

FIJI PUBLIC SERVICE ASSOCIATION

v.

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FIJI POSTS AND TELECOMMUNICATIONS LIMITED

[HIGH COURT, 1990 (Palmer J) 28 September]

Civil Jurisdiction

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Employment- Trade Union- whether a union previously recognised by a Government Department is entitled to recognition by its privatised successor- whether the successor's refusal to recognise the union is justiciable- Trade Union (Recognition) Act (Cap 96 A) Section 4 (1).

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The Plaintiff union had been recognised by the Department of Post and Telecommunications but when the Department was privatised its successor, the Defendant, declined to recognise it. The Union sought a recognition order from the High Court. Dismissing the action the High Court HELD: (i) a new employer is not bound by statute to recognise a union recognised by its predecessor (ii) the predecessor's obligation to recognise a union is not a "liability" within the meaning of Section 69 (1) of Decree 37/1989 and (iii) the Union not having availed itself of the statutory recognition procedures the Court had no jurisdiction to entertain the action.

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Cases cited:

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Pasmore v. Oswaldtwistle Urban Council [1898] AC 394
Rothmans of Pall Mall Overseas Ltd & Ors v. Saudi Arabian Airlines Corp [1980] 3 All ER 359
Wilkinson v. Barking Corp. [1948] 1 All ER 564

H. Nagin for the Plaintiff
Q.B. Bale for the Defendant

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Action for declaratory Judgment in the High Court.

Palmer J:

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This action arises out of the privatization of post and telecommunications services in Fiji. The proceedings were instituted by Originating Summons, but by consent oral evidence was led by both parties and it was agreed that there would be written submissions. The Plaintiff has filed such submissions, the Defendant, has not. The Plaintiff seeks "an Order that the Defendant forthwith recognise the Plaintiff as the collective bargaining agent relating to the rates of pay and terms and conditions of employment of all salaried employees of the Defendant." It also seeks some consequential orders. A considerable amount of evidence has been tendered by affidavit and orally but the point in fact is a relatively short one.

Prior to the 1st of January 1990 the post and telecommunications services for

Fiji were provided by the Government of Fiji through the Post and Telecommunications Department. That provision ceased as from that date and the function of the Department to provide such services was taken over by a limited company established for that purpose which is the present Defendant. It is common ground that until that date the Plaintiff represented the established employees of the Department. The present contest arises because the Defendant refuses to make deductions from the pay of its employees of Union dues payable to the Plaintiff while the Plaintiff for its part claims that the Defendant is obliged to continue to make such deductions in the same manner as made by its predecessor, the Post and Telecommunications Department.

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While there is some dispute as to the percentage of employees who are members of the Plaintiff it is common ground that they are in excess of 50% of the total employees.

The Plaintiff makes much of Clause 6 (a) (III) of its Constitution which provides that "membership of the association shall be open to persons not being unestablished staff who are employed by the Posts and/or Telecommunications Department or any of its successors." It claims that the defendant company is the successor to the previous Department and that therefore its employees are eligible for membership in the Plaintiff association.

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The Plaintiff goes on to argue that it was recognised by the previous department pursuant to the Trade Unions (Recognition) Act (Cap.96 A) ("the Act"), and that fact is not in dispute. It argues consequently that because of those circumstances its right to represent the Defendant's employees and a concomitant obligation of the Defendant to make deductions in respect of Union dues continues as before in the case of the Department. In this context it places reliance on Section 4 of the Act which provides in sub-section (1): "A Trade Union if recognized by an Employer under the provisions of Section 3 shall continue to be entitled to such recognition until such time as the Permanent Secretary, on application by the Employer, determines that there is another Trade Union claiming to represent some or all of the persons previously claimed to be represented by the Trade Union recognised under the provisions of section 3 and that therefore the provision of section 3 should no longer apply", and subsection (2) which provides: "The Trade Union entitled to recognition under the provisions of section 3 shall cease to be so entitled with effect from the date of determination by the Permanent Secretary."

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There has been a contest as to whether the Defendant is in fact the successor to the previous Department for the purposes of the Plaintiff's Constitution and whether the term "successor" therein refers to some other government department or is wide enough to embrace any other body, government, statutory or under the Companies Act which performs the same functions as the previous Department. That contest goes to the question of whether the Plaintiff can have as its members employees of the Defendant company, which on one view is critical to the issue here.

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A However even if one were to resolve that question in the Plaintiff's favour it does not suffice to enable the Plaintiff to succeed in the present action. Assuming that issue in the Plaintiff's favour would mean, firstly, that the Defendant is the successor of the previous Department, and secondly that the Plaintiff is entitled to have its employees as members. But it would still leave unresolved a third element in the equation, namely that the employer is not the same.

B Section 4 of the Act speaks of a Trade Union recognised by an employer. In my view that means the employer who originally recognised it and not its successor. Indeed the very term 'successor' has implicit in it the proposition that the succeeding body, however much it may perform the same functions and however much it may employ the same people is just that, a successor and not the same.

C It is next necessary to notice Section 3 of the Act which is as follows:

PART II - RECOGNITION OF TRADE UNIONS

Recognition of trade union without rival union

D 3. - (1) Where there is a trade union of which more than fifty per cent of the persons eligible for membership thereof in the employment of an employer are voting members and there is no rival trade union claiming to represent these persons, that trade union shall for the purposes of collective bargaining be entitled to recognition by the employer in accordance with the provisions of a recognition agreement voluntarily executed by the employer and the trade union or, in default of any such agreement, in accordance with a compulsory recognition order made by the Permanent Secretary under the provisions of subsection (2).

E (2) If a trade union claims to be entitled to recognition by an employer under the provisions of this section but the employer refuses recognition, the trade union may refer the question to the Permanent Secretary who, after taking into account all facts and circumstances appearing to him to be relevant, may, subject to the provisions of section 10, make an order, under this Part referred to as "a compulsory recognition order" -

- F (a) declaring that the trade union is entitled to recognition under this section; and
- G (b) specifying the manner in which the employer shall accord recognition to the trade union."

(section 10 is not relevant here)

It will be seen that the section provides for recognition to be arrived at by a

voluntary agreement or as an alternative, in default of any such agreement, by a compulsory recognition order made by the Permanent Secretary. In this case the fact that the Defendant, though it may be a successor is not the same employer as the Department, is clearly recognised by the Plaintiff who, as appears from the Affidavit of its General Secretary, invited the Defendant to agree to a recognition agreement which he himself submitted to them for execution. The Defendant however refused to do so. That action on the part of the Plaintiff is quite inconsistent with the proposition that the present employer within the time meaning of section 4 of the Act is the same employer as the previous one, and equally with the proposition that the Plaintiff's case rests on the fact that it may represent employees of the successor organisation.

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The Defendant having refused to enter into such a recognition agreement brings into play subsection 2 of section 3 of the Act. This makes it clear that the machinery provided by the legislation for resolving a refusal of voluntary recognition is an application to the Permanent Secretary. What has happened here is that the employer has refused recognition, which he is entitled to under section 3 of the Act. I have already dealt with the proposition that the present employer is the same as the previous employer and that therefore recognition continues until determined in accordance with section 4 of the Act. The Plaintiff at least at this stage has its statutory remedy. Authority is quite clear on the point.

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In Pasmore v. Oswaldtwistle Urban Council [1898] AC 394 the House of Lords, per the Earl of Halsbury, said:

“The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.”

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In Wilkinson v. Barking Corp. [1948] 1 All ER 564: at 567: [1948] 1 KB 721 at 724 Asquith, L.J. said:

“It is undoubtedly good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to this remedy or this tribunal and not to others.”

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It may be objected that the Defendant has not taken the point. However the Court is aware of the legislation just referred to. And in Wilkinson the Court also said:

“A party cannot submit to, so as to make effective, a jurisdiction which does not exist.”

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In Rothmans of Pall Mall (Overseas) Ltd and others v. Saudi Arabian Airlines Corp [1980] 3 All ER 359, at 364 Mustil J. (who was upheld on appeal) after citing the first quotation above from Wilkinson went on to say:

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“Where the statute is of this kind, it is immaterial whether the parties wish the Court to try the action. It must disclaim jurisdiction, since to continue with the action would be contrary to law.”

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Accordingly I am of the view that this action is misconceived.

I should refer to one other submission put by the Plaintiffs and that is with reference to the Posts and Telecommunications Decree (37/1989) 1989. Part (vii) of that Decree deals with the “Transfer of Undertaking of Department of Posts and Telecommunications.” Section 69 (1) is as follows:

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“On such day as the Minister may by order appoint for the purposes of this part (in this Decree referred to as ‘the transfer date’) all the property, rights and liabilities to which the Department of Posts and Telecommunications was entitled or subject immediately before that date shall, without further assurance (subject to the following provisions of this section) become by virtue of this section property, rights and liabilities of a company nominated for the purposes of this section by the Minister (in this Decree referred to as ‘the Company’.)”

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The Plaintiff argues that the Defendant as the successor of the Department takes over the liability of the recognition of the Plaintiff and that such recognition continues until determined in accordance with section 4 of the Act. In my view the term ‘liabilities’ in the Decree does not include any supposed obligation to recognise the Plaintiff. But be that, as it may, in my view the Decree cannot by such a side wind as the reference to liabilities have the effect of overcoming the express statutory provisions of section 3 of the Act already referred to.

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For the above reasons the action application fails and is accordingly dismissed. As the Defendant has succeeded on a point not taken by it there will be no order as to costs.

(Judgment for the Defendants.)

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