlement" of the matter, it ought not to shrink from giving effect to its conclusions. He referred to Australian Authority in which a reinstatement award was made. H

- A The Tribunal erred in law in finding it had no power to order reinstatement of Reddy following an appropriate finding.

Appeal allowed.

Cases referred to:

- B *Ridge v. Baldwin* (1963) 2 All E.R. 66
Newcastle Wharf Labourers Union v. Newcastle and Hunter River Steamship Company Ltd. (1902) A.R. 1.
Australian Consolidated Press Ltd. v. Federated Miscellaneous Workers Union (1973) A.R. (N.S.W.) 181.
Raniga v. Air Terminal Services s.c. 790/82
- C ROONEY, J.

Judgment

- D This is an appeal from a decision of the Sugar Industry Tribunal (Sir Ronald Kermode) and is the first to be presented to this Court since the establishment of the Tribunal under the Sugar Industry Act, section 18. The issue raised in the appeal is of the greatest importance as it is concerned with the nature, purpose and jurisdiction of the Tribunal itself.

- E Mr Nitya Reddy (Reddy) is the president of the Sugar Milling Staff Officers Association (SMSOA) (the appellant), a registered trade union. He was also, until the 5th June 1986, a senior accountant employed by the Fiji Sugar Corporation (FSC) (the respondent) at its Lautoka Mill. On that date Reddy was summarily dismissed by the FSC.

- F This action led, almost inevitably, to a confrontation between SMSOA and FSC. The former gave 14 days notice of its intention to take strike action to the latter and to the Tribunal to meet the requirements of section 98(1)(b) of the Act. The Industrial Commissioner (Mr Daryl Tarte), an officer of the Tribunal, on the 9th June issued a certificate of dispute by virtue of the powers invested in him by section 104 of the Act and referred the matter as an unresolved dispute for determination by the Tribunal under Part IX of the Act.

What followed is set out in the ruling of the Tribunal:

- G "At a meeting on the 17th of June 1986 to consider the procedure to be followed at the hearing, Mr Reddy indicated that the Association wanted the officer reinstated, but that he considered the proceedings would be a waste of everybody's time if the Tribunal was not empowered to order that the officer be reinstated, if it found that the dismissal was unfair.

- H Mr Sweetman opposed the request contending that the only issue was whether the issue was lawful or unlawful. If the dismissal was held to be unlawful, the officer's remedy was to claim damages. He made it clear that he did not concede that the Tribunal was empowered to order reinstatement of the officer.

The Tribunal agreed to hear argument on the issue before any evidence was called and he informed Counsel that he would adjourn to consider the matter

after hearing Counsel's submissions. He set the 26th of June 1986 as the date for commencement of the hearing.

The issue which was to be argued and on which the Tribunal was to rule was in the following terms:

'If dismissal was found to be unlawful or unfair, whether the Tribunal has the power to order reinstatement of Mr Reddy (the officer) or to award him compensation.'

The Tribunal having considered the submissions made, held:

"The ruling of the Tribunal is that it has no power in the circumstances of this dispute to order that the officer be reinstated if it finds his dismissal was unfair."

That ruling was based upon reasons which I will consider later in this judgment. However, the Tribunal went on to express further views on the subject. Sir Ronald Kermode stated that the Tribunal had no power to reinstate Reddy because the FSC had not agreed to any terms of reference which would empower it to order reinstatement if it found that the dismissal was unfair or unjust. Sir Ronald went on to suggest that even if the Tribunal concluded that Reddy had been unfairly dismissed it would not follow that the Tribunal would order his reinstatement unless the FSC indicated a willingness to take him back, because the "compulsory reinstatement of a senior officer is unlikely to result in peace and harmony in the industry".

The grounds of appeal are:

- "1 THE Tribunal erred in Law in finding that it had no power to order the reinstatement of the dismissed officer (Nitya Reddy) under the Sugar Industry Act if it finds that his dismissal was wrongful or unlawful and/or unfair.
2. THAT the Tribunal erred in Law in deciding that it had no jurisdiction to reinstate the dismissed officer (Nitya Reddy) because the Corporation has not agreed to any terms of reference involving any issue of unfair dismissal.
3. THAT the Tribunal erred in holding that it could not consider the issue of unfair dismissal under the Sugar Industry Act or the Collective Agreement between the Appellant and the Respondent.
4. THAT the Tribunal erred in Law in not hearing the dispute referred to it by the Industrial Commissioner under Section 104 of the Sugar Industry Act and contained in the Certificate of dispute issued under his hand on the 9th day of June 1986.
5. THE Tribunal erred in Law in holding that the only issue for it was whether the dismissal of the officer Nitya Reddy was lawful or unlawful."

Ground 1 above arises directly from the Tribunal's ruling and is the proper subject matter of the appeal before this Court. Grounds 2, 3 and 5 refer to matters of opinion expressed by the Tribunal in its ruling. These opinions may or may not be valid, but, they form no part of the decision which is the subject of the appeal. Whether or not I accepted as correct the views of the Tribunal of these matters could not affect the decision which I am obliged to make in this appeal. My opinions would be obiter and not binding upon the Tribunal. I do not propose, therefore, to deal with them.

As to Ground 4, this mis-states the true position. The Tribunal has not yet heard the dispute referred to it because the parties agreed that the Tribunal must first decide whether or not it had jurisdiction under the Act to order the reinstatement of Reddy. I shall therefore confine my attention to that issue alone.

A In reaching the decision to decline jurisdiction to order the reinstatement of Reddy, the Tribunal considered the terms of the collective agreement between SMSOA and the FSC dated the 1st April 1983. This agreement sets out the conditions upon which the members of the trade union are employed. There is nothing in that agreement which provides for the reinstatement of an employee whose services are dispensed with by the FSC. The Tribunal appears to have concluded that the absence from the contract of employment of any such provision precluded it from making an award which would have that effect.

B Further, the Tribunal held that an order to reinstate a dismissed employee would be in effect an order of specific performance. A contract for personal services cannot be specifically enforced. The Tribunal held that it was not entitled to interpret the Sugar Industry Act in a manner which would require it to assume an implied jurisdiction to order specific performance of any employee's contract which courts generally speaking "have never dreamt of enforcing."

C Mr Sweetman for the respondents submitted that the Act confers no power on the Tribunal to reinstate an employee who is dismissed. The Tribunal is bound to act within the law. That, he submitted, was implicit in the right of appeal to this Court conferred by section 123, if the decision of the Tribunal "is erroneous in point of law."

D Mr Sweetman contended that at common law a master can terminate the contract with his servant at any time and for any reason or for none. But, if he does so in a manner not warranted by the contract he must pay damages for breach of contract. (1963) 2 All E.R. 66 as per Lord Reid at 71). He argued that the Tribunal, being a court obliged to act in accordance with law, has no jurisdiction to make an award which this Court could not make.

E In a recent case of *Raniga v. Air Terminal Services Ltd. & Others* (790/82) (unreported) I accepted that in Fiji the law of employment is essentially that found in the common law subject to limited statutory modification by the Employment Act, Cap. 92. I refused to grant relief in a civil action based on a collective agreement in which the claim was for damages for making the plaintiff redundant in circumstances which were allegedly contrary to the agreement. But, that case did not arise out of an industrial dispute and the plaintiff did not rely upon any enactment which took his case outside the ordinary law of contract.

F Mr Sweetman also pointed out that the FSC had not agreed to invest the Tribunal with any power to make an award of reinstatement, as they might have done by the terms of reference.

The Tribunal is the creation of the Sugar Industry Act. The powers of the Tribunal are those expressly or by implication conferred upon it by the statute. Hence it is necessary to consider the terms of the Act.

G The preamble to the Act indicates its comprehensive character. The purpose of the measure is the establishment of certain institutions and other matters relating to the sugar industry and—

H "FOR PROMOTING THE EFFICIENCY AND DEVELOPMENT OF THE SUGAR INDUSTRY AND THE CO-ORDINATION OF THE ACTIVITIES OF ALL SECTIONS OF THE SUGAR INDUSTRY: FOR PROMOTING GOOD RELATIONS BETWEEN ALL SECTIONS OF THE SUGAR INDUSTRY."

(See also section 3).

The following definitions to be found in section 2(1) may be relevant:

" 'employee' means a person who is employed in the industry under a contract (whether the contract is written or oral, express or implied), being a contract of service or apprenticeship or a contract personally to execute any work;"

Among the objects of the Act set out in section 3 are:

"(f) to encourage, and provide the means for, conciliation with a view to the prevention and settlement of all disputes within the industry by amicable agreement; and

(g) to provide means for preventing and settling disputes within the industry which are not resolved by amicable agreement with the maximum of expedition and the minimum of legal form and technicality."

Section 22 reads:

"22(1) There shall be an officer to be known as the Industrial Commissioner of the Sugar Industry Tribunal who shall be appointed by the Chairman of the Judicial and Legal Services Commission, after consultation with the Commission and who shall have such functions as are assigned to the Industrial Commissioner by or under this Act or by the Tribunal.

(2) The term of office of the person appointed to be the Industrial Commissioner shall be 3 years and he shall be eligible for re-appointment."

The powers of the Tribunal are set out in section 26. Those relevant to the present issue are:

"(a) to hear and determine industrial disputes which have been certified by the Industrial Commissioner to be unresolved disputes under this Act;

(b) to register collective agreements and to hear and determine any question as to the making, registration or interpretation of such agreements;

(d) to hear and determine any question as to the interpretation of this Act and of any award;"

The other powers referred to in section 26 and the duties prescribed by sections 28 and 30 make it abundantly clear the the Tribunal is more than a court of law. It has much broader functions which are in many respects analogous to those possessed by industrial courts established in the United Kingdom, Australia and New Zealand. The duties of the Tribunal are extended by various sections of the Act. For the purposes of this case I am only concerned with those powers of the Tribunal which relate to its duties in resolving industrial disputes.

A Severe restrictions on the right to strike are imposed by section 98 of the Act. In particular, no industrial action shall be taken in respect of an industrial dispute if the Industrial Commissioner certifies the matter to be an unresolved dispute [(1)(c)].

Section 102 (1)(a) reads:

"102(1) For the purposes of this Act 'industrial dispute' means an actual or apprehended dispute:

- B (a) between one or more employers or organisations of employers and one or more employees or organisations of employees, where the dispute relates wholly or mainly to any one or more of the following, that is to say:
- C (i) the terms and conditions of employment, or the physical conditions in which any employees are required to work;
- (ii) the engagement or non-engagement, or termination or suspension of employment, of one or more employees;
- (iii) the allocation of work as between employees or groups of employees;
- (iv) a procedure agreement or any matter to which in accordance with subsection (2) of section 86 a procedure agreement can relate;"

D The functions of the Industrial Commissioner are provided for by sections 103 and 104:

"103.—(1) The Industrial Commissioner shall endeavour by conciliation:

- (a) to maintain harmonious relations between all persons engaged in the industry so as to prevent industrial disputes; and
- (b) to promote the settlement of an industrial dispute, expeditiously and fairly:
- E (i) before the dispute is certified by him under this Act to be an unresolved dispute; and
- (ii) after he has so certified the dispute, at the request of the Tribunal.

(2) In endeavouring to promote the settlement of an industrial dispute in accordance with subsection (1), the Industrial Commissioner shall:

- F (a) if, in his opinion, it is appropriate to do so, or on being directed to do so by the Tribunal, use the machinery or arrangements which exist under a registered procedure agreement binding on the parties to the dispute;
- (b) in any other case, take such steps as he deems to be fair and reasonable.

G (3) Where there is any question or difference as to whether an industrial dispute exists, the Industrial Commissioner may refer the matter to the Tribunal for determination, and the Tribunal may determine the matter in a summary manner without hearing witnesses.

104. If the Industrial Commissioner is satisfied:

- H (a) that no useful purpose would be served by continuing to conciliate under section 103 for the purpose of promoting the settlement of an industrial dispute; or
- (b) that any party to an industrial dispute refuses to enter into any conciliation for that purpose:

the Industrial Commissioner shall certify the industrial dispute as an unresolved dispute and shall refer the matter for determination by the Tribunal under this Part or, where the dispute is required to be determined otherwise than by the Tribunal under the provisions of the Master Award or, pending the making of the Master Award, of a contract of general application in pursuance of the Act of 1961, as having effect by virtue of subsection (1) of section 71, for determination in accordance with those provisions." A

Particular powers of the Tribunal are set out in section 105. I need not quote the section here, but it is clear that it was the intention of the legislature that the Tribunal would determine the dispute and "carefully and expeditiously hear, inquire and investigate the matters in dispute and all matters affecting the merits of the case and the just settlement of the matters in dispute". B

Section 109 authorised the Tribunal to—

"(c)act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms." C

By section 116 the Tribunal shall not make an award which is:

"(a) inconsistent with the provisions of any other written law regulating the wages, hours of work or other terms or conditions of, or affecting the employment of any person." D

Section 117 reads:

"117. In making an award in relation to any proceedings before the Tribunal under this Act, the Tribunal shall not be restricted to any specific relief claimed by any party or to the demands made by any party in the course of the proceedings, but may include in the award any matter or thing which the Tribunal thinks necessary or expedient, in particular in the case of proceedings relating to an industrial dispute, for the purpose of preventing or settling the matter in dispute or of preventing further disputes." E

If the ordinary law of master and servant prevailed in the sugar industry the appellant's members would be free to withdraw their labour in pursuance of their objective which is the reinstatement in his employment of Reddy. By such means the union might succeed and the FSC become obliged to re-employ Reddy not matter how distasteful this might be. But, such a strike would be illegal under section 98 and would expose the strikers to the penalties for illegal industrial action under section 99. Likewise, at common law the FSC could dismiss its entire workforce if the employees did not accept demands made upon it. But, such a lock-out would also be illegal and punishable under the Act. F

The legislative purpose of the Tribunal is to enable employers and employees to obtain redress without resort to industrial action which would be damaging to an industry which is vital to the economy of Fiji. The Tribunal is there as a substitute to resolve industrial disputes without the risk of such disruption. If it is to serve its purpose the Tribunal must have and must exercise all the powers necessary to achieve the same results as might otherwise be attained by strikes and lock-outs. To hold otherwise would be to assume that the legislature intended, not only to suppress the rights of the parties to take industrial action, but, to curtail their right to achieve their legitimate objectives by other means. G H

The attainment of security of employment for members and the fear of victimization whether overt or covert are matters of particular concern to trade unions. This is especially so in times of high unemployment. On the other hand, employers seek to avoid over-manning and the retention of workers considered unproductive and often harbour the suspicion that trade union officials are responsible for any problems which they encounter with their workforce. That being the case there is always present the possibility of conflict. In the present dispute there may exist such elements and it may be the duty of the Tribunal to determine their presence.

The Industrial Commissioner in the exercise of his powers under section 104 of the Act has certified the existence of the unresolved dispute. His certificate includes the following:

- “THE DISPUTE REVOLVES AROUND THE DISMISSAL OF MR N. N. REDDY AND THE RESPECTIVE CLAIMS BY THE PARTIES ARE—
- THE FSC CLAIM THAT IT ACTED LAWFULLY IN DISMISSING MR REDDY.
 - THE ASSOCIATION CLAIM THAT:
 - (A) THE FSC DID NOT FOLLOW THE AGREED DISCIPLINARY PROCEDURES SET OUT IN CLAUSE B.9 OF THEIR COLLECTIVE AGREEMENT WHEN THEY SOUGHT TO SUSPEND MR REDDY.
 - (B) THE FSC ACTED UNLAWFULLY AND UNREASONABLY IN DISMISSING MR REDDY.
 - (C) MR REDDY SHOULD ACCORDINGLY BE REINSTATED.”

That is the matter referred to the Tribunal for determination under the Act. Neither the issue of the certificate nor its terms has been challenged by any party. Subject to the power of the Tribunal to give directions under section 105, the certificate constitutes the terms of reference. There is no need for the parties to agree upon any others. As I see it, both the FSC and SMOSA are bound by the certificate as is the Tribunal itself. The certificate includes the appellant's claim that Reddy should be reinstated.

The dispute relates to the termination of employment of an employee of the FSC and is thus an industrial dispute within the meaning of section 102(ii). It is this which the Tribunal must “carefully and expeditiously hear, inquire into and investigate.....”. The Tribunal is enjoined to reach “a just settlement of the matters in dispute”. If at the end of its investigation of the merits of the case the Tribunal is convinced that the reinstatement of Reddy is required as a “just settlement” of the matter, it should not shrink from giving effect to its conclusions merely because such an award might have the effect of ordering specific performance of a contract of service. The provisions of section 117 permits the Tribunal to “include in the award any matter or thing which the Tribunal thinks necessary or expedient...for the purpose of preventing or settling the matter in dispute or of preventing further disputes”.

Reference was made by Mr Reddy to the Industrial Arbitration Act, 1901 of New South Wales. The definition of industrial dispute in that Act bears similarity to section 102 of the Fiji Act. Matters relating to:

“the employment of children or young persons, in any industry or the dismissal of or refusal to employ any particular person or persons or class of persons therein”

are included within the definition.

The case of *Newcastle Wharf Labourers Union v. Newcastle and Hunter River Steamship Company Ltd.* (1902) A.R. 1 discussed in *Australian Consolidated Press Ltd. v. Federated Miscellaneous Workers Union* (1973) A.R. (N.S.W.) 181 at 189 and 190 was the first reported case in which an industrial tribunal constituted under the law of New South Wales made a reinstatement award. The *Australian Consolidated Press* case was decided by an industrial commission and in its decision it reviews judgments of courts in New South Wales and Australia based upon different statutes. Some of these decisions turned around the statutory meaning of "an industrial matter". The various Acts referred to set up differing regimes. It does not follow that the views expressed in the judgments and decisions quoted have a direct bearing on the situation created by the Sugar Industry Act. A detailed examination of the relevant legislation and the judicial decision thereon is not warranted. The act in Fiji must be construed according to its purpose and I hold that the primary intention of the Act was to preserve the sugar industry from the ravages of industrial action by providing an alternative method of resolving whatever disputes may arise.

Until the merits of this dispute are investigated by the Tribunal, it is not possible to predict its outcome. All that I am required to do on this appeal is to rule on the issue raised by the parties. I am satisfied that the Tribunal erred in law in finding that it would have no power to order the reinstatement of Reddy following a finding that his dismissal was wrongful, or unlawful or unfair.

This appeal is allowed. The appellant's costs are to be paid by the respondent.

Appeal allowed.