IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO.: HBC 55 OF 2006

BETWEEN: MOBIL OIL AUSTRALIA PTY LIMITED

PLAINTIFF

A N D: MINISTRY OF LABOUR, INDUSTRIAL RELATIONS & PRODUCTIVITY

FIRST RESPONDENT

TRANSPORT WORKERS UNION

SECOND RESPONDENT

Mr. H. Lateef for Plaintiff

Mr. K. Keteca for First Respondent

Mr. H. Nagin for Second Respondent

Date of Hearing: 10th August 2006

Date of Ruling: 28th August 2006

DECISION

This is an application by way of originating summons for extension of time to file an application for judicial review. On 31st August 2005 the first respondent had granted compulsory recognition order under the Trade Union (Recognition) Act 1998 to the second respondent to represent the applicant's employees. Certiorari is one of the reliefs which the applicant is seeking. Therefore the relevant period for making of the application was three months.

Order 53 Rule 4 of the High Court Rules is the relevant rule which deals with delays in application for relief. It states :

> ***"4. – (1) Subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant –***
>
> ***(a) leave for the making of the application, or***
> ***(b) any relief sought on the application,***
>
> ***if, in the opinion of the court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.***
>
> ***(2) In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceedings for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding.***
>
> ***(3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."***

On the basis of above rule, the application ought to have been filed by 1st December 2005. It was filed on 14th February 2006.

Is Originating Summons proper procedure for extension of time in judicial review?

The application was opposed. Firstly it was opposed on the ground that originating summons was not the proper procedure by which the applicant should have begun the proceedings but by way of judicial review. Mr. Keteca for the first respondent contended that the issue of delay can only be considered when an application under Order 53 Rule 4(1) is made and not independently under a separate action.

Mr. Lateef on the other hand submitted that application by way of originating summons was not fatal. It only had costs consequences for the applicant as the applicant would incur more costs. His view was court should consider merits.

An application for judicial review is a specialized procedure provided by Order 53 of the High Court Rules. It is a process by which courts exercise their supervisory jurisdiction over the tribunals and also statutory authorities in the area of public law. Order 53 provides a comprehensive code by which applications in judicial review are to be brought before the courts and the manner in which they are to be dealt with once they are before the courts.

Order 53 itself does not state how extensions for time may be sought but because the rule provides that leave may be refused because of delay, it is an application which should be made as part of the application for leave asking the court to exercise its discretion despite the delay. I agree with Mr. Keteca that the issue of delay is part and parcel of one of the considerations at the leave stage. It is my view that it is procedurally incorrect to use originating summons to seek extension of time as a separate issue in a separate proceeding.

I am fortified in my view because when one looks at appendix 1 Form 27 of High Court Rules it provides that for Order 53 applications Atkins Encyclopedia of court Forms is to be used. Unfortunately the High Court Library did not have a copy of the 1980 issue of Atkins, but the 1998 issue of Atkins provides that the applicant must include reasons for delay on the appropriate section of the RSC

Appendix Form 86A. Form 86A is an application for leave forms and it states ***"if there has been delay include reasons here"*** that is under grounds on which relief is sought.

I therefore conclude that reasons for delay and application for extension of time to file must be sought with the leave application and not by separate originating summons.

Order 53 Rule 4 – considerations:

Order 53 Rule 4 provides that leave may be refused if there is undue delay in bringing the proceedings. The meaning of ***"undue delay"*** was considered by Lord Ackner in R. v. Stratford-on-Avon District Council, ex parte Jackson – (1985) 1 WLR 1319. There the English Court of Appeal was considering the English equivalent of our Order 53 Rule 4. At page 1325 F Lord Ackner stated :

> ***"we have concluded that whenever there is a failure to act promptly or within three months there is "undue delay". Accordingly, even though the court may be satisfied in the light of all the circumstances, including the particular position of the applicant, that there is a good reason for that failure, nevertheless the delay, viewed objectively remains "undue delay". The court therefore still retains a discretion to refuse to grant leave ..."***

The above comments were endorsed by Lord Goff of Chieveley in Caswell and Another v. Dairy Produce Quote Tribunal for England and Wales – (1990) 2 ALL ER 434.

So prima facie in cases where a certiorari is the remedy sought, a delay of three months is considered an undue delay which needs to be explained by the applicant. Hence a court may refuse leave on the grounds of delay unless it sees good reason or reasons for extending the time; but even if it considers that there is good reason, nevertheless it may still refuse leave or where leave has been granted, then at substantive hearing, if in the opinion of the court, the grant of such

relief is likely to cause substantial hardship to the rights of any person or cause substantial prejudice or is detrimental to good administration.

The prejudice or hardship need not be to the parties; it can be to any person other than the parties.

In Caswell Lord Goff refused to give a precise definition of what constitutes detriment to good administration. However, he said that it involved ***"citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision ..."*** and ***"the effect of the relevant decision and the impact which would be felt if it were to be re-opened"***.

Application of principles:

The applicant was aware of the order. It had consulted its solicitors. It says it had to seek instructions from its Human Resources Department in Melbourne and compensation manager in Malaysia.

The solicitors had advised the applicant of the need for a review if fifty percent of employees had not joined the union. Further in this day and age with E-mail and telephone, I cannot see any reason why a multinational company should take so long to decide and contact its solicitors. Besides, it was a simple matter of calculating fifty percent of total eligible employees, to join a union.

The essence of Judicial Review is an expeditious procedure to deal with public law matters. This purpose would be frustrated if a leisurely approach were taken in such matters – The State v. Public Service Commission, Ex-parte Sevuloni Nasalasala – HBJ 36 of 1987.

Further, I also have to consider the subject matter of the proceedings which is recognition of unions. The Trade Union (Recognition) Act 1998 sets out strict timetables in the recognition process. Under Section 3, a union which has secured membership of more than fifty percent of the employees and no other union claims to represent other persons, then that union can apply to the employer for voluntary recognition. The employer must respond to it in 7 days. If the employer refuses

recognition or fails to grant recognition within one month, the union can apply to the Permanent Secretary for compulsory recognition. Section 3 therefore imposes strict time tables on which an employer must respond. Time frames show that employers by dilatory tactics cannot postpone recognition indefinitely. Matters of recognition are therefore treated with urgency by the legislature.

The effect of compulsory recognition order is that instead of the employer negotiating terms of contracts with individual employees, it must bargain with the union on a collective basis. Here the applicant says it was being negotiating separate contracts with employees in breach of the order and attempting to defeat the entire purpose of collective bargaining.

Any grant of leave now would throw the compulsory recognition order into a state of uncertainty. What would happen to levies paid by the union members to the union? Would that need to be refunded?

Conclusion and Orders:

I remain unpersuaded as to the satisfactory explanation for the delay. Further even if delay was explained, I consider that grant of relief would substantially prejudice the right of the union members to have the union represent them with a collective voice. Accordingly I refuse to extend time for filing of the Judicial Review. I order costs against the applicant in favour of each of the respondents in the sum of $600.00 to be paid in fourteen (14) days.

[Jiten Singh]
JUDGE

At Suva
28th August 2006