FIJI SUGAR AND GENERAL WORKERS v CORAL SUN LTD (HBC0430D of 2003S)

HIGH COURT — CIVIL JURISDICTION

JITOKO J

14 January 2004

Employment — termination of employment — redundancy — reinstatement — damages.

Practice and procedure — applications — motions — redundancy — order to comply with ministerial order — order to reinstate employees — whether or not to grant motion — nature of motion — Trade Disputes Act ss 4, 5A, 5A(2)(b).

On 18 September 2003, the Permanent Secretary for Labour, Industrial Relations and Productivity (the Permanent Secretary) issued a compulsory recognition order (No 12 of 2003) (CRO) giving recognition to the Fiji Sugar and General Workers Union (FSGWU) as the trade union organisation representing the employees of Coral Sun Ltd (the Defendant) for the purpose of collective bargaining. On the same day, the Defendant wrote to the Registrar of the Trade Unions objecting to the issuance of the compulsory recognition order while at the same time sought clarification as to the Ministry of Labour's position with respect to a recent court decision on the issue of membership. The Defendant asked the Ministry of Labour to revoke the compulsory recognition order because it was bad in law.

Meanwhile, on 17 November 2003, the Defendant subjected three of its employees who were drivers and members of the FSGWU to redundancy.

While all of these were going on, on 18 November, 40 employees failed to report to work. The Defendant, pursuant to the terms of contract of employment that absence from work for 24 hours without approval from the management can result in termination of employment, dismissed the 40 workers. The remaining employees continued to work as normal.

On 20 November 2003, the Plaintiff reported to the Ministry of Labour that there was a trade dispute between the Defendant and the Plaintiff union regarding the three workers who were made redundant. The ministry accepted the existence of a trade dispute and referred the matter to a dispute committee.

On 24 November 2003, the Plaintiff reported to the Permanent Secretary advising of a trade dispute informing of it that all the workers plus the three drivers who were the subject of the first trade dispute between the parties had been locked out by the Defendant. On 4 December 2003, the Minister for Labour, Industrial Relations and Productivity issued an order declaring the "lock out" by the Defendant unlawful and prohibited its continuation.

On 5 December 2003, the Plaintiff sought a declaration that the Defendant was bound to recognise the Plaintiff union pursuant to a compulsory recognition order and comply with the compulsory recognition order; an order by way of injunction that the Defendant comply with Minister for Labour, Industrial Relations and Productivity Order not to continue with lock out of any employee before lock out on 18 November 2003; an order by way of injunction that the Defendant reinstate all employees locked out by it from 18 November 2003; and an order by way of injunction that the Defendant be prohibited from recruiting and or employing any replacement employee to replace members of the Plaintiff union.

On 12 December 2003, the matter came before Byrne J who advised that he was not able to hear either the originating summons or the motions. The parties then agreed that the matter be transferred to Suva. On 19 December, counsel for both parties appeared in

the court and agreed to deal with the inter partes motion first. It ordered the Plaintiff to file its submissions on the day and the Defendant to file its reply. On 24 December 2003, oral arguments were heard.

The Plaintiff sought an application pursuant to O 29 r 1 of the High Court Rules, sought an order for the Defendant to comply with the order of the minister, to reinstate the locked out workers and argued that the 44 workers would not be compensated in damages if the injunction filed would not be granted.

The Defendant opposed the Plaintiff's motion and argued that what the Plaintiff sought amounted to a mandatory injunction that would require it to reinstate the 44 workers. The Defendant further argued that the non-observance by the Defendant of the ministerial order was premised on the argument that the order of 4 December 2003 issued by the Minister of Labour was fundamentally wrong in law and thus, was void or voidable.

Held — (1) While the Plaintiff reported to the minister that there was trade dispute between the Plaintiff and the Defendant regarding the other employees, there was no evidence presented that the dispute was accepted and declared by the Permanent Secretary pursuant to s 4 of the Trade Disputes Act. The ministerial order only referred to the three employees and did not include all the others.

(2) Further, the Plaintiff was misconceived as to the nature of the relief he sought. What the Plaintiff sought was a mandatory injunction that should it be granted, it would order the Defendant to comply with the order and direct to reinstate all the other workers who were dismissed. That even if the relief sought was not mandatory in nature, there would still be difficulties for the court to grant any form of injunctive relief. Moreover, the balance of convenience would tend to favour the Defendant who was well-placed to give compensation and who already made an undertaking as to damages.

Application dismissed.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504; *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148; 67 ALR 553; *Madhu Kishwar v State of Bihar* (1996) AIR 1864; 1966 SCC (5) 125; *Noodles Bakery Ltd v Long Life Noodles Bakery Ltd* [2003] FJHC 291; *Redland Bricks Ltd v Morris* [1970] AC 652; [1969] 2 All ER 576; *Ricegrower's Co-operative Ltd v Howling Success Australia Pty Ltd* (1987) ATPR 489, cited.

K. Vuataki for the Plaintiff

G. P. Shankar for the Defendant

Jitoko J. The Plaintiff, is a trade union organisation purporting to represent some employees of the Defendant company. By originating summons filed at the Lautoka High Court on 5 December 2003 it sought:

(a) A declaration that the Defendant is bound to recognise the Plaintiff Union pursuant to Compulsory Recognition Order dated 18th day of September, 2003.

(b) An Order by way of injunction that the Defendant by itself, its Directors, Manager, servants or howsoever comply with Compulsory Recognition Order dated 18th day of September, 2003.

(c) An Order by way of injunction that the Defendant, its Directors, Manager, servants or howsoever comply with Minister for Labour, Industrial Relations and Productivity Order of 4th of December, 2003 in particular Defendant not to continue with lock-out of any employee before lock out on 18th day of November, 2003.

(d) An Order by way of injunction that the Defendant reinstate all employees locked out by it from 18th day of November, 2003.

(e) An Order by way of injunction that the Defendant, its Directors, Manager, servants or howsoever be prohibited from recruiting and or employing any replacement employee to replace members of the Plaintiff Union.

The Plaintiff added that:

> This Application is made on the grounds that the Permanent Secretary for Labour Productivity and Industrial Relations ordered that the Defendant recognise Plaintiff for purposes of negotiation for its members employed by the Defendant. Defendant refused to recognise Plaintiff and locked out Plaintiff members on 18th day of November, 2003 and started recruiting replacement workers. Plaintiff reported made dispute and Minister for Labour, Productivity and Industrial Relations ordered such lock out unlawful and that Defendant let in workers who were members of the Plaintiff Union. Defendant was served with Order and did not comply.

On the same day the Plaintiff, by a motion sought the following orders:

a) That Defendant comply with the Order of the Minister of Labour, Productivity and Industrial Relations dated 4th day of December, 2003 and reinstate workers locked out by it from 18th day of November, 2003 until further Order.
b) That all pleadings be served within three days on Defendant.
c) That the Motion be heard inter partes on such date as the Honourable Court may decide.

On 12 December 2003, the matter came before Byrne J at Lautoka who advised that he was not able to hear either the originating summons or the motions. The parties then agreed that the matter be transferred to Suva. On 19 December, counsel for both parties appeared before me and the court agreed to deal with the inter partes motion first. It ordered the Plaintiff to file its submissions on the day and the Defendant to file its reply by 23 December. Oral arguments was heard on 24 December 2003.

The facts

On 18 September 2003, the Permanent Secretary for Labour, Industrial Relations and Productivity (the Permanent Secretary), issued a Compulsory Recognition Order (No 12 of 2003), (CRO), backdated to 1 July 2003. The order gave recognition to the Fiji Sugar and General Workers Union (FSGWU) as the trade union organisation representing the employees of the Defendant for the purpose of "*collective bargaining*". On the same day, the Defendant through its solicitors, GP Lala & Associates, wrote to the Registrar of the Trade Unions objecting to the issuance of the compulsory recognition order while at the same time seeking clarification of the Ministry of Labour's position in the light of a recent court decision on the issue of membership. The letter implored the Ministry of Labour to revoke the compulsory recognition order, it being bad in law. The office of the Registrar of Trade Unions responded on 20 November 2003 as follows:

> This is to acknowledge the receipt of your letter dated 18th instant:
>
> The issues you raised have been discussed and I will revert to you once a decision is made.

Meanwhile a day earlier, on 17 November, the Defendant had made redundant three (3) of its employee drivers, who were purported members of the Plaintiff union. In response, the general secretary of the latter, informed, by a letter to the Defendant's general manager, that its action was illegal and in breach of the CRO. On 20 November 2003, the Plaintiff reported to the Ministry of Labour the existence of a trade dispute between itself and the Defendant in respect of the three (3) workers. A day later, the ministry accepted the existence of a trade dispute and, acting in accordance with s 5A(1) of the Trade Disputes Act, referred

the matter to a dispute committee. The composition and convening of the committee formulated under s 5A(2)(b) is yet to be done.

While all of these were going on, on 18 November, 40 employees failed to report to work. The Defendant, pursuant to the terms of contract of employment that stipulates that absence from work for 24 hours, without approval of management can result in termination of employment, dismissed the 40 workers on 19 November 2003. The remaining employees continued to work as normal.

On 24 November 2003, the Plaintiff wrote the Permanent Secretary for Labour advising the existence of a trade dispute between itself and the Defendant and as also reported that all the workers plus the three drivers (the subjects of the first trade dispute between the parties), have been locked out by the Defendant. On 4 December 2003 the Minister for Labour, Industrial Relations and Productivity issued an order declaring the "*lock out*" by the Defendant unlawful and prohibiting its continuation. It should be noted that the ministerial order in its preamble, referred specifically to the existing trade dispute in respect of the Defendant and the three employee drivers only. I shall discuss this in more details later.

Plaintiff's arguments

The Plaintiff's application in its motion dated 5 December 2003, is made pursuant to O 29 r 1 of the High Court Rules and under the inherent jurisdiction of this court. It seeks an order of the court for the Defendant to comply with the order of the minister of 4 December 2003 "*and reinstate workers locked out by it from 18th day of November, 2003 until further Order*".

It is an injunctive relief which would in effect require the Defendant to re-employ all those of its "*ex-employees*" whose services it had terminated including the three drivers with whom the Defendant had earlier made redundant.

The Plaintiff, relying on the *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 (*American Cyanamid*) principles to support its application for the grant of injunction, argues that it has clearly established that a serious issue is raised. Counsel argued that despite the Minister of Labour declaring on 4 December 2003 the lock out by the Defendant unlawful and prohibiting its continuation, the latter, in defiant of the order, continues to act contrary to it. There is clearly a serious issue of law raised.

On the balance of convenience, counsel submitted that this should favour the Plaintiff. On the facts of the case, the dismissed and redundant employees of the Defendant have been locked out of their place of work by any employer who has refused to obey the directive and order of the Minister of Labour. The proper procedure, the Plaintiff argued, would be for the Defendant, in this instance, to abide by the order of the minister, and thereafter if it so wishes, challenge the order. The Plaintiff referred to *Ricegrower's Co-operative Ltd v Howling Success Australia Pty Ltd* (1987) ATPR 489 and *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148; 67 ALR 553, to support its contention that in deciding the balance of convenience the court may be guided by its evaluation and/or perception of the seriousness and weight of the Plaintiff's case.

Finally the Plaintiff argued that the 44 workers would not be sufficiently compensated in damages, if the injunction it is seeking is not granted. They have effectively lost their jobs and are left without any means to support their families. The additional unliquidated damages, including pain and suffering cannot, in the estimation of counsel for the Plaintiff, be adequately compensated in damages. The Plaintiff further argued that damages for loss of employment cannot replace

the individual's right to work. Citing the Indian case of *Madhu Kishwar v State of Bihar* (1996) AIR 1864; 1966 SCC (5) 125, as authority, counsel submitted that "*the right to work is the most precious liberty that man possess*" and depriving it from the workers in essence, denies them their right to life. Damages, in counsel's view, cannot be an adequate remedy under the circumstances.

Defendant's arguments

The Defendant opposes the Plaintiff's motion. In the first place, it contends that what the Plaintiff seeks, amounts to a mandatory injunction, in that it would require them to re-employ the 44 workers who they have dismissed pursuant to the terms of their contract of employment, or whose services have been terminated through redundancy packages. This is notwithstanding the ministerial order of 4 December 2003. The non-observance by the Defendant of the ministerial order, counsel submitted, is one that is premised on the argument that the order of 4 December 2003 issued by the Minister of Labour is fundamentally wrong in law. This is because the order is based on the PS for Labour's compulsory recognition order of 18 September 2003, which the Defendant claims is in turn, void or voidable.

The reasons why the Defendant hold this view is set out in details in its submissions as well as in the affidavit of one Mr Russell White, one of its directors. It is not the intention of the court to regurgitate the Defendant's contentions. However, it is sufficient, the Defendant argues, to show that there is a serious issue raised as to the legality or otherwise of the ministerial order.

The Defendant's additional ground for opposing the motion is based on the argument that the termination of the services of 40 of its employees are in accordance with their contract of employment. The government, in this instance, the Minister of Labour cannot, and does not, have the power to force an employer to re-employ workers, if they have been dismissed in accordance with the law. Finally, the Defendant submitted that the *American Cyanamid* principles are not applicable to mandatory injunctions, which it claims this one to be. At any rate, the Defendant is a reputable international company, which is more than adequately resourced, to compensate for damages to the Plaintiff, should the court find in its favour.

Court's consideration

In its motion of 5 December 2003, the Plaintiff is seeking from the court an order that the Defendant do comply with the Minister of Labour's order of 4 December "*and reinstate workers locked out by it from 18th day of November, 2003 until further Order*". The ministerial order states as follows:

> WHEREAS a trade dispute exists between Fiji Sugar and General Workers Union (hereinafter referred to as the "Union") on one part and Coral Sun Fiji Limited (hereinafter referred to as the "Employer") on the other part.
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> *AND WHEREAS, a trade dispute exists between Fiji Sugar and General Workers Union and Coral Sun Fiji Limited as the Company without any consultation, negotiation or agreement with the Union has decided to make redundant three (3) employees based at Nadi Airport on 17 September 2003. The Union contends that the Company has breached Clauses 1 and 4 of the Compulsory Recognition Order No 12 of 2003. These employees are Kamal Mani (Driver), Praveen Chand (Driver) and Rakesh Chand (Driver). The Union contends that the action by the Company is unfair, unjust and wrong.*
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> *AND WHEREAS, the Acting Permanent Secretary for Labour, Industrial Relations and Productivity on the 21st of November 2003 referred the trade dispute to a Disputes Committee duly constituted under the provisions of s 5A(1) of the Trade Dispute Act.*

Now THEREFORE, in exercise of the powers conferred upon me by s 6(4) of the Trade Disputes Act, I declare lock-out by Coral Sun Limited as unlawful from 6.00 am on 18th November 2003 and prohibit within one (1) hour from the time of receipt of this Order the continuation of such lock-out.

It very quickly becomes apparent upon reading the ministerial order, that what the Plaintiff seeks in its motion is not in conformity with the terms of the order. What the Plaintiff is seeking is the reinstatement of all the 44 workers whose services had been terminated by the Defendant on 19 November 2003 and who subsequently have been denied entry into the Defendant's premises. Yet the order by the minister of 4 December, finding that a state of lock out exists, and then declaring it illegal and prohibiting its continuance, only applies to the three employees specified in the preamble to the order. There is no mention or reference to the other workers. It would seem therefore that the effect of the ministerial order, if it is applicable at all, would apply only to the three driver employees. This view is supported by the fact that while the Plaintiff had reported the existence of a trade dispute between the Plaintiff and Defendant in respect of the other 40 workers in his letters of 24 November 2003 and 4 December 2003 respectively, there is no evidence produced to show that such dispute had in fact been accepted and declared by the Permanent Secretary under s 4 of the Trade Disputes Act and consequently, bring it within the ambit of ss 6 and 9 of the same. As there has not been a trade dispute accepted by the Ministry of Labour in respect of the 40 workers, and there being no specific reference to their plight in the relevant ministerial order, the application by the Plaintiff for the Defendant to comply with the said order by reinstating all the workers locked out from the Defendant's premises since 18 November 2003, would appear to be misconceived. In the view of this court, the only workers who are covered under the ministerial order are the three driver employees named therein.

But even if this court were to assume for a moment that the lock out order applied equally to all the other employees, the question is whether the injunction application is applicable and if so, has sufficient merit to persuade this court to decide in its favour. In terms of its motion, the Plaintiff seeks an order of the court for the Defendant to comply with the order made by the Minister of Labour on 4 December 2003. It furthermore sought the reinstatement of the workers locked out on 18 November 2003. However, there appears to be some misconceptions on the part of the Plaintiff as to what exactly is the nature of the relief it is seeking. This is because there are two distinct and separate issues involved. One does not necessarily arise as a result of the other. The fact that the minister had ordered the lock out illegal does not ipso facto mean the reinstatement of the workers who had, according to the Defendant, been dismissed for breaching the terms of their contract of employment. Furthermore, "*lock out*" as defined under s 2 of the Act, assumes that there already exists a trade dispute, which the court has already found to the contrary, in the case of the 40 workers.

What is the nature of the relief the Plaintiff is asking? There is no doubt to this court, having considered all that is before it, that what the Plaintiff seeks amounts to a mandatory injunction. It would, if it succeeds, order that not only must the Defendant comply with the minister's order, but also direct that it reinstate all the 44 workers that have been dismissed by the Defendant. The fact that the Plaintiff's prayer has the phrase "*until further Order*", does not make it any different from the essence and nature of a mandatory injunction and the type of the order that would ensure should the court entertain the Plaintiff's motion: see *Halsbury's* 4th ed vol 24 pp 901–2.

The law on the granting of mandatory injunction is well-settled and is fully discussed in *Redland Bricks Ltd v Morris* [1970] AC 652; [1969] 2 All ER 576 (*Redland Bricks*) and most recently in *Noodles Bakery Ltd v Long Life Noodles Bakery Ltd* [2003] FJHC 291. While the court has jurisdiction to grant mandatory injunction upon an interlocutory application, it does so only in exceptional circumstances. These are fully summarised by Lord Upjohn in *Redland Bricks* at AC 655. It is equally clear that the courts very rarely, if ever, grant mandatory injunction in situations where breach of contract are alleged. It is sufficient to say that the circumstances of this case does not satisfy any of the conditions set out in Lord Upjohn's judgment.

Even if the relief sought was not mandatory in nature as the Plaintiff's counsel argues, it would still be difficult, under the confusing nature of the evidence so far filed in this case, for the court to grant any form of injunctive relief. Both parties agree that there is a serious issue raised that is to be argued. However the balance of convenience, in the court's view, would tend to favour the Defendant who is well-placed to compensate and in fact already made an undertaking as to damages. There is therefore very little likelihood of the Plaintiff succeeding in its application.

There remains only the issue of the Defendant's summons dated 19 December 2003 for leave to join the Ministry of Labour as the second Defendant in the proceedings. The Defendant referred the court in its submission, to O 15 r 6(i) and (ii). Under this order, the court may add additional part or parties to the proceedings if the court is satisfied that the party to be joined is someone whose presence is necessary and whose evidence will enable a proper and complete adjudication to be made by the court.

At the heart of this case is the issue whether the CRO issued by the Permanent Secretary of 18 September 2003 was valid. Depending on whether the CRO was valid or not, will ultimately decide whether the consequent actions taken, including the ministerial order of 4 December 2003, were legal or otherwise. It would seem to the court, where in the circumstances of this case the Ministry of Labour's decision resulting in the 18 September 2003 order has not yet been heard or at least canvassed, that it is only wise and proper to add the ministry as a party to the proceedings, although not necessarily as a defendant.

In the final, the Plaintiff's motion is hereby dismissed with costs of $250 to the Defendant. The Defendant's application of joinder is allowed only to the extent that an order is hereby made for a third party notice to be issued by the Defendant in the name of the Ministry of Labour with the order that the documents, as amended, be served by the Defendant, on the Permanent Secretary of Labour within 14 days.

Application dismissed.