AIR PACIFIC LTD v FIJI AVIATION WORKERS ASSOCIATION and Anor (CBV0006 of 2003S)

SUPREME COURT — CIVIL JURISDICTION

FATIAKI P, KEITH and MALCOLM JJ

8, 17 September 2004

Practice and procedure — appeal — redundancy — interim award — whether permanent arbitrator erred in law in holding that burdens of substantive and procedural justification distinct from obligations in clause 29.1 of collective agreement and in applying those distinct burdens to Appellant's case — whether permanent arbitrator erred in law by interpreting first and second sentences of clause 29.1 as applying to situations of redundancy where those employees subjected to redundancy were not in a common pool of employees but held distinct position — whether or not Appellant breached requirement under third sentence of clause 29.1 of collective agreement — Constitution of the Republic of Fiji ss 33(3), 43(2) — Industrial Relations Code of Practice — Trade Disputes Act s 5A(5)(a).

In 1998, Air Pacific Ltd (the Appellant) improved its productivity by making 19 of its senior employees redundant. The Fiji Aviation Workers Association (the Respondent) represented 12 of these employees and challenged the redundancies. The Permanent Secretary for Labour and Industrial Relations referred the dispute to the permanent arbitrator (the arbitrator).

The arbitrator issued an interim award and held that the Appellant breached clause 29.1 of its collective agreement with the Respondent.

In March 2000, the Appellant applied to the High Court for judicial review to quash the interim award. The High Court set aside the interim award and held that the arbitrator adopted the wrong legal approach by applying the law of unjustified dismissal of New Zealand which included the concept of "substantive justification" and that the arbitrator's findings were manifestly unreasonable.

On appeal, the Court of Appeal allowed the Respondent's appeal and restored the interim award. The court disagreed with the High Court in setting aside the findings of fact relating to the breach of clause 29.1.

The Court of Appeal on 26 August 2003 gave leave to the Appellant to appeal on the following issues of significant public importance: (1) whether or not the arbitrator erred in law by holding that the burdens of substantive and procedural justification were distinct from the obligations in clause 29.1 of the collective agreement and applying those distinct burdens to the Appellant's case; (2) whether or not the arbitrator erred in law by interpreting the first and second sentences of clause 29.1 as applicable to situations of redundancy where those employees subjected to redundancy were not in a common pool of employees but each held a distinct position; and (3) whether or not the Appellant breached the requirement under the third sentence of clause 29.1 of the collective agreement.

Held — (1) The arbitrator erred on its findings on the first issue. The expression "substantive justification" does not have a distinct existence in the law in Fiji. Rather such law, was to be found in the relevant collective agreement in the common law and in ss 33 and 43(2) of the Constitution of the Republic of Fiji.

(2) Once the employer declared a single position redundant, there was no need to undertake the first sentence under clause 29.1. If there was a single individual, he should not be compared by reference to all the criteria of selecting individuals. That those criteria were personal to the individual employees and that the management prerogative of the employer to make particular positions redundant does not involve making assessments of personal characteristics. Thus, the clause did not refer to the total work force, but rather

to the consequences of the management decisions in question and that these decisions related to 12 separate and distinct positions. Accordingly, the obligations imposed by the first and second sentences of the clause did not apply to the Appellant's case. The Court of Appeal and the arbitrator erred in their interpretation of clause 29.1.

(3) The obligation to discuss matters on redundancy decisions were also supported by the right to fair labour practices including humane treatment under s 33 of the Constitution in that there was an obligation to discuss and not to consult and negotiate. The operation of the obligation has to recognise both the employer's management responsibilities and its obligations of good faith and to follow "fair labour practices".

Appeal allowed.

Cases referred to

Aoraki Corporation Ltd v McGavin [1998] 3 NZLR 276; *B P (SS) Co Ltd v W R Carpenters (Fiji) Ltd* Award No 35/1999; *Housing Employee's Association v Housing Authority* Award No 27/1999, cited.

J. S. Kos and *G. K. Phillips* for the Appellant

H. Nagin for the first Respondent

Fatiaki P, Keith and Malcolm JJ.

The permanent arbitrator decides an employment dispute

[1] In 1998, the Appellant, *Air Pacific* took steps to improve its productivity. The steps included making 19 of its more senior employees redundant. The *Fiji Aviation Workers Association* (the Association) the Respondent, represented twelve of them. It challenged the redundancies and the Permanent Secretary for Labour and Industrial Relations, acting under s 5A(5)(a) of the Trade Disputes Act as enacted by Decree No 27 of 1992, referred the dispute to the *permanent arbitrator* (the arbitrator) to settle the following matters:

1. Unfairly making 12 of the Association members redundant …;
2. Breaching Clause 29.1 of the Collective Agreement by neither following the required redundancy selection procedure nor allowing the required time for discussions and union representation, and refusing to discuss or justify its selection of redundant persons.

[2] Clause 29.1 of the collective agreement provided as follows:

> Redundancy
>
> 29.1 In the event of redundancy, attributes such as skill, experience, abilities, performance, length of service, shall be considered by the Company when revised manpower levels are being determined. Where these attributes are equal, employees shall be discharged on the basis of last in, first out. The Company shall advise the Association at least two months prior to implementation of redundancy to allow for time for discussions.

[3] Subclauses 2 and 3 of clause 29 provided the basis for calculating severance payments for employees whose "services are terminated by the Company because of redundancy".

[4] The two questions before this court on appeal, set out in [10] below, arise from this provision: (1) does it imply a requirement, to be satisfied by Air Pacific, of "substantive justification" for the redundancies; we must also consider what the content of such a requirement would be and whether it exists independently of the collective agreement; *and* (2) does it extend beyond situations where some of a common class of employees are being made redundant to the situation, found in the present case, where each position which is the subject of the redundancies is different.

[5] The arbitrator heard the dispute in June 1999 and received written submissions until 2 August. On 30 December it issued an *interim award*, holding:

> In terminating the employment of the 12 grievors for redundancy, the Company breached clause 29.1 of its collective agreement with the Association. It acted in a manner which was substantively unjustified and procedurally unfair.
>
> The parties are to appear before the Tribunal on a date to be agreed to be heard on the matter of an appropriate remedy.

The High Court quashes the award

[6] On 4 March 2000, Air Pacific applied to the High Court for judicial review to quash the *interim award*. The court received written submissions in June and August and held an oral hearing on 6 February 2001. Justice Scott in the High Court, in a judgment given on 8 May, set aside the *interim award*. First, he ruled that the arbitrator adopted the wrong legal approach, principally by importing from the law of New Zealand a law of unjustified dismissal, including the concept of "substantive justification"; and, second, be found as manifestly unreasonable the arbitrator's findings of fact on the basis of which the arbitrator found Air Pacific in breach of clause 29.1.

The Court of Appeal restores the award

[7] The Court of Appeal (Reddy P, Kapi JA and Sheppard JA) on 11 April 2003 allowed the Association's appeal and restored the *interim award*. While the court agreed with the High Court that the New Zealand authorities interpreting statutory provisions which had no equivalent in Fiji should not be applied in Fiji, it disagreed on the question whether the arbitrator had applied them as an independent ground for decision. Rather, referring to passages in the award, it held that they indicated that

> the Tribunal did not apply the principle of law set out in the New Zealand authorities. The Tribunal treated the provisions of the Agreement on redundancy as determinative of the issues before it.

[8] It later summarised its position in these words (which it will be seen are reflected in the first question put to this court):

> We note that in applying clause 29.1 of the Agreement, the Tribunal constantly made reference to the principle of "substantive justification". As we have indicated earlier, this principle is introduced by statute in New Zealand but it is not applicable in Fiji for the reasons we have set out earlier.
>
> We have considered whether the reference to "substantive justification" is in fact [an] adoption of principles of law applicable in the New Zealand authorities. We have concluded that this is not necessarily so. Where the Tribunal has used this terminology, it has been stated within the context of non-compliance with clause 29.1 of the Agreement. For instance, when stating its final conclusion, the Tribunal stated:
>
> > For the foregoing reasons, the Tribunal finds that the termination of the employment of 12 grievors was in breach of clause 29.1 of the collective agreement and substantively unjustified and procedurally unfair.
>
> In essence, the reference to "substantial justification" is a reference to non-compliance with the requirements of clause 29.1. It would be advisable not to use this terminology to avoid any confusion.

[9] Second, the Court of Appeal ruled that clause 29.1 could apply to situations, such as the present, where there was not a common class of position from which only some positions were being made redundant. The tribunal had not erred in

that respect. Finally, it disagreed with the High Court's setting aside of the findings of fact relating to the breach of clause 29.1. The findings of the tribunal were not so absurd or perverse as to justify that.

Questions stated for this court

[10] The Court of Appeal (Eichelbaum, Tompkins and Penlington JJA) on 26 August 2003 gave leave, under s 122 of the Constitution, to Air Pacific to appeal to this court on the following questions of "significant public importance":

1. Whether the Court of Appeal was correct in finding that the Permanent Arbitrator did not exceed his jurisdiction by relying on the concept of "substantive justification", the Court having concluded that such references by the Arbitrator to "substantive justification" were "not necessarily" to the statutory concept of "substantive justification" but were "in essence" to the contractual provision in clause 29.1 of the relevant Collective Agreement between the parties.
2. Whether the Court of Appeal erred in its construction of clause 29.1 of the collective Agreement when it found that clause 29.1 is not restricted to situations where a common class is being partially retrenched, the Court concluding instead that it is applicable even "where the positions the subject of redundancy are different, such as in the present case.

[11] The Air Pacific arguments on these two questions have changed sharply between the arbitration and later phases. Before the tribunal on the first question, in contending that the redundancies were substantively justified, it emphasised the New Zealand authorities: "New Zealand law was an appropriate precedent for Fiji given that neither Fiji nor New Zealand have any extensive legislation providing for redundancy". In its closing submissions, it followed that passage with a lengthy extract from a New Zealand Court of Appeal judgment and, under the heading substantive justification, provided a detailed justification, both general and specific, of the redundancy decisions it had taken. It was only when, after 15 pages, the submissions moved from substantive matters to "procedural fairness" that Air Pacific contended that the collective agreement was to be given primacy, although once again New Zealand authorities were quoted at some length before the requirements of clause 29.1 were considered.

[12] By contrast, the judicial review hearings and judgments have proceeded on the basis of the central role of clause 29.1. The first question before this court similarly assumes the centrality of clause 29.1.

[13] The second change, although not so marked, in Air Pacific's argument concerns the scope of clause 29.1 — the subject of the second question. Before the arbitrator it contended that on the facts it had complied with the requirements of the provision. The argument now is, that as a matter of interpretation rather than as a matter of fact, there was no failure to comply with clause 29.1 because its requirements including its requirement of discussions in the final sentence, were inapplicable given the particular nature of the positions being made redundant: they were *not* within a common class of employment.

Question one: Reliance on "Substantive Justification"

[14] This question assumes that any limit on the employer's management prerogatives to declare positions redundant and to implement the redundancies is to be found only in the employment contract and in particular in clause 29.1. There is no independent obligation on Air Pacific to justify the redundancies and related decisions, although Air Pacific accepts that its decisions must be taken in

good faith. The association also accepts that it must found its case on the collective agreement, particularly clause 29.1, with the good faith gloss. It also depends on clause 25:

> 25.0 *INDUSTRIAL RELATIONS CODE OF PRACTICE*
>
> The Company and the Association shall act in accordance with the provisions of the industrial Relations Code of Practice dated June 1973 or as revised from time to time.

The relevant provisions of the Code are as follows;

> 44. Responsibility for deciding the size of the work force rests with management. Before taking the final decision to make any substantial reduction, management should consult employees or their representatives, unless exceptional circumstances make this impossible.
>
> 45. A policy for dealing with reductions in the work force, if they become necessary, should be worked out in advance so far as is practicable and should form part of the undertaking's employment policies. As far as is consistent with operational efficiency and the success of the undertaking, management should, in consultation with employee representative, seek to avoid redundancies by such means as:—
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> - (i) restrictions on recruitment;
> - (ii) retirement of employees who are beyond the normal retiring age;
> - (iii) reductions in overtime;
> - (iv) re-training or transfer to other work.
>
> 46. If redundancy becomes necessary, management in consultation, as appropriate, with employees or their representatives, should:
>
> - (i) give as much warning as practicable to the employees concerned;
> - (ii) consider introducing schemes for voluntary redundancy, retirement, transfer to other establishments within the undertaking, and a phased rundown of employment;
> - (iii) establdish which employees are to be made redundant and the order of discharge should be based on "last in" "first out" all other conditions being equal;
> - (iv) offer help to employees in finding other work in co-operation, where appropriate, with the Ministry of Labour, and allow them reasonable time off for this purpose;
> - (v) decide how and when to make the facts public ensuring that no announcement is made before the employees and their representatives and trade unions have been informed;

[15] This court, along with all branches of government and those performing the functions of any public office (such as the permanent arbitrator), must also give effect to s 33(3) of the Constitution which provides:

> Every person has the right to fair labour practices, including humane treatment and proper working conditions.

[16] The parties agree that judicial review is available if, among other things, the arbitrator exceeded its powers or committed an error of law — the grounds for review in issue in this case. Given that the real question is whether the award of the arbitrator can be reviewed on those grounds, and not whether the Court of Appeal erred, it is convenient to reformulate the first question: thus was the arbitrator acting within his power and in accordance with law when he referred to the concept of "substantive justification" in making his *interim award*?

[17] A related question is what did the arbitrator understand by "substantive justification"? The arbitrator did *not* apply it in relation to Air Pacific's profitable status, nor to its decision to reorganise its staff. The arbitrator also accepted that

Air Pacific, in disestablishing positions as superfluous to its needs, acted "for purely commercial reasons and not out of personal motives." But, the arbitrator continued (under the heading clause 29.1), the employer must in addition show that it has attempted to make a just choice among positions. We set out the final part of the award included under the heading clause 29.1. It is in this part that the arbitrator may be seen as making a finding of lack of "substantive justification" against Air Pacific:

> 1. … as part of its substantive justification burden, the employer must show not just commercial reasons for making a particular position redundant but also that it has attempted to make a just choice among positions.
> 2. Furthermore, the Tribunal considers that since substantive justification is concerned with why a particular individual has been selected, in cases where an agreement sets out criteria for selecting individuals, the employer has the further burden of showing that even if a position has been fairly selected, the employer must show that that criteria has been applied in selecting a particular individual as part of its proof of substantive justification i.e. in the words of Thomas J [in *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 at 307], that it has made "a just choice" not just of the position but of the individual as well.
> 3. The Association's actual claim as set out in the Terms of Reference was that Company did not show that it had followed the "required selection procedure" under clause 29.1. The clause required "attributes such as skill, experience, abilities, performance, length of service" to be considered, in the event of redundancy, and where these are equal to discharge on the basis of last-in-first-out.
> 4. The Tribunal does not accept the General Manager's assertions that "no issue of selection" arose in most cases since "each position was individual" sufficiently answers the requirement of clause 29.1.
> 5. Subject to the good faith conduct of discussions with the Association, (which is dealt with below), the Company has the right both to identify positions and individuals, but it was required to show that it had fairly identified the positions and once it had identified positions, it had applied the criteria set out in clause 29.1. On that basis, it was required to show that it had looked at the possibility of transferring or "bumping" employees from the positions to be affected to other positions and making less senior employees redundant.
> 6. In this case, the evidence before the Tribunal was that the General Managers were concerned only with identifying positions and that it was the Manager, Human Relations, who had the task of translating that decision into individual terms. The Manager, Human Relations was unfortunately not called to give evidence. Even if the Tribunal were to accept that a just choice had been made of the positions, the Tribunal must nevertheless find that the Company has failed to meet its burden of showing that the agreed criteria for making a just choice of individuals was followed and therefore that there was no substantive justification for any redundancies. (Para numbers added).

[18] In this critical part of the *interim award*, the tribunal appears at times to require of the employer at least two distinct things: a "substantive justification" ground *and* compliance with the express terms of clause 29.1 (the subject of the second question). That is to be seen in [5]:

> The Company has the right both to identify positions and individuals, but it was required to show that it had fairly identified the positions and once it had identified the positions, it had applied the criteria set out in clause 29.1.

[19] Paragraph 1 of the passage quoted from the award appears to state the non-contractual second obligation even more distinctly and strongly, viz "the employer must also show that it has attempted to make a just choice among positions." No such obligation is to be found within the words of clause 29.1 which is about choice between *employees*. Next, to refer to [2], the employer must make a just choice both of the position and of the individual. (The arbitrator had earlier said he "generally favoured the approach" of Thomas J.)

[20] Those passages support Air Pacific's appeal. So too does the arbitrator's earlier extensive discussion over more than four pages both of earlier awards which had also made major use of the New Zealand cases and of those cases themselves. For instance, under the heading, the *tribunal's approach*, are these passages:

> In 2 recent Awards, the Tribunal has considered the principles that are to be applied in redundancy situations: Award No 27/1999 (*Housing Employee's' Association v Housing Authority*) and Award No 35/1999: (*B P (SS) Co Ltd v W R Carpenters (Fiji) Ltd*). In those cases, the Tribunal adopted, with some important variations, the views which were expressed by the New Zealand Court of Appeal in the 3 leading cases cited by Mr Kos.
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> In the Awards, the Tribunal said that in redundancy disputes employers are subject to the same rules and principles that apply in unjustified dismissal claims, but modified somewhat in view of the unique context of a redundancy situation.
>
> …
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> As in unjustified dismissal disputes, the employer has the burden of justifying the termination in terms of "substantive justification" and "procedural fairness." However, as the Tribunal has said in a number of previous disputes involving unjustified dismissals, these are convenient categories for analysis only. In reality they overlap and may, in many cases, be practically indistinguishable.

[21] All that can be put against that continuing emphasis by the arbitrator on the burden on the employer to justify the redundancies, substantively and procedurally, is the final para 6 and especially its final sentence, with its emphasis on the "agreed criteria" which is to be read as a reference to the list in clause 29.1. If that sentence is read simply by itself it may be thought that the decision turns only on the clause. But we do not think that that is a fair reading of the award taken as a whole. That one reference is overwhelmed by the wider references to distinct burdens of justification to be satisfied by Air Pacific.

[22] Accordingly we conclude on the first question that the arbitrator did err in law by stating burdens of substantive and procedural justification distinct from the obligations included in the collective agreement and in particular in clause 29.1, and in applying those distinct burdens in this case. As Mr Kos, who has appeared throughout for Air Pacific in this matter, frankly acknowledged before us, he bore significant responsibility for this error, given the way he presented the case to the arbitrator.

[23] We agree with the Court of Appeal that the expression "substantive justification" (which is almost a "term of art" in the New Zealand legislation") should be avoided. It does not have a distinct existence in the law in Fiji. Rather that law, to put it generally, is to be found in the relevant collective agreement, in the common law and in s 33 of the Constitution; s 43(2) of the Constitution may also be relevant.

Question two: Selection of individuals

[24] The terms of clause 29.1 required Air Pacific to consider certain matters "when revised manpower levels are being determined". If the attributes were equal, employees were to be retained on the basis of seniority. The parties disagree whether those requirements apply in the present case where, as they accept, the positions the subject of redundancy all differ; this is *not* a case of a common class being partly retrenched. This matter was not distinctly addressed by the tribunal or the High Court. The Court of Appeal said only this about it:

> Counsel for the Company submits that the act of selection under clause 29.1 can only apply where there is a "common class of position from which only some positions are being made redundant".
>
> We accept that this clause may apply to circumstances where there is a common class of position from which only some positions are being made redundant. However, we do not accept that this clause is restricted to such circumstances. We cannot find any words in clause 29.1 capable of such limitation. Where the positions, the subject of redundancy are different, such as in the present case, there is no reason why the Company cannot consider all or some of the attributes set out in clause 29.1 in considering redundancy. We consider that the first sentence in clause 29.1 is capable of this meaning. The "tie-breaker" is relevant where the attributes are equal.
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> The "tie-breaker" in this clause is somewhat similar to clause 46 (iii) of the code which provides that employees who are made redundant should be discharged "based on 'last in' 'first out' all other conditions being equal". Like clause 29.1, this clause is drafted to apply generally with a "tie-breaker" in the event that the relevant conditions are equal.
>
> We find that the Tribunal did not make any error in applying clause 29.1 to the present case.

[25] With respect and in agreement with Air Pacific, we cannot see how this provision can be applied in the current situation. The only way that has been suggested is by finding a distinct obligation of the employer to make a just choice *among positions* by reference to those criteria. Those criteria are of course *personal* to individual employees, but the management prerogative of the employer to reorganise its business by removing particular positions does not involve it making assessments of personal characteristics. We have rejected the existence of any distinct obligation to make a just choice of positions. Once the employer has declared a single position redundant, a position which, as here, is *not* part of a common pool, there is *no* room for the comparisons envisaged by the first sentence of clause 29.1 to be undertaken. If there is a single individual there is no other person to whom that individual can be compared or preferred by reference to all the criteria. The clause is *not* directed to the total work force, but rather to the consequences of the management decisions in question. The decisions here related to 12 separate and distinct positions.

[26] We accordingly conclude that the obligations imposed by the first and second sentences do *not* apply to the present situation and that the second question is to be answered, Yes, the Court of Appeal and impliedly the permanent arbitrator did err in their interpretation of clause 29.1.

A third question

[27] But, as Mr Kos acknowledged, that is not the end of the matter. He accepted that were he to succeed on the two questions he could not ask for the award to be quashed. The matter would in fairness have to be remitted to the

permanent arbitrator with appropriate directions on the law he was to apply. So far as the two questions put to this court are concerned, those directions have already been given.

[28] A third matter arises from the third sentence of clause 29.1. It imposes an obligation on Air Pacific to "advise the Association at least two months prior to implementation of redundancy to allow time for discussion". There is a finding of fact by the arbitrator, a finding restored by the Court of Appeal, that Air Pacific breached this requirement. That finding of fact is not before us. Air Pacific now argues that this obligation of discussion is limited in the way that the first and second sentences are, that is, to situations when the redundancy affects employees in a common pool.

[29] We disagree. Clause 29.1 is not so limited in its terms. The *Industrial Relations Code of Practice*, particularly in para 46 ([14] above), indicates matters about which discussions might well have been very valuable. Further, as a matter of good faith — an obligation of all employers — Air Pacific could not in any event contend that that sentence was to be read narrowly: it recognised on 26 March 1998 that it needed to comply with that two months process; on 20 May when it finally made known the names of the 12 staff members it again referred clause 29.1 and the 60 days notice given in March; and in a letter of 1 July 1998 to the Permanent Secretary of Labour it said it had complied with the obligations required of it under that provision, including making repeated invitations to the association to discuss the impending redundancies. The obligation to engage in discussions on the full range of matters arising from the redundancy decisions is also supported by the right to "fair labour practices", including humane treatment, under s 33 of the Constitution. It is an obligation to discuss, not to consult and certainly not to negotiate. The operation of the obligation has to recognise both the employer's management responsibilities referred to for instance in para 44 of the Code and its obligations of good faith and to follow "fair labour practices."

Result

[30] We answer the questions as indicated in [22] and [26] above. As indicated in the text we have found it convenient to adjust the wording of the questions:

> *Question 1:* Did the permanent arbitrator err in law by stating burdens of substantive and procedural justification distinct from the obligations in the collective agreement and in particular in cl 29.1 and by applying those distinct burdens to Air Pacific in this case?
> *Answer:* Yes.
> *Question 2:* Did the permanent arbitrator err in law by interpreting the first and second sentences of cl 29.1 as applying to situations of redundancy where those employees being made redundant were not in a common pool of employees but each held a distinct position?
> *Answer:* Yes.

The matter is remitted to the permanent arbitrator for further consideration in the light of the answers to the two questions and the directions given in [29] above about the extent of the obligation of discussion.

[31] Mr Kos suggested that a new arbitrator would be able to decide on the record the questions of compliance with the discussion obligation in clause 29.1. We have doubts about that: consider the sharply different views taken by the arbitrator and the High Court Judge about the process followed by Air Pacific and the Association. After all the time that has gone by the parties may well consider that the sensible way forward is to negotiate a just settlement based on the breach

by the employer of its duties under the final sentence of clause 29.1 read with the Code and supported by s 33 of the Constitution. Any such settlement would have regard to the interpretation that this judgment places on clause 29.1 in its two aspects.

[32] In the circumstances there is no order for costs.

Appeal allowed.