

IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Civil Action No. 174 of 1985

Between:

THE FIJI BANK EMPLOYEES UNION a
duly registered body under the
Trade Union Act, Cap. 96 of the
Laws of Fiji

Plaintiff

- and -

1. THE PRICES AND INCOMES BOARD a
statutory body established under
the Counter-Inflation Act, Cap.
73 of the Laws of Fiji

2. THE ATTORNEY-GENERAL OF FIJI

Defendants

Mr. Tevita Fa for the Plaintiff
Mr. M.J. Scott for the First Defendant
Dr. Ajit Singh for the Second Defendant

J U D G M E N T

These proceedings were instituted by way of originating summons. The plaintiff (the Union) seeks the following declarations :

"1. (A) A declaration that the Prices and Income Board, erred in law and in fact when it directed in its letter dated 16th January, 1985 that in the absence of any formal agreement between the Association of Banks and the Fiji Banks Employees Union the Counter-Inflation (Remuneration) (Control) Order 1984 (Legal Notice No. 108/84) affected the payment of 1984 Cost of Living Adjustments to the members of the Fiji Bank Employees Union and who are the employees of the Australia & New Zealand Banking

Group Limited, the Bank of New Zealand,
the Bank of Baroda, the Barclays Bank
PLC and the Westpac Banking Corporation.

Or Alternatively

- (B) A declaration that in the special circumstances of the general agreement existing between each of the Banks and the Union that each of the Banks would pay members of the Union the 1984 Cost of Living Adjustments the Counter Inflation (Remuneration) (Control) Order, 1984 (Legal Notice No. 108/84) did not apply to the members of the Fiji Bank Employees Union as implied and directed in the Prices and Incomes Board's letter of the 16th January, 1985.
- (C) That Order 3 of the Counter-Inflation (Remuneration) (Control) Order, 1984, that is, Legal Notice 108/84, is ultravires section 10 of the Counter-Inflation Act, Cap. 73 and is therefore null and void.

Or Alternatively

- (D) That on a fair and proper construction of section 10(3) of the Counter-Inflation Act Cap. 73, read in conjunction with the other parts of section 10 of the Act, no lawful Order emanating from it, could be made with retrospective effect and because of the retrospective nature of the Counter-Inflation (Remuneration) (Control) Order, 1984, that is, Legal Notice No. 108/84, is therefore null and void. "

The only evidence placed before the Court is an affidavit sworn by Robert Bijay Kumar on the 22nd February, 1985. Certain documents were agreed by counsel and put in by consent.

In the Royal Fiji Gazette of the 9th November, 1984 a notice appeared at page 699, under the hand of V.P. Baldeo as Secretary of the first defendant (P.I.B.). It notified the public that the P.I.B., with the approval of the Minister of Finance, intended to make an order

under the Counter-Inflation Act (Cap. 73) after the expiration of 14 days. A draft of the proposed order was also published. The draft order had the effect of imposing restrictions on the amount of remuneration an employer could pay an employee after the promulgation of the order. The restriction was to apply to the rate of remuneration payable before the "appointed day" which was the 9th November, 1984.

The Minister approved of the proposed order on the 23rd November, 1984 and it was published in the Royal Fiji Gazette on the 26th November, 1984. The order has become known as the "wage freeze" and, as might have been expected, it has given rise to much public controversy. What is being challenged in these proceedings is the legality of the order itself and the correctness of the interpretation put upon it by the P.I.B. insofar as the Union and its members are concerned.

The power of the P.I.B. to make the order arises from section 10 of the Act which reads :

"10.-(1) The Board may, with the approval of the Minister, by order, restrict or regulate the payment of remuneration of any kind.

(2) Before making or giving an order or notice under this section (other than one which only removes or lessens a restriction), The Board shall, subject to the provisions of section 11, give fourteen days' notice in the manner prescribed in subsection (3) to the person paying the remuneration which would be subject to the restriction and to any organisation which appears to the Board to be concerned, and shall afford to such person or organisation an opportunity of making representations to the Board which, unless the Board otherwise directs, shall be in writing.

(3) If it appears to the Board -

(a) that it is impracticable to give notice under subsection (2) to all the persons paying the remuneration; or

(b) in any case, that a substantial number of those receiving the remuneration are not represented by any organisation, the Board shall instead publish fourteen days' notice in the Gazette and in such other ways as it may consider appropriate of its intention to make the order and shall afford to all those persons an opportunity of making representations to the Board which, unless the Board otherwise directs, shall be in writing.

(4) Where an order under this section is contravened, the liability for the contravention attaches to the person paying the remuneration.

(5) Where an order under subsection (1) has restricted or regulated the payment of any kind of remuneration, it shall be an offence and illegal to enter into any agreement or arrangement whereby the employer makes to, or for the benefit of, the employee some payment, whether called remuneration or not, to compensate for the remuneration which has been restricted or regulated. "

Section 11 is concerned with dividends and has no relation to section 10.

Counsel for the Union submitted that the order was ultra vires the powers granted to the P.I.B. by section 10 of the Act. He contended that the power to "restrict or regulate" in section 10(1) above does not include a power to prohibit the payment of remuneration and that the order made on the 26th November amounted to a prohibition.

Counsel relied on a number of authorities for the proposition that a power to regulate did not include a power to prohibit. He cited Municipal Corporation of City of Toronto v. Virgo (1896) A.C. 88 and in particular a passage from the judgment of Lord Davey at 93 which reads :

" No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or

governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit it did so by express words. "

Counsel also relied on Melbourne Corporation v. Barny 31 C.L.R. 174 and Swan Hill Corporation v. Bradbury 56 C.L.R. 747.

In Hazeldon v. McAra (1948) N.Z.L.R. 1087, O'Leary C.J. said at 1097 :

" I think the power to regulate implies a power of partial prohibition, otherwise the power to regulate would be of little effect."

and

" I therefore arrive at this - that the statutory power to regulate empowers the imposition of restrictions. "

In Jackson v. Collector of Customs (1939) N.Z.L.R. 682 the Supreme Court of New Zealand held :

" While the Court has no concern with the reasonableness of regulations made by Order in Council nor with the policy of the Government responsible for the promulgation, its duty being to search for the intention of Parliament, to support regulations that keep within that intention, and to disallow such as do not, the first and often most decisive step in discovering that intention is to ascertain the true scope of the measure impugned and the legal effect it would produce. "

The long title of the Act describes it as :

" An Act to establish the Prices and Incomes Board; to afford powers of control over prices, charges, remuneration, dividends and rents; and for connected purposes. "

The Act contains sections which empower the P.I.B. to control the aforesaid matters and it is required by section 4(4) to "act in accordance with any general or specific directions as to the policy to be followed given to it from time to time by the Minister and published by him in the Gazette". The purpose of the Act is to limit the effect of market forces on the national economy and to stem the effect of inflationary pressures. To achieve this desired result orders such as the "wage freeze" are considered necessary and desirable.

The object of the Act was considered by Marsack J.A. in the Fiji Court of Appeal in C.A. 192/78, Prices & Incomes Board & Others v. Richard Fong & Another, when the learned Judge said :

" It was conceded, and in fact affirmed, by both sides that in interpreting a statute, full regard must be had to the purpose for which the statute was enacted. The objective of the Counter-Inflation Act must be to counter inflation. Some argument took place before this Court as to the precise meaning of this phrase, and several dictionary definitions of 'inflation' were quoted. That most relevant to the present proceedings could well be that of the New Oxford Dictionary: 'Increase beyond proper limits, especially of prices'. Keeping this in mind will, in my view, help to interpret the relevant sections in the local Act. "

The P.I.B. may "restrict and regulate" the payment of remuneration in terms of section 10(1). It would be clearly ultra vires for the P.I.B. to prohibit the payment of remuneration of any kind. Having regard to the object of the statute, it was within the powers of the P.I.B. to make an order restricting the payment of remuneration above a certain level, in this case, the level obtaining on the 9th November, 1984.

In view of the above the plaintiff is not entitled to the alternative declaration (C) above.

The declarations (A) and (B) above will be taken together. The letter of the 16th January, 1985 reads as follows :

"The Secretary,
Association of Banks in Fiji,
P O Box 575,
SUVA.

Dear Sir,

Re - COLA 1984

I refer to your submission dated 20th November, 1984 in respect of payment of 1984 Cost of Living Adjustments to all your salaried staff and service workers.

I am directed to advise you that since the actual agreements were not formalised as at 9th November, 1984 therefore, they would be affected by the Counter-Inflation (Remuneration) (Control) Order, 1984 (Legal Notice No. 108/84). Accordingly, the payments cannot be implemented.

Yours faithfully,

(V.P. Baldeo)
Secretary
Prices and Incomes Board

c.c. Ministry of Employment & Industrial Relation
Fiji Bank Employees Union "

There is in existence an agreement between the Union and the Association of Banks in Fiji dated the 13th December, 1983. It was registered under section 34 of the Trade Disputes Act. This means that its provisions were an implied condition of the contracts of employment between the Union members and the employer banks (subsection (7)). That agreement remained in force "until the date on which the parties have agreed that it shall cease to have effect".

Clause 17 of the agreement stipulated that it "shall remain in force until the 30th September, 1984 and thereafter until superceded by a subsequent agreement between the parties".

No subsequent agreement was entered into between the Union and the Association of Banks in Fiji prior to the 9th November, 1984.

Mr. Kumar's affidavit states :

- "8. That the Association of Banks in Fiji as far back as 27th July, 1984 agreed to pay the members of my union the 1984 Remuneration Wage Guidelines which the Tripartite Forum had agreed to. Following this, a member of the Association of Banks in Fiji, the National Banks of Fiji, as from 18.10.84 paid its staff the guideline increase and this was made retrospective to 1.10.84.
9. That the other Banks delayed their payment of 1984 Cost of Living Adjustments because they were awaiting a resolution of certain items contained in a log of claims submitted to the ABIF which had been reported to the Permanent Secretary for Employment and Industrial Relations by way of a trade dispute in terms of the Trade Disputes Act.
10. That upon the acceptance of a trade dispute between my union and the ABIF by the Permanent Secretary for Employment & Industrial Relations conciliation proceedings commenced on 9th November, 1984. "

In a letter dated 31st July, 1985 from a Mr. Huey, the Chairman of the Association of Banks in Fiji (the Association) to Mr. Kumar, reference was made to a meeting held on the 27th July. Mr. Huey's letter sought to confirm the Association's position in regard to several matters then under negotiation between the parties. The Association agreed in principle to "pay the wages increase set by the Tripartite Forum Wages Guideline for 1984 with effect from 1st April, 1984" subject to certain reservations. The letter proposed to implement a certain rate of wages "forthwith on your agreement".

There were other matters dealt with in that letter. It was all part of a general re-negotiation of the terms and conditions of service between the Union and the Association. These negotiations did not achieve an

immediate result and on the 19th October, 1984 Mr. Kumar reported a trade dispute to the Acting Permanent Secretary for Employment and Industrial Relations. In view of that situation it is not possible to find that there existed prior to the 9th November, 1984 a binding agreement requiring the members of the Association to pay to the members of the Union remuneration greater than that provided in the registered agreement dated the 13th December, 1983.

Even if it was possible to hold that the members of the Association were bound to pay the increased rates, no such undertaking had been registered under the Trade Disputes Act. There is ample authority for the proposition that unregistered agreements entered into by employers and employees are not contracts in the legal sense and are not enforceable at law. (See re Andrew M. Paterson Ltd. (1981) 2 N.Z.L.R. 289, Ford Motor Co. Ltd. v. Amalgamated Union of Engineering & Foundry Workers [1969] 2 Q.B. 303 and Australian Agricultural Co. v. Federated Engine Drivers and Firemen's Association of Australasia (1913) 17 C.L.R. 261).

Even the fact that one of the members of the Association has paid its employees the new rates of pay with effect from the 18th October, 1984, is of no assistance to the plaintiff. In Young v. Canadian Northern Railway Co. (1931) A.C. 83 it was held that a wage agreement did not form part of a workman's contract of employment, even though it had been applied to him. The Privy Council held that this fact was equally consistent with the view that the employers had done so as a matter of policy.

The plaintiff is not therefore entitled to the declarations (A) and (B) above.

The declaration (D) is based upon the assumption that the order was made with retrospective effect. The "appointed day" for the purpose of the order was the 9th

November, 1984, the day upon which the draft order was published in the Gazette. The order itself did not purport to become law on a date earlier than its publication. It became law on the 26th November, but, it chose the 9th November as the appointed day upon which the level of remuneration was "frozen".

The term "retrospective" may be used in several different senses. (Gardner & Co. v. Cove (1928) Ch. 955 per Maughan J. at 966). Is this order retrospective in the sense that it affects existing contracts of employment as from the 9th November, 1984 or does it apply to actual transactions which have been completed, or to rights and remedies which have already accrued?

Paragraph (4) of the order seeks to make it prevail over contracts of service. It provides that "remuneration of a person for work done after the commencement of the order shall not exceed the highest rate at which it was paid or provided before the appointed day".

The terms of the order do not expressly say that an agreement made before the appointed day to pay a rate of remuneration higher than that existing at the appointed day is affected by the order. It would appear the award of an arbitrator to pay remuneration after the appointed day at such higher rate would not be affected by the terms of the order. It is not necessary for me to decide the point, but, if the Courts of Fiji were to follow the decision of the Privy Council in Société United Docks v. Gov. Mauritius (1985) 2 W.L.R. 114 then attempts to apply the order to existing contractual obligations would not succeed.

It was always legal to increase or agree to increase remuneration prior to the 9th November, 1984. On the 26th November it became unlawful to increase or to agree to increase remunerations to an extent that was higher than the rates applied on the 9th November.

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The order constitutes an interference with existing rights, but, so do most statutes. That does not mean that such legislation must be regarded as retrospective in character. (West v. Gwynne (1911) 2 Ch. 1 at 11 and 12).

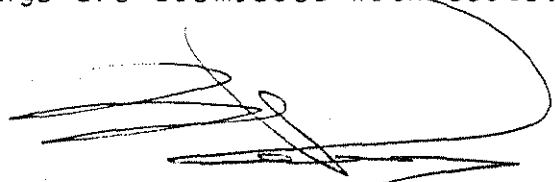
I am of opinion that the order did not have a retrospective effect and, even if it had, it did not apply retrospectively to the members of the Union who did not possess a vested right to the payment of a higher remuneration than that they were receiving on the 9th November, 1984.

I may add that no objection was taken by either of the defendants to the procedure followed by the plaintiff in this instance.

It could be argued that the plaintiff ought to have applied to the Court for judicial review of the order made by the P.I.B. and not come by way of originating summons. In England, the House of Lords has expressed the view that "as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority's infringement of his public law rights to seek redress by ordinary action". [O'Reilly v. Mackman (1982) 3 W.L.R. 1096].

As the point was not taken, I am not obliged to consider whether this Court should follow the House of Lord's decision, or if it did so, it would regard the present case as falling outside the general rule.

These proceedings are dismissed with costs.



(F.X. Rooney)
JUDGE

Suva,

14th June, 1985