IN THE HIGH COURT OF FIJI
AT LAUTOKA
EMPLOYMENT JURISDICTION

ERCC No: **07** of **2020**

BETWEEN : **FEDERATED ARILINE STAFF ASSOCIATION**

PLAINTIFF

AND : **AIR TERMINAL SERVICES**

DEFENDANT

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. N. R. Padarath with Mr. M. Anthony for the Plaintiff
: Mr. D. Sharma with Ms. G. Fatima for the Defendant

Submissions : 1 & 7 July 2020

Date of Ruling : 13 July 2020

RULING

EMPLOYMENT LAW: INJUNCTION Termination of employment – Whether injunction available to prevent termination of employment – Whether mandatory injunction to reinstate available – Whether relief against termination of employment available independent of statutory relief when notice requirements are complied with – Employer's right to terminate – Collective agreement – Whether termination of all employees terminates collective agreement – Validity of affidavit – Order 2 Rule 2, Rule 29 Rule 1 (2) & (3) and Order 41 Rules 1 (4) & 9 (2) of the High Court Rules 1988 – Sections 4, 6 (5), 6 (6), 24, 41, 144, 160 (3) of the Employment Relations Act 2007 – Employment Relations (Amendment) Act 2020

Cases referred to in this judgment:

a) *Sun Insurance Co Ltd v Sorojini (2019) FJHC 139, HBC 218.2012 (28 February 2019)*
b) *Denarau Corporation Limited v Vimal Deo [2015] FJHC 112, HBC 32.2013 (24 February 2015)*
c) *Eastwood v Magnox Plc. and McCabe v Cornwall County Council [2004] 3 All ER 991*
d) *Johnson v Unisys Ltd [2001] 2 All ER 801*
e) *Vefa Ibrahim Araci v Kieron Fallon [2011] EWCA Civ 668 (4 June 2011)*
f) *Philippe Grenet v Electronic Arts Ireland Limited [2018] IEHC 786*
g) *University of Western Australia v Gray [2006] FCA 686*
h) *Laurence Kearney v Byrne Wallace [2019] IECA 206*

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1. The plaintiff filed an *inter partes* summons dated 23 June 2020, and the substantive reliefs sought by it are reproduced below:

    a) *That the defendant and/or its servants and/or its agents be restrained from terminating the members of the plaintiff association from employment until final determination of the matter.*

    b) *That the defendant and/or its servants and/or agents be restrained from terminating the collective agreement dated 22 January 1998 until final determination of the matter.*

2. At the heart of this summons is the defendant's termination of employment of several of its workers -amounting to 595- who are members of the plaintiff. The termination was on the basis that the employer could not provide work as it had suffered a 95% reduction in work due to the Covid-19 pandemic.

3. At the plaintiff's urging that the matter could not be delayed until the sittings of the Employment Relations Court in Lautoka, the summons was placed before Tuilevuka, J on 23 June 2020. His Lordship dealt with the matter promptly and delivered a ruling on 25 June 2020, which neither granted nor declined any of the orders sought by the plaintiff. Instead, the summons was referred to this court, and counsel represented the parties when the matter was listed on 1 July 2020.

4. Tuilevuka, J's take on the matter is evident by the following paragraph of his ruling: *"I have no doubt that there are valid serious issues to be considered. I have considered very carefully the fact that all 595 members of FASA have been served their individual letters. Every letter purports to terminate the employment of every individual recipient, with benefits and other entitlements paid. The horse has bolted so to speak".*

5. When the matter was taken up by this court on 1 July, it transpired that another *inter partes* summons was filed by the plaintiff on 30 June 2020; after the ruling of Tuilevuka, J. The summons of 30 June 2020 relied on Order 29 Rule 1 and sought *inter alia* the following orders:

    a) *That the Applicant be allowed leave to add an additional order in the summons filed on 23 June 2020.*

    b) *That the following orders be added, "That the defendant and/or their servants and/or their agents be restrained from recruiting and/or acting upon the advertisement published in the Fiji Sun dated 27 June, 2020.*

6. Though the defendant objected to the hearing of the 2nd summons, the court accepts it for consideration. The 1st order sought by the summons dated 30 June seeking to add a relief is, therefore, allowed.

7. The plaintiff also filed an originating summons on 30 June 2020 seeking to determine certain questions of law which are reproduced below:

    a. "*Whether the recent amendment passed under the Employment Relations (Amendment) Act to section 24 of the Employment Relations Act 2007 gives a right to an employer to terminate a collective agreement and/ or member of a part to a collective agreement?*

b. *Whether an employer can rely on section 41 of the Employment Relations Act 2007 elect to terminate an employee who is a member of a union which is a party to a collective agreement?*

c. *Whether the doctrine of frustration and/ or the statutory exception of act of God as provided for under the Employment Relations Act 2007 apply to collective agreement?*

d. *Whether section 24, section 41 and the doctrine of frustration and/ or statutory exception of act of God is available to the defendant to terminate the collective agreement in the circumstances and particularly when they have advertised for all the positions purportedly terminated in the Fiji Sun dated 27 June 2020 being within 8 days of the purported termination?"*

These are the orders sought by the plaintiff:

i. *"A declaration that the defendant's termination letter dated 19 June 2020 is unlawful and is in breach of the collective agreement dated 22 day of January 1998;*

ii. *An order that the termination letters dated 19 June 2020 addressed to all members of the plaintiff be withdrawn forthwith;*

iii. *A declaration that the doctrine of frustration and/ or the statutory exception of act of God do not apply to collective agreements;*

iv. *An injunction that the defendant and/ or servants and/ or their agents be restrained from terminating the collective agreement;*

v. *An injunction that the defendant and/ or servants and/ or their agents be restrained from terminating the members of the plaintiff association;*

vi. *An injunction that the defendant and/ or servants and/ or their agents be restrained from recruiting and/ or acting upon the advertisement published in the Fiji Sun dated 27 June 2020;*

vii. *An order that the employees who were purportedly terminated by letter dated 19 June 2020 and whose position has been advertised in the Fiji Sun dated 27 June 2020 be forthwith reinstated to their original position under the collective agreement".*

8. The defendant was given time to file an affidavit in opposition to the plaintiff's summons dated 30 June and the plaintiff to file its reply to the affidavits filed on

behalf of the defendant. Both parties were directed to file submissions by 7 July 2020. The matters in the originating summons were reserved for contest after the court's ruling on the summons dated 23 and 30 June 2020.

9. Semisi Turagabaleti, the President of the Federated Airlines Staff Association, the plaintiff, gave an affidavit in support of the plaintiff's application and supplementary affidavit as well. The material paragraphs of his affidavits are reproduced below:

a) *"FASA has over 595 members and all these members are employed with ATS.*

b) *ATS has announced the termination of its employees. Majority of the employees who have received their termination letters are members of FASA.*

c) *The ATS management is under contractual obligation to refer all changes in staff rules, rates of pay, conditions of employment, increase or decrease in the workforce and the creation of new classification weather or not specifically contained in the agreement to FASA for discussion and mutual agreement.*

d) *On the 18th June 2020, a meeting was convened between FASA and the ATS HR manager, ATS finance manage and assistant manager human resource. In this meeting the ATS management gave a verbal presentation that the board has approved the termination of the workforce.*

e) *After being informed by the Board and ATS management intention to terminate we informed the ATS management in the meeting that FASA needs more time to respond to their verbal presentation. It was decided to re convene a meeting at 2.30pm the same day.*

f) *At around 2.30pm the ATS management handed a letter confirming what was said in the verbal presentation in the earlier meeting.*

g) *After being handed with the letter the ATS management informed me that the termination letters are ready, and that the management will proceed with the termination. FASA was not given any opportunity to response at this time.*

h) *The ATS management is using the COVID 19 pandemic to suggest that the company is unable to provide work. The World Health Organization had declared COVID 19 a pandemic on 11 March 2020. Thereafter, the workers and members of FASA went on leave with and without pay.*

i) The FASA in consultation with the ATS management had come to an agreement as to the utilization of leave for all members. In fact, this is how the collective agreement was implemented. However, the decision to terminate the workers was done without adhering to terms of the collective agreement.

j) The members of FASA had at all times engaged with the ATS management on the good faith basis which was within the terms of the collective agreement. However, the ATS management proceeded to terminate in bad faith and on nonexistent facts. The whole dynamics of their 18 June 2020 letter has changed with the Government's announcement.

k) The said advertisement is contrary to the grounds stated in the termination letters handed over to all union members. The management had stated that they are terminating the employment of all union workers on the grounds that there is no work available because of Covid-19.

l) To-date all the union members are being terminated from their employment. Prior to terminate the union executive nor the members were approached to discuss the termination. However, the management had tried after the application was filed to discuss the effects of the terminations. There has been no resolution on this issue.

m) The union verily believes that the actions of the ATS management continues to undermine and breach the collective agreement with FASA.

n) *At the hearing, it was informed that two different letters has been issued to the union workers. One letter stated that the termination was effective immediately and the other letters stated that termination was effective within two weeks from the date of service.".*

Defective affidavits and other objections

10. Both parties raised objections of a technical nature; the defendant regarding the plaintiff's application; and the plaintiff on the affidavits filed on the defendant's behalf. In view of the reasoning of the ruling on the plaintiff's summons of 23 and 30 June 2020, I do not propose to consider these objections at length, but an observation will nevertheless be of pertinence.

11. On behalf of the defendant, an affidavit in response was filed on 30 June 2020 by its Manager, Human Resources, Richard Donaldson, averring *inter alia* that the plaintiff had not served it any substantive application addressing the issues raised in paragraphs one and two of the plaintiff's *inter partes* summons and that

there was no final matter to determine, and that the affidavit of Mr. Semisi Turagabaleti did not comply with Order 41 Rule 9(2) of the High Court Rules 1988.

12. Likewise, the plaintiff objected to the affidavit of Mr. Richard Donaldson saying that he was not duly authorised to swear the affidavit on behalf of the defendant company, and drew the court's attention to the decisions in *Sun Insurance Co Ltd v Sorojini*[1] and *Denarau Corporation Limited v Vimal Deo*[2]. It was held in these cases that it was not sufficient for a deponent to state that he has authority to swear on behalf of a company, and that he must state the person who gave that authority; whether it is a director or secretary or other authorised officer of the company; in the absence of such a declaration and the authority itself, those decisions suggest that the deponent will lack the authority to swear an affidavit on behalf of the company.

13. I have, however, taken a different view. Order 41 Rule 1 (4)[3] states that every affidavit must be expressed in the first person and, unless the court otherwise directs, must state the place of residence of the deponent and his occupation, or if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state that fact. In the case of a deponent who is giving evidence in a professional, business or other occupational capacity the affidavit may, instead of stating the deponent's place of residence, state the address at which he works, the position he holds and the name of his firm or employer, if any. To the extent required in this rule, then, there is compliance.

14. The UK's Supreme Practice 1995[4] makes this clear by stating that:

"*modern practice is so changed that the references to the very technical rules of the past are no longer helpful and they have dropped. As long as the directions at para. 41/11/1 are complied with and the affidavit in its essentials complies with this Order, minor matters are usually waived under R.4*".

[1] (2019) FJHC 139, HBC 218.2012 (28 February 2019)
[2] [2015] FJHC 112, HBC 32.2013 (24 February 2015)
[3] High Court Rules 1988
[4] Volume 1, page 699

15. In the case of Mr. Semisi Turagabaleti's affidavit, the defendant has made a bare statement that it does not comply with Order 41 Rule 9 (2) without specifying the defect, and on the face of it no deficiency is apparent. In these circumstances, affidavits filed on behalf of both parties are in substantial compliance with the rules, and are acceptable to court.

16. The second issue raised by counsel for the defendant was that no originating process was filed when filing the first summons. I agree with the plaintiff's submission that in view of the exigency, this proceeding was instituted by an acceptable mode. Order 29 Rule 1 (2) & (3)[5] provides an avenue for a party to make an application without first filing an originating process.

17. Order 29 Rule 1 (2) provides,

> "*Where the applicant is the plaintiff and the case is one of urgency and the delay caused by proceeding in the ordinary way would entail irreparable or serious mischief such application may be made ex parte on affidavit but except as foresaid such application must be made by notice of motion or summons*".

Order 29 Rule 1 (3) reads,

> "*The plaintiff may not make such an application before the issue of the writ or originating summons by which the case or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the court thinks fit*".

18. Mr. Donaldson also raised an objection in his affidavit stating that the *inter partes* summons referred to the collective agreement dated 22 January 1998, while Mr. Turagabaleti's affidavit in support claimed that FASA and ATS entered into a collective agreement on 9 October 1998, and that the plaintiff had not specified the applicable agreement. But this has been corrected to 22 January 1998 in Mr. Turagabaleti's supplementary affidavit dared 30 June 2020.

[5] *Supra*

Termination of employment

19. The plaintiff submitted that the issue before court is whether an injunction should be granted to restrain the defendant's conduct and, if necessary, grant a mandatory injunction to reinstate the workers. The plaintiff contended rather forcefully that this case is a clear example of an exceptional circumstance where the court must act to prevent the unlawful action of the defendant.

20. The plaintiff argued that the defendant had used the Covid-19 pandemic as a means to terminate workers when clearly there was no law or basis to do so, and called upon the court to restrain the defendant from employing people in the positions from which its members were terminated by misrepresenting that no work was available and that all the workers terminated for those positions should be immediately reinstated.

21. According to the defendant, the decision to terminate all the members of the plaintiff was communicated to the plaintiff by letter dated 18 June 2020. The letter, produced by both parties, states *inter alia*:

> "*… the ATS board of Directors has approved ATS Management to implement the following:*
>
> 1. *The termination of all existing workforce contracts on the basis of the company being unable to fulfill the contracts, pursuant to ERA 2007 S 41, with provision for voluntary early retirement for those who are eligible. Payment include two weeks wages in lieu of notice, outstanding annual and long service leave with the 10% leave loading.*
> 2. *The implementation of termination to be conducted in stage in order to sustain and provide services for current ad hoc business.*
> 3. *The introduction of fixed term daily employment contracts based on deployment list with workers engaged as required.*
> 4. *Inclusion of the deployment list will be as required by the company and based on workers application, selection and agreement to the terms of the deployment list.*
> 5. *Remuneration for workers performing duties under the fixed term daily contracts shall include a 25% loading on their current basic rates of pay*".

22. Mr. Donaldson stated in his affidavit that to-date neither the individual employees nor the union has invoked the employment grievance or dispute mechanism of the collective agreement or the Employment Relations Act as required under section 110(4) of the Act, and, that the plaintiff had failed to exhaust the available internal appeal procedures.

23. He stated that all employees were legitimately terminated, and no provision of the collective agreement was breached, and that all payments and benefits owed to the former employees were paid in full in their final pay of Monday 22 June 2020, while the termination letter set out the reason for the termination which was the inability of the defendant to fulfil the contract of employment and provide work.

24. However, the plaintiff contended that the defendant's motive is in question as an advertisement was placed in the Fiji Sun almost 7 days after the termination of employment, advertising the positions from which the employees were terminated, although the termination letter referred to article 2 B of the collective agreement and the defendant's inability to provide work.

25. Mr. Donaldson, in his affidavit, explained the newspaper advertisement was to invite expressions of interest for registration purposes for workforce deployment, and that the purpose of the exercise was to create a pool of standby workers to fulfill specific duties as and when required on an *ad hoc* need basis; registration was open to former employees as well.

26. The defendant claimed that it had informed all its employees as early as 24 March 2020, including the plaintiff's members, of the drastic impact Covid-19 had on its business; that the plaintiff was kept informed of developments throughout the period 19 March 2020 to 18 June 2020. The defendant claimed that its revenue plunged by 95%, and that as at May this year the company recorded a loss of $2.5. The plaintiff disputes that it was consulted and lays blame on the defendant for failing to follow due process prior to taking a decision to terminate the employment of its members.

27. The defendant's position is that it was entitled to terminate the employment of the plaintiff's members pursuant to the provisions of:

a. Article 2 B of the collective agreement

b. Section 41 (a) of the Employment Relations Act 2007

c. Section 24 as amended by the Employment Relations (Amendment) Act 2020

28. The relevant portion of Section 24 (1) of the Act as amended states:

> "*An employer must unless the worker has broken his or her contract of service or the contract is frustrated or its performance prevented by an act of God, provide the worker with work in accordance with the contract during the period for which the contract is binding on a number of days equal to the number of working days expressly or impliedly provided for in the contract*"

29. The amended section 24 of the Acts[6] states an "act of God" includes a pandemic declared by the World Health Organization. The plaintiff submitted that the recent amendment does not give the employer a right to terminate a collective agreement and that the amendment only discharges an employer from his or her duty to provide work; a discharge from that duty did not automatically give a right of termination.

30. The defendant could also not rely on section 41 of the Employment Relations Act, the plaintiff asserted. Section 41 does not give an employer the automatic right to terminate the employment contract, and certainly not a collective agreement, the plaintiff maintained.

31. Section 41 of the Employment Relations Act provides:

> *"If –*
>
> *(a) The employer is unable to fulfill the contract, or;*
>
> *(b) Owing to any sickness or accident the worker is unable to fulfill the contract,*
>
> *the contract may be determined, subject to conditions safeguarding the right of the worker to wages earned, compensation due to the worker in respect of accident or disease and the worker's right to repatriation*".

[6] Act No.11 of 2020

32. The plaintiff is correct in submitting that section 41 of the Act does not give an arbitrary right to terminate employment. In terms of section 41, the contract may be determined, in the case of the employer's inability to fulfill the contract, subject only to the conditions of safeguarding the right of the worker to wages earned, compensation due to the worker in respect of accident or disease and the worker's right to repatriation. However, there is no complaint by the plaintiff that any of those statutory stipulations were not observed in terminating employment. There is no evidence before court that the defendant has acted in breach of section 41 or that through the operation of this section the defendant has terminated the collective agreement.

33. The plaintiff's angst is understandable; its members have lost their livelihood in a single crushing blow, for no fault of theirs. But, the plaintiff, in my surmise, has fundamental difficulties in its case. An aspect of that was made clear by Tuilevuka, J when he reasoned in his ruling that the horse had bolted, before reserving the matter for my consideration.

34. The first relief sought by the plaintiff's initial summons is to restrain the defendant from terminating the members of the plaintiff from employment until final determination of the matter. This relief could not have been granted by court; by the plaintiff's admission its members' employment was terminated by letter dated 18 June 2020.

35. It was submitted on behalf of the plaintiff that a mandatory injunction be granted, if necessary, reinstating the workers. Seeking a mandatory injunction, in my view, is misconceived. An entrenched principle of the common law is that specific performance will not lie in respect of personal services. It is for this reason that compensation is the employee's normal remedy. The employer employee relationship, with its unique facets, cannot normally be forced upon the parties; the known exception is where the legislature has provided otherwise. Under the common law, an action did not lie against the employer for termination of employment, if there was compliance with the notice requirement of the contract between the employer and the employee. This was so even where

the circumstances surrounding the termination were unfair, even oppressive[7]. This severity of the law was later tempered by statutory intervention. In Fiji, the Employment Relations Act 2007 provides *inter alia* statutory mechanisms to address the grievances of workers who have been terminated from employment.

36. A separate statutory regime to deal with terminations of employment has left the common law principle largely undisturbed, with activism to a certain extent being seen in some cases to distinguish the direct process of termination from other acts – such as a suspension – that are also closely connected to the event of termination, in conjunction with an implied duty of trust and confidence. In those cases, where an act was directly connected with termination of a worker's employment, the court refused to grant relief, unwilling to venture into the legislative domain concerning dismissal. These matters were considered by the House of Lords in *Eastwood v Magnox Plc. and McCabe v Cornwall County Council*[8], the House of Lords had this to say:

> *"This development of the common law, however desirable it may be, faces one overriding difficulty. Further development of the common law along these lines cannot co-exist satisfactorily with the statutory code regarding unfair dismissal. A common law obligation having the effect that an employer will not dismiss an employee in an unfair way would be much more than a major development of the common law of this country. Crucially, it would cover the same ground as the statutory right not to be dismissed unfairly, and it would do so in a manner inconsistent with the statutory provisions. In the statutory code Parliament has addressed that highly sensitive and controversial issue of what compensation should be paid to employees who are dismisse d unfairly"*[9].

37. Similarly, in *Johnson v Unisys Ltd*[10], the House of Lords held that an employee had no right of action at common law to recover financial losses arising from the unfair manner of his dismissal. The case was distinguished in *Eastwood v Magnox Plc. and McCabe v Cornwall County Council*[11] in which their Lordships held an

[7] Addis v Gramaphone Company Limited [1909] AC 488
[8] [2004] 3 All ER 991; the two appeals were heard together
[9] At page 997
[10] [2001] 2 All ER 801
[11] *Supra*

action could be founded on the implied duty of trust and confidence concerning the employer's conduct prior to the decision to terminate employment. That principle was also applied by the Court of Session in Scotland in *King v University Court of the University of St. Andrews*[12]. Though these cases were not cited by either party, they highlight the great care that courts must exercise in venturing towards the area of dismissal from work for which Parliament has enacted special laws. On the other hand, the Court of Appeal in Ireland in *Laurence Kearney v Byrne Wallace*[13], which neither party made reference to, held that the appellant was faced with an insuperable obstacle in obtaining a interlocutory injunction to restrain his dismissal, and declared that an implied term would not deprive the employer of the right to terminate the contract of employment with proper notice and, for example, where it is based on a redundancy, as in that case.

38. Counsel for the plaintiff, while conceding that an injunction to prevent a termination of employment is not the norm, submitted that in the "rarest of rare cases" courts have issued an injunction to prevent a termination of employment, and referred to several cases for support of his proposition: *Vefa Ibrahim Araci v Kieron Fallon*, a decision of the English Court of Appeal, has no connection with the issue at hand, as it did not relate to an injunction to prevent a termination of employment. The relief there was sought to enforce a negative covenant. Jean *Philippe Grenet v Electronic Arts Ireland Limited*, a decision of the High Court of Ireland[14], related to an employer who dismissed its senior director for misconduct, and thereafter, withdrew its termination letter and dismissed him on a no-fault basis. The decision of the court must be seen in the context of the facts of the case, where there was a likelihood of damage to the employee's reputation due to the employer's conduct.

39. The court is of the view that the facts of this case do not justify such intervention. The applicable common law principle is quite clear, and need not be stretched artificially to accommodate the complained situation. The defendant – as the employer – has exercised its contractual and statutory right. The collective

[12] [2002] IRLR 252
[13] [2019] IECA 206
[14] [2018] IEHC 786

agreement also permitted the defendant to terminate the workers' employment with 2 weeks' notice. In doing so, the defendant may or may not have acted fairly. This court makes no finding on that; indeed, it is not possible to make findings of disputed facts in a proceeding of this nature. If the defendant has fallen short in its obligation or duty, in the process of terminating employment, that is a complaint the members of the plaintiff are entitled to canvass in terms of the Employment Relations Act, which prescribes the reliefs that can be granted to workers where the conduct of the employer is found to be in breach of the law.

40. The plaintiff added another relief by its summons dated 30 June 2020, to restrain the defendant from recruiting or acting upon the advertisement published in the Fiji Sun dated 27 June, 2020. It must necessarily follow that this relief be declined by court. It is difficult to see the legal basis upon which the plaintiff could impede the defendant's choice of its employees. Moreover, while there is no evidence of an immediate resumption of work, the advertisement, which was tendered to court, speaks of an expression of interest for the purpose of registration, and former employees could apply, subject to clearance formalities.

Collective Agreement

41. The plaintiff argued that though under normal circumstances the invocation of article 2 B of the collective agreement may be valid, the situation concerning the plaintiff was not normal and that the effect of the termination merited special consideration. Under normal circumstances, the plaintiff reasoned, if one or two employees are terminated it would not have affected the enforceability of the collective agreement; however, if the employment of all employees of the plaintiff are terminated, that would bring the collective agreement to an end. The plaintiff further submitted, rightly in my view, that sections 24 and 41 of the Act do not entitle the employer to terminate a collective agreement.

42. A collective agreement is defined as an agreement made between a registered trade union of workers and an employer which (a) prescribes (wholly or in part) the terms and conditions of employment of workers of one or more descriptions;

(b) regulates the procedure to follow in negotiating terms and conditions of employment; or (c) combines paragraphs (a) and (b)[15].

43. The registration of a trade union renders it a body corporate by the name under which it is registered, and, subject to the Act, confers on it perpetual succession and may do or be subject to any of the matters specified in section 144 of the Act. Where a collective agreement provides for an expiry date it expires on the date specified in the agreement[16].

44. The termination of employees, therefore, will not result in bringing the trade union to an end or, as suggested by the plaintiff, in terminating the collective agreement, which will continue in force until the expiry of the term as provided by the collective agreement; while in force, it will bind the employer, the defendant in this action, and the union, a body corporate with perpetual succession, the plaintiff. The members of the union may keep changing without that having an impact on the continuity of either the union or the collective agreement to which the union is a party. A worker is not obliged to join a union[17] and no employer may make it a condition of employment that a worker must not be or become a member of a trade union[18]. In these circumstances, the termination of the workers' employment will not by itself result in the termination of the collective agreement; ordinarily, it would cease to be of force through the effluxion of time or by the means specified in the agreement.

45. In view of the foregoing, the court does not see a serious issue to be tried. Citing the decision of *University of Western Australia v Gray* (No.3), a decision of the Federal Court of Australia[19], the plaintiff submitted that where the balance of convenience lies against a party it may be overcome by a very strong case on the part of the applicant. Such a strong case on the part of the plaintiff is not evident, and the court need not, in the circumstances discussed above, consider the balance of convenience in this instance. The plaintiff's summons dated 23 June

[15] Section 4, Employment Relations Act 2007
[16] Section 160 (3) *ibid*
[17] Section 6 (5) *ibid*
[18] Section 6 (6) *ibid*
[19] [2006] FCA 686

and 30 June 2020 are declined. Having regard to the nature of the controversy in the contemplation of the plaintiff, costs will not be ordered.

Orders

A. The plaintiff's summons dated 23 June 2020 is dismissed.

B. The 2nd order sought by the plaintiff's summons dated 30 June 2020 is dismissed.

C. Directions are to be taken for the hearing of the Originating Summons filed on 30 June 2020.

D. Parties are to bear their own costs.

Delivered at Suva this **13th** day of **July, 2020**

M. Javed Mansoor
Judge