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

CIVIL APPEAL NO. ABU0010 OF 2003S
(High Court Civil Action No. HBJ 39 of 2001S)

BETWEEN:

FIJI PUBLIC SERVICE ASSOCIATION

Appellant

AND:

ARBITRATION TRIBUNAL

First Respondent

AND:

AIRPORTS FIJI LIMITED

Second Respondent

Coram: Sheppard, JA
Tompkins, JA
Gallen, JA

Hearing: Tuesday, 9th March 2004, Suva

Counsel: Mr. H. Nagin for the Appellant
Mr. Udit for for the First Respondent
Mr. Sharma for the Second Respondent

Date of Judgment: Friday 19th March 2004

JUDGMENT OF THE COURT

Introduction

[1] The appellant (the Union), pursuant to leave granted, applied in the High Court for judicial review of an award of the first respondent the Permanent Arbitrator (the Arbitrator) dated 30 of August 2001. Following a hearing, Scott J, in a judgment

delivered on 5 March 2003, dismissed the motion for judicial review. The Union has appealed against that dismissal. Mr Udit indicated that the Arbitrator abided the decision of the Court.

Background

[2] On 7 June 2001 the Union reported a trade dispute to the Permanent Secretary for Labour and Industrial Relations, in accordance with s 3 of the Trade Disputes Act (Cap. 97). The other party to the dispute was the first respondent (Airports). On 20 July 2001 the Permanent Secretary referred the disputes to the Arbitrator under the provisions of s 6 of the Act. The Arbitrator proceeded to hear the dispute. By agreement between the parties, he proceeded only with the first paragraph of the terms of reference which required him to determine whether the action of Airports to suspend and terminate without pay the 6 named employees was unfair harsh and unjustified. The Union sought orders that the termination be quashed, the grievors reinstated, and salaries restored from the date of suspension.

[3] The Arbitrator came to the conclusion that Airports had failed to establish procedural fairness and had also failed to prove that the grievors' conduct amounted to serious misconduct or was a serious breach of the terms and conditions of employment. He declined to order reinstatement. He ordered Airports to pay the grievors six months salary by way of compensation for the loss of their jobs.

[4] Before the Arbitrator, the Union contended that Airports was bound by what was referred to as the CAAF-FPSA Collective Agreement of 7 August 1998 (the Agreement).This was an agreement entered into on 7 August 1998 between the Civil Aviation Authority of Fiji and the Union. One of the provisions of the Agreement required the Authority to recognize the Union as the sole representative of and the agent of the employees of the Authority in respect of all matters pertaining to the rates of pay, hours of work, discipline and all other terms and conditions of employment of salaried staff.

[5] At the hearing before the Arbitrator the Union contended that, for detailed reasons advanced, Airports had become bound by the Agreement. This contention was

advanced principally in support of the Union's submission that the Union had become recognized by Airports for the purpose of representing Airports' employees, but also in support of the claim for reinstatement.

[6] Counsel for Airports submitted that Airports had not given the Union recognition, and consequently the Union could not represent the 6 grievors before the Arbitrator. The Arbitrator rejected that submission, holding that he was bound by the reference by the Permanent Secretary and that if Airports wished to challenge that reference the proper forum was the High Court.

[7] Although the Arbitrator accepted the submission by Airports that the issue of recognition fell outside paragraph 1 of the terms of reference and therefore outside his jurisdiction, he considered it would be useful to address the issue of whether Airports was bound by the Agreement. For reasons he set out in his award, he concluded that the Agreement which had been negotiated by the Union with the Authority, could not bind Airports, a separate legal entity to the Authority. He held that, in the absence of an operative collective agreement and there being no contracts of service, the 6 grievors purported termination would have to be decided on common law principles pertaining to employment and the relevant statutes.

Fiji Public Service Association v Civil Aviation Authority and ors **No 015 of 1998L**

[8] This application for judicial review was between the same parties and the Attorney General. The Union was the applicant, the Authority the first respondent, the Attorney General of Fiji the second respondent and Airports the third respondent. It was an application by the Union seeking judicial review of the reorganization charter dated 9 January 1998 issued by the Minister for Public Enterprises. It was that charter that effected the transfer of assets from the Authority to Airports.

[9] The application came before Madraiwiwi J. He gave his decision refusing the application on 27 November 1998 and his reasons for decision of 30 November 1998. In addition to a number of other issues raised, the Union claimed that Airports as the

successor assignee of the Authority was bound by the Agreement. The Judge rejected that submission. He held:

> ". . . there being nothing in the Act or the charter to oblige [Airports] to assume any obligations under the [Agreement]. The Court is of opinion that given the general intention of the Act as has been stated elsewhere, surely [Airports] must be at liberty to enter into such arrangements as would best ensure it's viability as a commercial enterprise. In such circumstances the [Agreement] between the [Union] and the [Authority] is not binding on [Airports]."

The hearing in the High Court

[10] The order 53 statement filed in support of the application for judicial review sought an order of certiorari quashing the relevant part of the Arbitrator's award, an order or declaration that the Agreement was binding on Airports, and an order that the six grievors be reinstated by Airports without any loss of salary.

[11] In his judgment the Judge reviewed the background, the formation of the Agreement between the Union and the Authority and the Arbitrator's award, referring to the reasons why the Arbitrator held that the Agreement was not binding on Airports. It was his opinion that the Union was attempting to use the arbitration proceedings, which were primarily concerned with a case of alleged unfair dismissal, to avoid the earlier findings of the High Court which had gone against it. He went on to hold:

> "If the Unions position was that the [Arbitrator] could not properly inquire into the circumstances of the dismissals without the legal status of the [Agreement] first being put beyond doubt, then in my view that status should first have been conclusively determined by the commencement of fresh proceedings in the High Court where the legal consequences of the matters advanced as constituting *de facto* recognition could have been fully examined and argued. It should however be noted that the Union has not suggested that the finding by the [Arbitrator] or the High Court that the [Agreement] was binding on [Airports] would in any way have affected the conclusion that the six grievors were unfairly dismissed.
>
> In my opinion the [Arbitrator] did not err in law in refusing to accept that the [Agreement] was binding on [Airports]. The question whether or not the [Agreement] is in fact binding on [Airports] was not before me and I therefore decline to make any declaration in relation to it."

[12] It is not apparent why the Judge was of the opinion that the question whether or not the Agreement was in fact binding on Airports was not before him. That issue was clearly pleaded in the Order 53 statement and was the subject of detailed submissions by counsel for the Union.

[13] His only reference to the application for an order seeking to have the six grievors re-instated was a comment that "the grievors are not pursuing an order for reinstatement and in fact are not seeking anything from this Court at all." This appears to be incorrect. The Union on behalf of the grievors was seeking their reinstatement. It was pleaded in the Order 53 statement, although counsel for Airports submitted that it was not actively pursued at the oral hearing in the High Court. Counsel confirmed to us that the six months salary had been paid. Counsel for the Union advised us that the grievors still sought reinstatement.

The Agreement

[14] Counsel for the Union submitted that the Agreement was binding on Airports. He submitted that the Arbitrator in his award and the judge in his judgment erred in holding that the Agreement was not binding. This submission was not, as the Judge thought, an attempt to overcome the earlier judgment. Rather it was based on events that occurred since 30 November 1998 when that judgment was delivered.

[15] Counsel relied on correspondence and documents that had been placed before the Arbitrator and were the subject of submissions in the High Court. The correspondence was between the Union, the Department of Public Enterprises, and Airports. By way of example, there is a letter from the Department to the Union dated 7 June 1999 confirming that all former Authority employees absorbed by Airports will be employed on terms and conditions that they had prior to 12 April 1999 under the Agreement. There is a letter from Airports of 25 October 1999 to the Union seeking written confirmation that the Agreement will apply only to those members of the Union in Airports' employment. The Union replied confirming that the Agreement applied to Union members and commenting on whether or not it should apply to non members.

[16] More significantly, there were produced the minutes of an Airports board meeting of 21 December 1999 in which the following minute is recorded

> "Government's directives - acceptance of Collective Agreement (W/P No. 3/99)
>
> The Board agreed and noted the directive of government and ratified the acceptance of the [Agreement]".

[17] Counsel for Airports accepted, in our view correctly, that this correspondence, and particularly the directors' minute, established that Airports had agreed that the Agreement applied to it. .

[18] It follows that the Arbitrator and the Judge erred in law in their conclusion that the issue was governed by the earlier judgment and by their failure to have regard to the events that occurred between the Union and Airports subsequent to the judgment.

Reinstatement

[19] The application for leave to apply for judicial review and the Order 53 statement sought by way of relief an order to remove "the relevant part" of the award and for that part to be quashed. The principal finding in the award, that the six grievors had been unjustly dismissed was, of course, a determination favourable to the Union. What the Union sought to challenge on the application for judicial review and this appeal was the determination by the Arbitrator that the six grievors should not be reinstated.

[20] The Arbitrator's conclusion on this issue was:

> "Reinstatement
>
> This is the primary remedy sought by all grievors involving unjustified dismissal. This Tribunal has very carefully considered this option in the light of all the relevant material placed before it during the hearing. It is also mindful of the fact that reinstatement is never an automatic remedy, but a matter for the Tribunal's discretion weighing all the relevant factors. Taking into account all the circumstances, the degree of misconduct, their unblemished record, the years of loyal service with the employer, I believe no fair and reasonable employer would have imposed the most severe punishment of dismissal. And, it was open to the grievors to argue that their dismissal was "disproportionately severe punishment" in

> contravention of their rights under s 25 of the Constitution, although admittedly this was not argued before me.
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> Be that as it may, it became quite obvious to this Tribunal during the hearing that a lot of "bad blood" exists between the parties. Consequently, this must inevitably affect the relationship of trust and confidence, which is so indispensable between a master and servant.
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> This factor cannot be overlooked by this Tribunal, in determining the appropriate remedy. Therefore, I do not accept that the grievors can continue to be harmonious and effective employees of the employer. In the outcome, reinstatement would be a wholly inappropriate remedy.
>
> Instead, in lieu of reinstatement, I direct the employer to pay all the grievors compensation of six months salary."

[21] Counsel for the Union submitted that this conclusion should be quashed because, as a consequence of the Arbitrator's error of law in failing to find that the Agreement had been accepted by Airports, the Arbitrator failed to take the Agreement into account in weighing up the factors relevant to reinstatement. It was his submission that it was the custom of Permanent Arbitrators, having found a dismissal to be in breach of a collective agreement, to order reinstatement, so that, had the Agreement been taken into account, the Arbitrator would have so ordered.

[22] There was no evidence to support this submission. Counsel for Airports referred us to Award No. 46 of 1999 in which that Permanent Arbitrator was required to determine whether dismissals were unjustified and if so, whether the grievors should be reinstated. In his award that Arbitrator commented that in Fiji, reinstatement to the grievor's previous position has been the primary remedy of the Tribunal, particularly in view of the absence of unemployment benefits coupled with the scarcity of alternative employment. But that Arbitrator went on to point out that the remedy was not automatic but rather it was discretionary. He referred to the decision of *Northern Distribution Union v BP Oil (NZ) Limited* [1992] 2 ERNZ which held that the test to be applied in deciding whether reinstatement is the appropriate remedy, should be whether, objectively assessed, the employee can be said to have the "trust and confidence" of his or her employer and "would be a harmonious and effective member of her employer's team". We agree that this concisely describes the correct test, and was the test the Arbitrator in this case applied.

[23] That Arbitrator in his award went on to refer to four instances where awards had been made finding unjustified dismissal but declining to order reinstatement. It is not apparent whether these examples involved a collective agreement. In the case that Arbitrator was considering, the terms of employment were governed by a collective agreement. The Arbitrator declined to order reinstatement.

[24] Counsel for the Union did not refer us to any provision in the Agreement that could result in an approach different to that to be applied at common law. Consequently, we do not accept the Union's submission that if the Arbitrator had recognized the application of the Agreement in the present case, it would have affected his conclusion on reinstatement. On the contrary, the Arbitrator approached the issue of reinstatement in an entirely appropriate manner. In that respect he made no error of law.

The result

[25] For reasons that to some extent differ from those found by the Judge, the appeal is dismissed. The respondent is entitled to costs which we fix at $1,500.

Sheppard JA

Tompkins JA

Galle[illegible] JA

<u>Solicitors:</u>

Messrs. Sherani and Company, Suva for the Appellant

Office of Attorney General's Office, Suva for the First Respondent

Messrs. Patel Sharma and Associates, Suva for the Second Respondent