IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0023 OF 2002S
(High Court Civil Action No. JR HBJ 16 of 2001S)

BETWEEN:

THE PERMANENT SECRETARY FOR LABOUR AND INDUSTRIAL RELATIONS

First Appellant

THE DISPUTES COMMITTEE

Second Appellant

AND:

AIR PACIFIC LIMITED

First Respondent

FIJI AVIATION WORKERS' ASSOCIATION

Second Respondent

Coram: Eichelbaum, JA
Gallen, JA
Smellie, JA

Hearing: Wednesday, 7th May 2003, Suva

Counsel: Mr. J. Udit and Ms N. Basawaiya for the Appellants
Mrs. Gwen Phillips for the First Respondent
Mr R. P. Singh for the Second Respondent

Date of Judgment: Friday, 16th May, 2003

JUDGMENT OF THE COURT

On the 13th February 2001 the Permanent Secretary for Labour and Industrial Relations accepted a report from Fiji Aviation Workers Association (FAWA) as to a trade

dispute between Air Pacific Limited, the first respondent, and FAWA the second respondent. Acting under the provisions of s.4(1) (h) of the Trade Disputes Act he referred the trade dispute to a disputes committee, the second appellant (the Disputes Committee) The committee gave a decision dated the 22nd March 2001 by which it determined:-

(a) that the action taken by Air Pacific Limited in terminating the employment of Jese Naka was harsh.

(b) that Jese Naka be re-instated to his former position with immediate effect

(c) that Jese Naka be paid 25% of his benefits with the period 19/5/99 to 21/3/2001.

Air Pacific Limited sought leave of the High Court to apply for Judicial Review of the decision of the Permanent Secretary to accept the report of the Trade Dispute and for review of the decision of the Disputes Committee already referred to.

Air Pacific Limited sought

1. Orders of certiorari removing both decisions into the High Court and quashing them.

2. Declarations that both decisions were unlawful, invalid and an abuse of the powers of the Permanent Secretary and the Disputes Committee.

3. Orders of mandamus requiring reconsideration of each of the decisions according to law .

4. An order staying each of the first and second decisions.

The application to obtain the necessary leave was granted on 3rd May 2001 and the substantive proceedings came before the Hon. Mr Justice Pathik on the 7th August 2001. On 3rd of April 2002 the Judge delivered judgment granting the relief sought. He made orders of certiorari quashing both decisions. Both appellants now appeal against that decision, seeking an order that the decision in the High Court be wholly set aside.

The relevant facts are not in dispute and it is convenient to refer to them by way of the chronology provided by Ms Philips on behalf of Air Pacific Limited.

On the 15th May 1999 one Jese Naka who was employed by Air Pacific Limited as a cabin crew training officer traveled to Sydney with air crew cabin trainees.

On 17th May 1999 he returned to Fiji from Sydney one day earlier than had been contemplated leaving the trainees behind in Sydney to return unsupervised.

On 18th May, having failed to report for duty, and without the consent of Air Pacific Limited he boarded the late flight to Los Angeles apparently to attend a football match.

On 24th May 1999 Air Pacific Limited wrote to Mr Naka advising him that a disciplinary inquiry was to be held to investigate a charge against him of being absent without prior approval. He was advised that disciplinary action might result depending, on the findings of the inquiry, and that he had the right if he wished, to be accompanied and represented by an official of his association. That association was FAWA of which Mr Naka was a member.

On 28th of May 1999 a disciplinary inquiry was conducted. This was attended by Mr Naka who was asked whether he needed representation or was prepared to appear on his own behalf. He elected to represent himself.

Mr. Naka had already been suspended from duty being advised of the suspension when advised of the inquiry.

By letter dated 1st June 1999 he was advised that his employment had been terminated retrospectively from 19th May 1999 and that he would be paid two weeks salary in lieu of notice of termination.

On 22nd December 1999 the General Secretary of the FAWA wrote to the Executive General Manager Corporate Services of Air Pacific Limited. That letter indicated that the second respondent considered Mr Naka had been unfairly treated and sought his re-

instatement, it specifically stated that in accordance with the grievance procedure contained in the senior staff collective agreement (which applied to Mr Naka) the grievance was raised at the level of the Executive General Manager of Air Pacific Limited. That part of the letter was as follows:

> ***"The above mentioned employee's employment with Air Pacific was terminated on 1st of June 1999 by your General Manager Human Resources. In accordance with the grievance procedure we are now raising this grievance at your level."***

On 19th January 2000 Air Pacific Limited wrote to the General Secretary of FAWA in the following terms:

> ***"19 January, 2000***
>
> ***Mr Attar Singh***
> ***General Secretary***
> ***FAWA***
> ***PO Box 5351***
> ***Raiwaqa***
> ***SUVA***
>
> ***Jese Naka***
>
> ***I refer to our meeting on 12 January 2000 with Kamlesh Kumar and Val Simpson representing FAWA and M. Nacola (Manager Human Resources Development) and me (nominee of Managing Director & CEO) on behalf of Air Pacific. This meeting was called by FAWA to activate the next step in the grievance procedure following the termination of Jese Naka subsequent to a disciplinary inquiry conducted in May 1999.***
>
> ***I have considered the submission made by FAWA at the above-mentioned meeting, the facts and findings of the disciplinary inquiry and the situation.***

I uphold the decision of the General Manager Human resources terminating the employment of Jese Naka. Mr Naka acted irresponsibly in abandoning a group of trainee flight attendants in Sydney and then willfully left his job without obtaining prior approval for his absence.

Mr Naka effectively abandoned his employment which is a serious misconduct resulting in this dismissal. The Company's position remains.

Yours sincerely

... ...
Josephine Yee Joy
EXECUTIVE GENERAL MANAGER CORPORATE SUPPORT"

On 20th November 2000 FAWA wrote to the Permanent Secretary for Labour and Industrial Relations advising of the existence of a trade dispute between Air Pacific Limited as employer and FAWA as the union. It indicated that FAWA considered the termination of the employment of Mr Naka was harsh and unfair and sought his re-instatement without loss of benefits. It indicated that it had raised the matter as a grievance in accordance with grievance procedures and stated that the final response of Air Pacific Limited had been made on 9th January.

On 22nd November 2000 Air Pacific Limited wrote to the Permanent Secretary setting out the point of view adopted by Air Pacific Limited with regard to Mr Naka's behaviour. It expressed concern at the length of time that it had taken FAWA to contest the case and indicated that FAWA ought to have acted and activated the disputes procedure immediately after the incident. The letter stated that, the action of the union "now raises various uncertainties".

On 13th February 2001 the Permanent Secretary wrote to FAWA in the following terms:

"I refer to your letter dated 20 November, 2000 reporting the existence of a trade dispute between your Association and Air Pacific Limited. I note that the dispute is over the termination of Mr Jese Naka with effect from 19 May, 1999 which action the Association claims is harsh and unfair, therefore the association seeks his reinstatement without loss of benefits.

In terms of Section 4(1)(a) of the Trade Disputes Act, Cap. 97, I have considered your report together with the response from Air Pacific Limited and have decided to accept the report of the trade dispute and shall refer the dispute to a Disputes Committee constituted by me under the provisions of Section 5A(1) of the Trade Disputes Act, Cap.97 for a decision.

You are now requested in terms of Section 51(2)(b) of the said Act to recommend an independent person to be appointed to represent your Association in the Committee. By a copy of this letter, Air Pacific Limited is also being asked, in accordance with Section 5A(2)(c) of the abovementioned Act to recommend an independent person to represent the Company in the Committee. The person so nominated should be available to hear the dispute and make a decision within 14 days from the date of appointment.

Please note that the Act requires that the recommendations are with me within 14 days from the date of this letter.

Yours faithfully

(Brian Singh)
PERMANENT SECRETARY FOR LABOUR AND
INDUSTRIAL RELATIONS

c.c. *The Chief Executive, Air Pacific Limited, NADI AIRPORT"*

On 14th February 2001 the dispute was referred to a disputes committee by the Permanent Secretary.

On the 22nd March 2001 the Disputes Committee heard the dispute and on the same day the committee issued a decision in the following terms:

"Now therefore after hearing the submissions by the association and the company the disputes committee has decided as follows:

That the action taken by the employer was harsh.

1. **That Mr Jese Naka shall be reinstated to his former position with immediate effect.**

2. **That Mr Jese Naka shall be paid 25% of his benefits to the period of 19th of May 1999 to 25th of March 2001."**

Air Pacific Limited sought to obtain a copy of the record of the proceedings before the disputes committee but was unable to obtain any such record and in fact supplied for the record at the time of the High Court proceedings a copy of its own record as to what took place before the disputes committee.

The statutory provisions are contained within the Trade Disputes Act Cap. 97 of the laws of Fiji.

In that Act section 2 is the Interpretation section and provides (inter-alia)

Dispute means a Trade Dispute ... ...

A dispute of interest means a dispute created with interest to procure a collective agreement defined under this act and includes a dispute created with interest to procure a collective agreement or amendment to settle a new matter as defined under this act.

Dispute of right means

(a) A dispute concerning the interpretation application or operation of a collective agreement including a dispute that arises during the currency of the collective agreement or

(b) A dispute that is not a dispute of interest .

A trade dispute means a dispute or difference

(a) between an employer and registered trade union recognised under the Trade Unions (Recognition) Act and connected with the employment or with the terms of employment or the conditions of labour of any employee

(b) between an employer and registered trade union that has applied for recognition under the Trade Unions (Recognition Act) and connected with the termination of employment of a worker during the time when the application for recognition by the trade union is being processed or

(c) between an employer and an employee who is a member of a registered trade union that has applied for recognition under the Trade Unions (Recognition Act) and connected with the termination of employment of that employee during the time when the application for recognition from the trade union is being processed.

The Act further provides:-

"3-(1) Any trade dispute, whether existing or apprehended, may be reported to the Permanent Secretary by:

(a) an employer who is a party to the dispute or a trade union of employers representing him (sic) the dispute; or

(b) a trade union of employees recognized under the Trade Unions (Recognition) Act which is a party to the dispute;

(c) a trade union of employees that has applied for recognition under the Trade Unions (Recognition) Act and which is a party to the dispute; or

(d) an employee who is a member of a trade union that has applied for recognition under Trade Unions (Recognition) Act and which is a party to the dispute.

(2) A report of a trade dispute shall be made in writing and shall sufficiently specify:

(a) the employers and workers, or the classes and categories thereof, who are parties to the dispute and the place where the dispute exists or its apprehended;

(b) the party by whom the report is made;

(c) each and every matter over which the dispute has arisen or is apprehended; and

(d) the steps which have been taken by the parties to obtain a settlement under any arrangements for the settlement of disputes which may exist by virtue of a registered agreement between the parties to it.

(3) The party reporting a trade dispute must without delay furnish by hand or registered post a copy of the report of the dispute to each party to the dispute.

4-(1) The Permanent Secretary shall consider any trade dispute of which he has taken cognizance and may take one or more of the following steps as seem to him expedient for promoting a settlement –

(a) inform the parties that he accepts or rejects the report of the trade dispute, having regard to the sufficiency or otherwise of the particulars set out in the report, to the nature of the report, or to the endeavours made by any of the parties to achieve a settlement of the dispute, or having regard to any other matter which he considers to be relevant in the circumstances:

Provided that:

(i) No trade disputes which arose more than one year from the date it is reported under Section 3 shall be accepted by the Permanent Secretary except in cases where the delay or failure to report the trade dispute within the specified period was occasioned by mistake or good cause;

(ii) A report which has been rejected by the Permanent Secretary shall be deemed not to be made under the provisions of this Act.

(b) inform the parties that any of the matters over which the trade dispute has arisen or is apprehended is not a trade dispute under this Act;

(c) refer the matter back to the parties and, if he thinks fit, make proposals to the parties or to any of them upon which settlement of the trade dispute may be negotiated;

(d) appoint any person (who may be a public officer or any other person considered by him to be suitable) to act as a mediator and conciliator where the trade dispute is a dispute of interest;

(e) endeavour to conciliate the parties by all reasonable means at his disposal;

(f) cause an investigation of the trade dispute, or any matter connected therewith, to be made by any person who appears to the Permanent Secretary to be independent and who may or may not be a public officer;

(g) report the trade dispute to the Minister, who may, if he thinks fit, authorize the Permanent Secretary to refer it to a conciliation committee appointed by the Minister for mediation and conciliation;

(h) refer the trade dispute to a Disputes Committee, where the dispute is a dispute of right.

(2) The decision of the Permanent Secretary under this section shall be in writing and shall as soon as practicable be communicated in writing by hand or by registered post to the parties to the dispute or to their representatives.

5-(1) In endeavouring to secure, by means of conciliation of the parties, the settlement of a trade dispute reported to him under section 3, the Permanent Secretary or any person appointed by him or the Minister shall, if and in so far as it is appropriate to do, make use of any machinery or arrangements for the settlement of disputes which exist by virtue of an agreement between the parties to the dispute.

(2) The Permanent Secretary may require a settlement effected as provided for in subsection (1) to be recorded in writing by the parties thereof and on being endorsed by the Permanent Secretary the settlement shall be a negotiated agreement and shall be deemed to be an award.

5A-(1) The Permanent Secretary shall refer a dispute of rights to a Disputes Committee for settlement.

(2) There shall be constituted a Disputes Committee consisting of three persons as follows:

(a) a chairman who is not a party to or concerned with the dispute appointed by the Permanent Secretary;

(b) a member appointed by the Permanent Secretary on the recommendation of the party affected by the dispute of rights;

(c) a member approved and appointed by the Permanent Secretary on the recommendation of the employer or the trade union of employers affected by the dispute of rights;

Provided that the recommendations for membership under paragraph (b) and (c) shall be submitted to the Permanent Secretary within fourteen days from the date of acceptance of the trade dispute.

(3) The Disputes Committee shall hear the parties to the dispute and make its decision without delay and in any case within fourteen days from the date the dispute was referred to it;

Provided that the Permanent Secretary may extend the period within which a decision is to made if in his opinion the circumstances of a case require that the extension be given.

(4) A decision of the Disputes Committee that is arrived at by consensus shall be binding on the parties and be deemed an award."

The Judge in the High Court came to the conclusion that for the purposes of the Act, the trade dispute, the subject of proceedings arose when Mr Jese Naka's employment was terminated with effect from 19th May 1999. He therefore concluded in terms of section 4(1)(a)(i), of the Trade Disputes Act that the reference from the union to the Permanent

Secretary on the 20th November 2000 was out of time. He considered a failure to comply with subsection 1 (a)(1) amounted to a jurisdictional issue and was not procedural. He held it was unlawful for the Permanent Secretary to accept the report of the trade dispute.

The Judge held the decision of the Disputes Committee was unreasonable and invalid. He took the view the committee had not given adequate or proper consideration to the rights of Air Pacific Limited and he expressed concern no reasons had been given for the decision. He took the view that the reference to the termination from employment, as being "harsh" indicated that the committee had approached its task contrary to law since the question was not whether the termination was "harsh" but whether it was open to the employer acting fairly and reasonably to have seen termination as an appropriate response to the behaviour complained of. He also considered that the committee had acted ultra vires in ordering a payment of part of Mr Naka's salary from the period of termination up until the date of decision and concluded that some hundreds of dollars had been paid out to Mr Naka to which he may not have been entitled had the committee handled the matter as it should. He therefore quashed the decision of the committee.

The first question for this Court therefore is whether the reference by the union to the Permanent Secretary was contrary to the provisions of section 4(1)(a)(i) of the Trade Disputes Act. This involves a determination of the date on which the dispute arose.

For the first respondent it was contended this date was the date of the termination of Mr. Naka's employment. We observe in passing that this could not have been the date from which the termination of the employment became effective. It must have been the

date on which Mr. Naka was advised that his employment had been terminated. That being 1st June 1999, that must from Air Pacific's point of view be the date on which the cause of any trade dispute arose. But it does not necessarily follow that a dispute did arise on that date. It is always possible a person affected by such a decision will accept that it is an appropriate decision in which case there would be no grievance and no dispute. A dispute involves two contesting parties. On the evidence before the court and before us it is not possible to say when Mr Naka decided to dispute the decision made by Air Pacific Limited. All we know is that Mr Naka at some later date determined to invoke the grievance procedures included in the collective agreement which applied to him.

On 22nd December 1999 FAWA wrote to Air Pacific Limited seeking reinstatement of Mr Naka and indicating it did so in accordance with the grievance procedure, which was a reference to the collective agreement.

The collective agreement provides a grievance procedure as follows:

"Disciplinary Procedure

27.4 ***If the employee is not satisfied with the action taken he may pursue the matter in accordance with the Grievance Procedures in Clause 28:0.***

Grievance Procedure

28.1 ***The aim of this clause is to secure and preserve amity and good relations between the Company, the Association, and the employee and to resolve any difference of opinion or dispute between the parties. No employee will be prejudiced in his relations with the Company because he makes use of this procedure.***

28.2 Whenever any grievance, dispute or difference arises affecting an individual or group of employees, either out of the application or interpretation of this Agreement, or from any other cause, all work shall continue normally and all concerned will make sincere attempt to settle the matter in accordance with the following procedure.

28.2.1 An employee, or spokesman for a group of employees, wishing to raise with the Management any grievance for which he, or the group of employees concerned; is directly involved, will approach in the first instance the appropriate Divisional Head or his nominee who will endeavor to settle the grievance within forty-eight hours.

28.2.2 If after a lapse of forty-eight hours no settlement is reached or explanation is forthcoming to justify an extension of time to solve the problem, the grievance shall be taken up by the Association to the Chief Executive or his nominee, who shall within seven working days thereafter inform the Association of the place and time when he will be available to meet the Association to discuss the grievance provided that the Chief Executive, or his nominee, shall convene such meeting with the President and/or Secretary of the Association along with any official or employee nominated by the Association Executive Committee not later than four working days beginning from the expiration of the abovementioned seven working days.

28.2.3 Should no satisfactory settlement then result, the grievance can be considered a trade dispute and shall be referred to a third party such as the Permanent Secretary for Labour and his assistance sought in resolving such trade dispute.

28.2.4 Should conciliation prove abortive the dispute shall then be referred to the Permanent Arbitrator or to an Arbitrator mutually acceptable to both the Company and the Association provided that:-

(i) Both parties agree not to delay matters unnecessarily in considering acceptance of this recourse; and

(ii) The decision of an arbitrator will be binding on the parties.

28.3 No strike action by the Association or action by the Company to create a lock-out shall be taken until all stages of the above procedure 28.2.1 – 28.2.4 shall have been fully completed or attempted by either party and the provisions of any current legislation, governing such disputes shall have been complied with."

The letter of 22nd December although referring to a "grievance" is quite conciliatory in tone which supports the view that at least in the eyes of the parties a "grievance" did not necessarily amount to a "trade dispute." This is consistent with the provisions of the collective agreement, which certainly makes that distinction, so that it is at least arguable that even by the time the letter of 22nd December was written no Trade Dispute had arisen. The letter of 22nd December clearly invokes the procedure of clause 28.2.2 of the collective agreement. Air Pacific Limited saw the letter as being a step in the grievance procedure as is evidenced by the reference in its letter of 19th January 2000 which specifically refers to a meeting having been held "as a step in the grievance procedure."

However a grievance in the language of the agreement adopted by the parties clearly becomes a Trade Dispute by the time that part of the grievance procedure contained in clause 28.2.3 has been invoked. That directly states that the procedure continues with a reference to a third party such as the Permanent Secretary. That is apt to indicate the procedure contemplated by sections 3 and 4 of the Trade Disputes Act. If that is so then the date of origin of the Trade Dispute could be argued to be the date of the next step that is the procedure that involves reference to the Permanent Secretary. That position was at least initially taken by the Permanent Secretary. We do not accept however that that is the most appropriate interpretation. Clause 28.2.3 of the Grievance Procedure states that if no satisfactory settlement results from the procedural step contained in clause 28.2.2 of the grievance can be considered a Trade Dispute. That strongly suggests that it is at that time a Trade Dispute arises for the purposes of the Act. If it only arose on the reference to the Permanent Secretary the limitation contained in section 4 would have little significance.

It would be possible to argue that a "trade dispute" did not necessarily arise on 19th January 2000 since we have no evidence as to whether Mr Naka considered the outcome a "satisfactory settlement" or not.

Having regard to the sequence of events leading up to the 19th January letter such a conclusion would be remote from reality and in the circumstances of this case we are of the view that a "trade dispute" arose on receipt of the letter of 19th January.

If the 19th of January is the date the trade dispute arose, then the reference to the Permanent Secretary on the 22nd November 2000 was well within one year.

Before leaving this aspect of the matter there are two other questions that need consideration. Ms Phillips in her careful submissions, in answer to a question, suggested that the dispute could have existed from the time disciplinary proceedings were commenced which resulted in the termination of Mr Naka's employment. It is clear there was a dispute between Mr Naka and Air Pacific Limited at that time, but that was not the dispute which was ultimately referred to the Permanent Secretary. It was a dispute as to discipline. The dispute the subject of these proceedings is as to the appropriateness of the outcome of the disciplinary proceedings.

Secondly she submitted industrial disputes ought for reasons of public policy to be determined without delay. She submitted that if this policy were accepted as a factor in the statutory interpretation called for in this case, it would result in the date at which the dispute arose being the earliest possible date, which would be the notification of

termination. In support of this contention she also relied upon the time constraints contained within the collective agreement as a recognition of the principle of prompt determination. She referred to a number of English authorities which emphasise the importance in matters of this kind of resolution in the shortest possible time.

We accept that the grievance procedures contained in the collective agreement do contain strict time constraints. These however deal with the procedures after a grievance has been raised, even if a "grievance" were to be equated with a "trade dispute". They do not deal with any period from the origin of the grievance to the time it has been raised.

As far as the English authorities are concerned differences in the legislation in the end make them of little assistance in construing this legislation. The period of limitation in England was four weeks, which may be contrasted with the period of one year contemplated by the Fijian legislation. Nor were the English authorities concerned with the commencement of the period. The cases to which we were referred all dealt with situations where there could have been no doubt as to the time when the dispute commenced.

The appellant relied upon the decision of this Court in **Fiji Airline Pilots Association v. Permanent Secretary for Labour and Industrial Relations** Civil Appeal No. ABU0059U.97S where the negotiations which constituted the dispute commenced some three years before the matter was referred to the Permanent Secretary. The limitation point was raised but the Court held the "dispute" only arose when the association "realized" its unsettled claims could not be resolved. Ms Phillips for the first respondent contended that

that decision was clearly distinguishable. She submitted that it involved a "dispute of interest" whereas the dispute in this case was one "of right," and she pointed out that negotiations in respect of collective agreements may extend over considerable periods. This submission is not without attraction but we note section 4 does not make any distinction between "disputes of interest" and "disputes of right." The Fiji Airline Pilots case (which was not referred to the Judge in the High Court) is not decisive of this case but it supports the view that the Trade Dispute arose when the parties' own negotiations failed.

We conclude by noting the submission made by Ms Phillips as to the importance of prompt action in industrial matters, has some further relevance here. The Permanent Secretary has a discretion as to whether or not he accepts a reference and in the case of a very stale claim he might appropriately decline to do so. He did not take such a step in this case and we do not think the circumstances justify any conclusion that his discretion was wrongly exercised.

We conclude therefore that the reference of the Union to the Permanent Secretary was within the time limits contemplated. We are satisfied he was entitled to accept it and adopt the procedure which he did.

Accordingly we consider that the Order for certiorari made in the High Court cannot stand and it is quashed.

The second decision quashed in the High Court is that of the Disputes Committee. There can be no doubt that neither this Court nor the High Court is entitled to substitute its view on the merits for that of the Disputes Committee, that is the body contemplated by Parliament as that required to determine the matter placed before it. Nevertheless it is now equally clear that in carrying out its task the Disputes Committee must operate within the law and comply with the rules of natural justice.

Ms Phillips submitted that the Disputes Committee had not made its determination in accordance with the law which applies to disputes between employer and employee and submitted the decision was defective on its face in that it indicated the basis for its conclusion was that the decision to terminate was "harsh"

Ms Phillips referred to the decision in Chronas Richardson Limited v. Wattson VAT 27th of March 2001 a decision of the English Employment Appeal Tribunal that dealt with a claim of unfair dismissal. In that case the Employment Tribunal had considered that a dismissal was unfair and ordered the payment of damages.

After consideration of a number of recent English authorities the Appeal Tribunal stated it was now established that the test for justification of a dismissal was one of fairness and reasonableness and that the fairness and reasonableness of a dismissal needed to be judged by the test of reasonable conduct by a reasonable employer, in the circumstances of the case. Ms Phillips relied upon authority to the effect that a "harsh", decision may nevertheless be fair and she submitted that for the committee in this case to make the award which it did on the only ground revealed, that the original decision had been

"harsh" was plainly wrong and not in accordance with the legal standard now generally accepted. Although Ms Phillips relied upon error on the face of the decision she also contended that the failure to provide reasons for the decision was itself grounds for setting it aside as that prevented any enquiry as to whether or not the approach taken by the committee was in accordance with law and there was no way of determining the relevance of matters taken into account.

In the High Court the Judge concluded the reference to "harshness" was an indication that the wrong test had been used and he concluded the committee had acted unreasonably. He considered that the case fell within the range of those considered by the Court of Appeal in England in the well known case **Associated Provincial Picture Houses v. Wednesbury Corporation** [1948] 1 KB 223. That case held that a decision of an authority would be considered unreasonable if the authority had taken into account irrelevant matters. We have some concern as to whether or not this was a case of unreasonableness but we are concerned that on the face of the decision there is at least a suggestion the correct test may not have been applied.

The question of whether or not failure to give reasons will invalidate a decision is dependent on circumstances and to some extent on the nature of the deciding body whose decision is under consideration. The nature and effect of the decision is also relevant. Decisions subject to appeal are these where reasons will almost always be required, as in their absence the appellate authority will be quite unable to assess the validity of the decision under appeal. On the other hand failure to offer reasons for a decision will not necessarily affect the decision of a body where the relevant legislation

does not provide an appeal and where the nature of the dispute is such that no reconsideration or review is to be expected. It is unlikely that a Court would consider setting aside, for example, the decision of a small claims tribunal on such a ground.

As to the desirability of giving reasons see **Fiordland v. Min. of Agric**. 1978 2 NZLR 341 and **J. Flexman Ltd.v. Franklin Cty Council** 1974 1 NZLR 690. The question arises as to where the decision of the committee in this case lies. The committee has power to affect the rights of citizens in a very significant way . The sums of money involved may be substantial. The effect on a person's present and future employment may be great. There are good grounds for arguing that such decisions should be open and transparent and supported by reasoning by which they can be considered. On the other hand the committee is in part comprised of persons who may have little knowledge of the legal principles on which they are required to act, and the jurisdiction is one where technicalties and legalistic agreement ought to be avoided.

If a committee such as that involved in this case is required to give reasons these need not be long or detailed, and the lay nature of the committee members would undoubtedly be taken into account by a Court in considering whether or not a decision should be interfered with. The committee is statutory in nature. The chairperson is appointed by the Permanent Secretary who one would have thought normally would appoint a person sufficiently experienced in employment law to be able to ensure the approach was according to established principles. We are of the opinion that in this case at least the nature of the dispute and the general thrust of the Trade Disputes Act are such that the committee ought to have given reasons for its decision. Its failure to do so

combined with the use of a term on the face of the decision which at least suggests a wrong approach was adopted means in our view that the decision must be seen as invalid.

Accordingly we agree with the Judge that in this case the decision of the Disputes Committee cannot stand and we uphold the decision setting it aside.

In view however of the conclusion to which we have also come that the decision of the Permanent Secretary to remit the dispute to a committee was a proper one the Permanent Secretary may consider remitting the matter to another committee to be constituted in terms of section 5.

We should like to make it clear however, our decision in this case is not to be taken as an invitation for unnecessary litigation in cases of this kind. Decisions of a committee of this nature are to be assessed in the light of the surrounding circumstances including the nature of the jurisdiction. If inappropriate cases are brought then they should be penalised by appropriate orders for costs.

In this case therefore the appellant has succeeded in respect of one aspect of the case, the respondents in respect of others. Having regard to the circumstances we do not consider it appropriate make any order for costs.

Formal Orders:

1. The order of certiorari made in the High Court quashing the decision of the Permanent Secretary for Labour and Industrial Relations accepting the report of the Trade Dispute between Fiji Aviation Workers Association and Air Pacific Limited and its subsequent reference to a Disputes Committee is set aside and the decision of the Permanent Secretary restored.

2. The order of certiorari made in the High Court quashing the decision of the Disputes Committee with regard to the above reference is upheld.

3. The Trade Dispute is to be referred to a Disputes Committee in terms of section 4(1)(h) of the Trade Disputes Act for final resolution.

4. There will be no orders for costs.

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Eichelbaum, JA

FIJI COURT OF APPEAL

.....
Gallen, JA

.....
Smellie, JA

Solicitors:

Office of the Attorney-General, Suva for the Appellants
Munro Leys, Suva for the First Respondent
Messrs. Kohli and Singh, Suva for the Second Respondent

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