IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU 0015 OF 2008
(On Appeal of the Judicial Review No. 11 of 2007)

BETWEEN : **EMPEROR GOLD MINING COMPANY LIMITED**

Appellant

AND : **1. THE ARBITRATION TRIBUNAL**

2. MINE WORKERS UNION OF FIJI AND VATUKOULA MINEWORKERS STAFF ASSOCIATION

Respondents

Coram : Lecamwasam JA
Wati JA
Kotigalage JA

Counsel : Mr. A. Sudhakar for Appellant
Ms. N. Karan for Respondent
Mr. R. Singh for Interested Parties

Date of Hearing : 9 May 2013

Date of Ruling : 30 May 2013

JUDGMENT

Lecamwasam, JA

[1] This is an appeal from an order of a judicial review application by the High Court. The invocation of judicial review arose pursuant to a disagreement on a redundancy package offered by the appellant to the respondents.

[2] The members of Mineworkers Union of Fiji and Vatukoula Mineworkers Association were employed under Emperor Gold Mining Company (the appellant), which had carried out mining operations at Vatukoula for a long period of time. As the mining operations were running at a loss over a few years, the company decided to cease operations and close down a section of the mine and treat some of the workers as redundant workers. From April 2006, the company through the issuance of a number of letters and circulars informed the workers of the closure, which triggered discussions between the workers and management over redundancy payments. The package demanded by workers and the staff members oscillated between three months pay upfront plus the payment of two weeks for every year of service.

One year's pay upfront plus the pay of three weeks for every year of service and a relocation allowance equivalent to FJD$700. And finally, and upfront payment equivalent to six months pay plus the pay of two weeks for every year of service and a relocation allowance equivalent to FJD$700.

[3] The company's offer stood at an upfront payment of three months pay plus the pay of two weeks for every year of service. Negotiations began between the parties with a view to settling the issue of the redundancy package. As the parties were unable to arrive at a settlement, both the association and the union reported trade disputes to the Chief Executive Officer of the Ministry who in turn referred the disputes to the Disputes Committee. On 13th July 2006 parties agreed to refer the dispute to Arbitration upon which the Minister authorised the Chief Executive Officer to refer the disputes to an Arbitration Tribunal. Acting on the above direction, the Chief Executive Officer referred the disputes to an Arbitration Tribunal for settlement pursuant to Section 5A (5) (a) of the Trade Disputes Act.

Terms of Reference are as follows:

> *"For settlement over.....failure to reach an agreement on the quantum of the redundancy package".*
>
> Having heard the matter, the Arbitration Tribunal made the following award:

"The redundant employee members of the Union and the Association are to be paid redundancy package of 5 month upfront together with two weeks for each year of service".

[4] Aggrieved by the above award of the Tribunal the company filed judicial review application in the High Court. After consideration the learned High Court Judge finally dismissed the judicial review application with costs.

The instant appeal is against the above order of the learned High Court Judge (HCJ).

The appellant based his appeal on the same grounds on which he relied before the High Court viz:

(a) The Tribunal misinterpreted the terms of reference;

(b) The Tribunal had no powers to award a redundancy package and therefore exceeded its jurisdiction;

(c) The Tribunal took into account or gave undue weight to irrelevant matters;

(d) It failed to take into account relevant matters.

As stated above, terms of reference are "for settlement over .....failure to reach an agreement on the quantum of redundancy package".

[5] The appellant's position is that by virtue of the above reference the Tribunal is vested with only a limited power and that is to settle the dispute referred to it and not to make any award. The appellant further argues that if there was no settlement what the Arbitration Tribunal should have done was to refer it back to the Minister. The appellant has attempted to interpret the word "settlement" in a narrow sense. The said word is being used in most of the jurisdictions in relation to trade or labour matters. Settlement connotes not only an amicable agreement between the parties as apparent from plain laymen's point of reading the text but it can also mean to a situation where it requires to put an end to a dispute after an inquiry. In that sense, the reference

empowers the Arbitration Tribunal to inquire into any matter and end the dispute by making an award. Section 5A (5) (a) cannot be taken in isolation. It must be read in conjunction with 5A (5)(b) wherein it says "(b) the tribunal after hearing the parties to the dispute shall make an award which shall be binding on the parties to the dispute". Therefore it is abundantly clear that the Tribunal has the power to hear the parties and make an award, which the tribunal has done in this case. In this case parties have explored the possibility of bringing about some settlement before the matter was referred to Arbitration. The failure to arrive at an amicable settlement was resultant in referring the matter to Arbitration. Therefore, as the learned High Court Judge correctly asked when a settlement fails one cannot expect the tribunal to simply fold the arms and do nothing. In such a situation, it is the duty of the tribunal to proceed with the inquiry and to make a final award, when the settlement failed, the arbitration tribunal had correctly gone into the inquiry and made an award. I do not perceive any error in the procedure followed by the Tribunal. Additionally correspondence between parties also demonstrates that the parties expected an order from the Arbitration Tribunal (exhibit 2, 8, 9). Therefore it was the necessarily the duty of the Arbitration Tribunal to inquire into the dispute and make an order which it correctly did. The second ground of appeal is also inextricably woven with the first ground of appeal. As stated above, the tribunal has not exceeded the jurisdiction but whereas it had acted within the power conferred by the reference. The learned High Court Judge had considered all the facts in arriving at his decision.

[6] As enumerated before, terms of reference directed the arbitrator to act under 5A (5) (a) and thereafter obviously to act under 5A (5) (b) to make an award. It is erroneous to argue that there is no provision for the award of the redundancy package. In the memorandum of agreement entered into by parties on 18th April 2006, parties have agreed thus; "redundancy package for those not re-employed to be negotiated between the unions and the company, based on an agreed redundancy formula". When the parties cannot agree on a formula, then the only remaining alternative is for the Arbitrator to make an award after hearing parties. According to the MOU parties have voluntarily agreed to negotiate for a redundancy package, therefore it is

abundantly clear that the Arbitrator had ample power to go into the issue of the redundancy package and make an award.

[7] The third ground of appeal is that the Tribunal took into account or gave undue weight to irrelevant matters, viz:

(a) No other mining industry in Fiji;

(b) Relatively low employment opportunities in Tavua and Vatukoula areas ;

(c) Education level of the workers were generally low;

(d) Future employment of the workers would require re-training or accepting low remuneration due to their limited skill levels;

(e) It would take the workers slightly longer period of time to find alternative employment as a consequence of a large number of them being flushed into the employment market at once.

[8] The learned High Court Judge although in a brief manner, had afforded careful consideration of the above grounds as well. When considering quantum of a redundancy package, these are important socio-economic factors that a Tribunal must consider. By any stretch of imagination these factors cannot be classified as irrelevant. The appellants submitted that there is no provision or formula for any redundancy payments and as the law in Fiji does not provide for such payment and as it was only a voluntary payment, quantum must be decided by the employer and no one else.

[9] By the reference of the Minister, authority was conferred on the Arbitration Tribunal to hear and make an award. Therefore the Tribunal had the legal authority to make an award. Once the tribunal is made to act under 5(b) it is the award of the Tribunal. The employer cannot take up the position that it is the right of the appellant to make a

voluntary payment. The appellant further submitted that the Tribunal did not give any weight or sufficient weight to all the relevant considerations viz:

(a) The employer was under no obligation to pay redundancy package;

(b) Redundancy payment in this matter was entirely voluntarily;

(c) The employer had paid a generous redundancy package;

(d) A package that not only compensated for the years of service but also added to it in the equivalent of the 3 months salary which may have assisted the workers in their transition period until they found alternative employment.

[10] In dealing with the other grounds of appeal I have dealt with most of the above points and hence a repetition will be redundant. However, the tribunal had mentioned that it considered any relocation expenses that may be incurred. In this instance the Tribunal had not only considered the plight of the employees but has also paid heed to the difficulties of the employer as well. It had considered the losses incurred by the employer in 2005 and 2006 and the sympathetic view taken by the employer towards its employees by not taking any steps under clauses 17 or 10.

[11] The High Court in dealing with an application for Judicial Review exercises a very limited jurisdiction quite distinct from the exercise of appellate jurisdiction. Relief by way of judicial review in relation to an award made by an Arbitrator will be available to quash such an award only if the Arbitrator :

(i) wholly or in part assumes jurisdiction which he does not have or exceeds that which he has

or

(ii) acts contrary to principles of natural justice

or

(iii) pronounces an award which is eminently unreasonable or irrational

or

(iv) is guilty of a substantial error of law.

[12] The remedy by way of judicial review cannot be made use of to correct errors or to substitute a correct order for a wrong order and if the arbitrator's award was not set aside in whole or in part it had to be allowed to stand unreversed. I refer to a passage in the Treatise of Administrative Law written by Professor H.W.R Wade (12th edition) at pages 34 and 35 which reads thus:

> *"Judicial Review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of the decision of an appeal under appeal...but in judicial review the court is concerned with its legality. On appeal the question is right or wrong. On review the question is lawful and unlawful?....judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed. The court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not."*

[13] Clause 17 reads as follows:

> *"In the event that circumstances warrant the closure of a section or sections of the operation for a fixed period of time, an employee may be required to take all or part of his annual leave due up to that point in time. Consultation with the union should be carried out prior to lay off where necessary employees may be laid off without pay during the period not exceeding six (6) months. Thereafter, if redundancy becomes necessary, Clause 10.0 will be affected".*

Clause 10.0 of the agreement stated:

> *"In the event of redundancies becoming necessary, the company shall notify the union as early as possible so that consultations and negotiations shall take place between the parties. In so far as possible and practicable, such factors as length of service, work record, skills, and experience and employees abilities will be considered. Where skills, experience and ability of employees are equal, employees will be made redundant on the basis of "last in first out".*

[14] When one considers the losses of FJD 27 million in 2005 and FJD 54 million in 2006, it amply illustrates the commercial plunge the company had taken, this downward trend of the company had been considered by the Arbitration Tribunal and paid due attention to the fact that the company did not elect to make use of clauses 17 or 10 and subject the workers to any form of inconvenience. As the company was running at a loss, it was compelled to close down the Smith Shaft. These facts were evident and the Arbitration Tribunal had adverted its attention to the above facts that are in favour of the appellant when it came to the consideration of the quantum of redundancies and addressed its mind in dealing with the matter.

[15] Having considered all circumstances I find that the Arbitration Tribunal had considered all relevant facts in favour of and against both parties in arriving at a decision the Arbitration Tribunal had not exceeded its jurisdiction, nor acted contrary to principles of natural justice, nor made an award eminently unreasonable or irrational or nor guilty of a substantial error of law. With this background there was no reasonable basis for the learned High Court Judge to reverse the order of the Arbitration Tribunal. As the learned High Court Judge has not erred in coming to his decision it is my view that this court should not interfere in said decision and therefore I uphold the decision of the learned High Court Judge.

[16] Taking into consideration the losses incurred by the company as a commercial enterprise into 2005 and 2006 which had a crippling effect on its performance and the sympathetic manner in which it treated its employees by not resorting to take steps under clause 17 or 10 of the Agreement, I order a nominal cost of FJD$1000 ($500 x 2) to be paid to the respondents namely, **Mine Workers Union of Fiji** and **Vatukoula Mine Workers Staff Association**.

Appeal dismissed.

Wati, JA

I have read the judgment of the Hon. Justice Lecamwasam and I agree with the reasons and the outcome of the appeal.

Kotigalage, JA

I agree with the findings and the decision to dismiss.

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HON. MR. JUSTICE S. LECAMWASAM
JUSTICE OF APPEAL

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HON. MADAM JUSTICE A. WATI
JUSTICE OF APPEAL

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HON. MR. JUSTICE C. KOTIGALAGE
JUSTICE OF APPEAL