

IN THE FIJI COURT OF APPEAL

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At Suva

Civil Jurisdiction

CIVIL APPEAL NO. 60 OF 1990

(High Court Civil Appeal No. 3 of 1989)

BETWEEN:

THE FIJI SUGAR CORPORATION LIMITED

APPELLANT

-and-

SUGAR MILLING STAFF OFFICERS ASSOCIATION

RESPONDENT

Mr. J. Singh for the Appellant
Mr. H. M. Patel for the Respondent

Date of Hearing : 7th August, 1992

Date of Delivery of Judgment : 18th August, 1992.

J U D G M E N T

This is an appeal from a decision of a Judge of the High Court given on 12th October 1990. It arose out of an industrial matter. Mr. Nitya Reddy was up to 5th June 1986 an employee of the appellant. On that day his services were summarily terminated. The matter was taken up by the respondent and became an industrial dispute. Mr. Reddy sought re-instatement, and, later on, compensation. The matter followed a somewhat lengthy path through the Sugar Industry Act 1984 Cap 206 and the Courts before an award of compensation was made by the Sugar Industry Tribunal on 19th April 1989, as follows:

"It accordingly awards a total of \$5,000 compensation made up of \$4,500 to be paid to Mr Reddy by way of compensation for wrongful dismissal and \$500 to the Association to reimburse it for legal costs it may have incurred at the hearing of the dispute."

The Tribunal refused to make an order reinstating Mr Reddy as an employee.

A right of appeal to the High Court from an award is conferred by s.123 of the Sugar Industry Act. An appeal was duly lodged and heard. The learned Judge in effect confirmed the award so far as it related to re-instatement. However, he set aside the award so far as it related to the amount of compensation and substituted an amount of \$15,000.00.

From this decision the Fiji Sugar Corporation Limited has appealed to this Court. The grounds of appeal include the following one:

"The Appeal to the High Court under S.123 of the Sugar Industry Act being limited to the ground that the decision of the Tribunal was erroneous in point of law the learned Judge failed to find any error of law on the part of the Tribunal and in increasing the amount of compensation merely substituted his own discretion for that of the Tribunal and thereby erred in law."

There is no appeal from the decision to refuse re-instatement.

The history, facts and relevant legislation were set out in reasons for the decision of the Tribunal of 9th April 1989. We

wish to say that that they are so clear and comprehensive, and explain the way in which the problem here arose, that we can do no better than to repeat them *ipsissimis verbis*. We do so by annexing them to these reasons for judgment.

It can be seen from the legislation to which the Tribunal referred, that it had a complete discretion to award what it found to be just and adequate compensation. It did so on the basis that Mr Reddy's summary dismissal was in breach of his contract of service, and that his employment could have been lawfully terminated on being given one month's notice or payment of one month's salary in lieu thereof. It proceeded to take into account what the law postulated as being the correct measure of damages at common law for breach of contract in such circumstances. It then proceeded to take into account other matters which it considered relevant - the offer of settlement made to him, the basis of his dismissal and its bearing on his subsequent failure to obtain employment, his lack of serious attempts to find employment. For the reasons that it gave it proceeded to make an award giving compensation to the respondent on the basis of a figure slightly in excess of 3 months salary.

The Sugar Industry Act, in s.123, provides (as far as is relevant):

"123(1)..... any person bound by an award may appeal to the Supreme Court against the award or any of the terms of the award on any of the following grounds-

(a).....

(b).....

(c) that the decision of the Tribunal is erroneous in point of law,

or by leave of the Supreme Court, if the Supreme Court is of the opinion that the matter is of such importance that, in the public interest, an appeal should lie."

No leave was sought. So an appeal lay on a question of law alone.

The Judge who heard the appeal and from whose decision this appeal is brought recounted the history of the dispute and the relevant statutory provisions. He adverted to the fact, as did the Tribunal, that the common law position as to damages did not govern the matter, and the effect of the failure of Mr Reddy to obtain employment. As to a submission by counsel for the Corporation, the Judge said:

"I very much disagree with him on the so called 'generous offer' of \$4500 for an employee of the Corporation on a salary of \$16,000 per annum who was wrongfully dismissed. There is not so much of generosity in the offer to compel me to affirm it."

He then went on

"In quantifying the amount at \$4500 the Corporation has gone beyond the decision in Addis's case. In my view if a Corporation was motivated not to follow Addis's case, there was every possibility for it to grant a greater sum as an ex gratia payment specially because of the fact that Reddy was wrongfully dismissed. It is also my view that as a possible settlement of the dispute a sum of \$15,000 would be fair amount of compensation. If he had been diligent enough, he could have easily mitigated the loss by getting some kind of employment which in his own words he said he did not care to look for."

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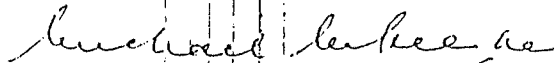
He proceeded to substitute the amount of \$15,000.00 for that awarded by the Tribunal.

It is perfectly clear that the appeal must be upheld. The Judge simply substituted what he thought was a fair amount for that awarded. He never so much as mentioned the exercise of the discretion by the Tribunal, or why its decision was wrong as a matter of law. He referred to the fact that the Tribunal had not simply followed the common law principle, which was correct, and said it was possible for it to grant a greater sum. The only basis on which he did not accept the account awarded was that it was not generous enough. No more need to be said.

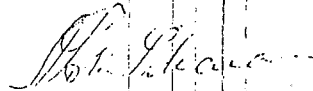
The appeal will be allowed and the order of the High Court will be set aside. This, of course leaves in place the award of the Tribunal.

Appeal allowed. Order of the High Court of 12th October 1990 set aside.

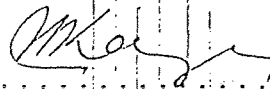
Respondent to pay the appellant's costs.



.....
Mr Justice Michael M Helsham
President, Fiji Court of Appeal



.....
Sir Moti Tikaram
Resident Judge of Appeal



.....
Sir Mari Kapi
Judge of Appeal

SUGAR INDUSTRY TRIBUNAL

Tribunal
Tribunal Accountant
Industrial Commissioner

Sir Ronald Karmode, K.B.E., C.L.D.
C.D. Aldrey, O.B.E., D.F.C., C.A.
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DISPUTE NO 3 OF 1986

In the matter of the Sugar
Industry Act 1984

and

In the Matter of a Dispute between
the Fiji Sugar Corporation and the
Sugar Milling Staff Officers
Association.

FINAL AWARD

It is necessary to set out the history of this Award, due to the inordinate delay in finalising it.

The Industrial Commissioner issued his Certificate of Dispute on the 9th day of June, 1986.

The Dispute was set down for hearing on the 17th day of June, 1986 and was adjourned to the 26th of June of that year. At the hearing, Mr. Jairam Reddy appeared for the Association and Mr. B N Sweetman for the Corporation. Mr. Reddy had been instructed not to seek compensation for Mr. Nitya Reddy, the former president of the Association whose summary dismissal by the Corporation had led to the dispute.

Mr. Jairam Reddy requested that a preliminary issue be decided by the Tribunal, namely whether the Tribunal had jurisdiction under the Sugar Industry Act to reinstate Mr. Nitya Reddy if the Tribunal found Mr. Nitya Reddy had been unfairly dismissed.

Mr. B N Sweetman opposed the application but, notwithstanding that objection, the Tribunal heard argument and in a written ruling dated 4th July, 1986 ruled that the Tribunal, in the particular circumstances of Mr. Nitya Reddy's dismissal, was not empowered to order his reinstatement.

That ruling was taken on appeal to the then Supreme Court (now the High Court) which on the 20th of October, 1986 held that the Tribunal was empowered under the Act to order Mr. Nitya Reddy's reinstatement if it decided to make such an order.

From that decision the Corporation took the matter on appeal to the Fiji Court of Appeal.

Before the Fiji Court of Appeal heard the appeal, Mr Jairam Reddy requested an early hearing of the dispute, a request again opposed by Mr Sweetman. The Tribunal, being concerned about the undue delay in hearing the dispute, acceded to Mr Reddy's request, but it was not until the 3rd of February, 1987 that the hearing commenced. An earlier date could not be fixed which suited both Mr Reddy and Mr Sweetman. The hearing was concluded on the 13th of February, 1987.

A 35 page decision by the Tribunal dated the 27th of February, 1987, which was termed an "Award", and which was in fact an Interim Award, and should have been so labelled, held that the Corporation had not established or satisfied the Tribunal that the dismissal was lawful.

During the hearing, and immediately after Mr Reddy had concluded his evidence, the Tribunal informed Counsel that he held the tentative view, based on the evidence, that Mr Reddy should not be reinstated if it was held that his dismissal was unlawful or unfair. The Tribunal stressed that that view could change after hearing Counsel's submissions.

The background to the Tribunal's actions was brought about by the Association at the commencement of the hearing changing its stance and seeking, as an alternative relief, compensation for Mr Nitya Reddy's dismissal.

That alternative relief was not relief which gave rise to the dispute and was not one the Association could seek on its own behalf. The Association demand at the time the dispute arose was solely for reinstatement of its President. Being of the view that the Association could not, without Mr Reddy's express consent, purport to seek compensation on his behalf, the Tribunal expressly sought confirmation from Mr Nitya Reddy that he confirmed the action by his Association in seeking compensation on his behalf, if the Tribunal did not make an order reinstating him. Mr Nitya Reddy confirmed the Association's actions and, when giving evidence on oath, indicated that compensation was his alternative claim.

In the 35 page decision the Tribunal explained the Unusual delay in dealing with the dispute. The original cause was Mr Jairam Reddy's request for a preliminary issue to be first considered by the Tribunal. Mr Reddy considered that the Tribunal should first rule whether or not it could reinstate Mr Nitya Reddy. The Tribunal was of the view that the Act did not empower it to do so, a view not shared by the then Supreme Court nor by the Court of Appeal. The Tribunal still had a discretion however, which had to be exercised judicially, whether to reinstate Mr Nitya Reddy. For reasons set out at length in its decision, the Tribunal refused to order the Corporation to reinstate him.

This decision was announced on the 27th of February, 1987. Mr Jairam Reddy could have challenged the failure to reinstate Mr Reddy if he considered the Tribunal had erred in law. He did not do so.

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It is not known what Mr Jalram Reddy planned to do. In May of that year he got caught up in the military coup and later left Fiji.

Mr H M Patel then took over from Mr Jalram Reddy. He wrote to the Industrial Commissioner on the 30th of September, 1988 advising that his firm was then acting for the Association and seeking urgent reinstatement of Mr Nitya Reddy whom Mr Patel also described as "our client". He asked that a date of hearing for continuation of the arbitration proceedings be assigned urgently.

It would appear from that letter that the Association had not fully briefed Mr Patel, and it also appears that he had not seen a copy of the lengthy decision of the 27th of February, 1987. Had he seen that decision he would have appreciated that the hearing had been concluded and submissions by Counsel heard by the Tribunal.

The last paragraph of the Interim Award stated:

"The proceedings are adjourned sine die until the Fiji Court of Appeal hears the further appeal when the Tribunal will then make a final award on the remaining issues."

In that award also the Tribunal indicated that the parties could consider a settlement pending the Court of Appeal decision.

Following the Court of Appeal's judgment delivered on the 19th of September, 1988, Mr Patel was advised by the Industrial Commissioner that the Corporation was not appealing against the judgment.

Mr Sweetman and Mr Patel then explored the possibility of a settlement without success. Copies of the correspondence that passed between them were sent to the Industrial Commissioner. Mr Patel on several occasions wrote direct to the Industrial Commissioner.

His last letter to the Commissioner is dated the 12th of April, 1989 wherein Mr Patel requested urgent finality of the Award. This letter has been ignored by the Tribunal, except as to the request for finality of the Award, as it does not appear Mr Sweetman was sent a copy.

It should be pointed out that the Tribunal does not know whether Mr Patel is acting solely for the Association, or Mr Nitya Reddy, or for both. During the negotiations for a settlement the correspondence of Mr Patel reads as if he were acting solely for Mr Reddy.

Mr Sweetman was also in doubt and in his letter of 27th October, 1988 to Mr Patel he stated:-

"In view of the fact that you are representing the Association, rather than Mr Reddy, we shall be grateful to have your acknowledgement that you also represent Mr Reddy and that he agrees to be bound in this matter by the Association's decision should any compromised agreement ensue."

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Mr Patel did not confirm whether or not Mr Reddy would be so bound.

Had the dispute been a Court action it would not have been proper to write to the Judge or his Registrar keeping the Court informed of the negotiations and (inter alia) informing the Court of the sums mentioned by the respective solicitors in seeking a settlement.

The Tribunal has very wide powers under the Act. Under section 99 of the Act dealing with procedural matters, sub-section 1(b) provides that the Tribunal shall not be bound to follow any rules of evidence, but may inform itself on any matters in such manner as it thinks fit.

From the correspondence which the Tribunal has perused, it is aware of the sum Mr Reddy claims would compensate him, which sum presumably the Association has instructed Mr Patel to seek. The Corporation, while alleging that it denies liability, indicated it was prepared to make an ex gratia payment so as to settle the dispute. Before considering the issue of compensation, the Tribunal points out again, that the issue of reinstatement of Mr Nitya Reddy was considered by it and in the interim award very full reasons were given for its refusal to reinstate.

The Tribunal has before preparing this Final Award again perused and considered the recorded evidence taken at the hearing, and sees no reason to change its views that Mr Nitya Reddy should not be reinstated. His reinstatement would not settle anything and in particular it would prevent further disputes in the future.

Section 105 of the Sugar Industry Act spells out the particular powers of the Tribunal in respect to hearing and determination of industrial disputes. Section 105(1)(d) states:-

"Award compensation in respect of any contravention of any term of an award, other than any term of an award for the payment of compensation; or in respect of any contravention of any term of a collective agreement."

The Court of Appeal in its judgment stated:-

"The power to award compensation is specifically set out in section 105(1)(d), but that subsection caters to a different situation: Where there has been contraventions of any term of an award or any term of any collective agreement, compensation is the answer. In the instant case there are no contraventions of any award and admittedly the collective agreement does not contain any reference to reinstatement based on unfair dismissal as some other collective agreements in Fiji do. Therefore Section 105(1)(d) does not cover the present dispute. Of course the Tribunal can award

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compensation in any case under his general powers under the Act. One has to read the Act as a whole in order to gather the powers of the Tribunal."

That general power is contained in section 117 of the Act which reads as follows:-

"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."

Section 116(i) of the Act states:-

"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;"

The collective agreement entered into by the Corporation with the Association contains provision that its members can be dismissed on being given one month's notice, or paying one month's wages or salary in lieu of such notice. That provision is engrafted on or becomes part of Mr Nitya Reddy's written contract of employment and is given legislative force by virtue of the fact that the agreement is registered under the provisions of the Sugar Industry Act.

Mr Nitya Reddy's contract of service could have been terminated by a Corporation giving him one month's notice or payment of one month's salary in lieu thereof.

Mr Nitya Reddy's summary dismissal was held by the Tribunal to be wrongful in the sense that it was in breach of his contract. Summary dismissal would have been justified had the Corporation ensured that the procedure to be followed in dismissing him was correct. Mr Reddy succeeded on a technicality, the doubt he created as to his intentions when ordered to hand over his keys. The Tribunal gave him the benefit of that doubt. There was also a further reason and that was that the Tribunal was also in doubt whether a suspended employee could be guilty of disobedience of a lawful order.

Mr Reddy's case was not one where the Corporation had treated him unfairly and that must have some bearing on the level of compensation that may be granted to him.

Where there is a breach of contract, damages is the usual remedy. The House of Lords, in *Addis v Gramophone Co Ltd* (1909) AC488 HL, formulated what has come to be known as the *Addis Rule*. A dismissed employee generally cannot recover in a damages action more than the

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amount equalling the loss of wages he would have earned during the period within which his contract might have been lawfully terminated. In Mr Nitya Reddy's case that period was one month.

The House of Lords held in that case that it did not matter; in the circumstances, whether or not the termination was wrongful, as in any case it amounted to a breach of contract.

Loreburn LC in that case, after stating that he could not agree that the manner of dismissal affected those damages, laid down the general rule:-

"If there be a dismissal without notice, the employer must pay an indemnity but that indemnity cannot include either compensation for the injured feeling of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."

If damages is the remedy, the law is clear that a claimant must take all reasonable steps to minimise his loss. That meant that Mr Reddy was obligated to seek other employment. He held a degree in economics and was a member of the Fiji Institute of Accountants. He has made no real effort to obtain employment in the past 2½ years.

In his evidence in chief at the hearing he is recorded as stating:-

"I have not seriously looked for work. Most employers would be particular about accountants who had been dismissed. Difficult to get job - scar against my professional reputation. I do not have certificate of public practice. I am still asking to be reinstated. Prayer for damages is an alternative."

In cross-examination he stated:-

"I have not looked seriously for work. There is keen demand for qualified accountants."

Mr Muntaz Ali, a chartered accountant and Registrar and Executive Director of the Institute of Accountants, who was called to give evidence for the Association and Mr Reddy, confirmed that Mr Reddy could not at that time work on his own. He would have to work for a chartered accountant for 2½ years. He mentioned there were vacancies for jobs at \$20,000 plus. He mentioned that a lot of accountants had migrated. Mr Ali was giving evidence in February 1987. It is common knowledge that since the coups the exodus of accountants and other professional people from Fiji has increased and there is a scarcity of accountants in Fiji.

Mr Ali went on to say:-

"Reddy well qualified to work for an accountancy firm. My clients may not have confidence in Reddy, if I employed him, because disclosure of confidential information is a serious matter."

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At the hearing Mr Reddy admitted publishing confidential financial information. It was that conduct which the Corporation was proposing to investigate when Mr Reddy's apparent refusal to hand over his keys led to his summary dismissal. He made it quite clear on oath that, where there was a clash of interest between his employer and his union and there was confidential information which would help his union, he was of the view that disclosure to his union would be justified.

The Tribunal is not surprised that Mr Reddy has not been employed as an accountant for the past two years. Firstly he has made no real effort to find employment and, secondly, his own conduct would make prospective employers very leery about employing him.

Mr Reddy's claim for compensation is for loss of total wages for "say 2½ years" FNPF subsidy (7%) interest at 10% thereon, loss of annual leave and professional integrity making an aggregate figure of \$100,000. That claim must be very heavily discounted if there is to be compensation which is additional to the level of damages which would be awarded in a civil action.

Mr Reddy is a highly intelligent man and the Tribunal has no doubt he was a capable accountant. Employers however will not condone disloyalty which he amply displayed in misguidedly putting his union's interest ahead of his employers. As for the disclosure of confidential information as Mr Muntaz Ali stated "that is a serious affair".

The Corporation offered three months salary by way of ex gratia payment to settle the dispute. It paid Mr Reddy one month's salary in addition to what he was entitled to when he was dismissed. The Tribunal would have allowed Mr Reddy one month's salary if the Tribunal had been a judge hearing a civil claim and that would have been the total damages he would have received. Of course he would have been allowed costs.

So far as the Corporation is concerned, awarding Mr Reddy a further 3 months salary by way of compensation would probably settle the dispute since it was prepared to pay the sum involved if a settlement had been achieved.

So far as the Association is concerned, the Tribunal is satisfied that the Association could not expect that a figure anywhere near the 100,000 that Mr Reddy claims would be awarded to him. Compensation of about a further three months salary would at least convey to the Association that it was justified in bringing the dispute before the Tribunal. The Tribunal considers the Association has shown its loyalty and support to its past president in bringing this dispute before it. It would not expect the Association to condone Mr Reddy's conduct.

Mr Reddy's gross basic annual salary was \$16,603. There may have been some benefits, details of which are not necessary, in view of the Tribunal's decision.

The Tribunal is of the view that this is a case where compensation

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over and above what Mr Reddy would obtain in a civil claim should be paid to effectively settle the dispute. It accordingly awards a total of \$5,000 compensation made up of \$4,500 to be paid to Mr. Reddy by way of compensation for wrongful dismissal and \$500 to the Association to reimburse it for legal costs it may have incurred at the hearing of the dispute. These sums are to be paid to Mr H.M. Patel as solicitor for the Association.

ated at Suva this 19th of April, 1989.

Registered at Suva this
20th day of April, 1989.

R G Kernode
R G Kernode
TRIBUNAL

b v Tarte
REGISTRAR OF THE TRIBUNAL