IN THE SUPREME COURT OF FIJI

000214

Civil Jurisdiction

Civil Action No. 129 of 1980

Between:

SHAHEED MOHAMMED Plaintiff

and

v.

1. THE FIJI PUBLIC SERVICE ASSOCIATION
2. MAHENDRA CHAUDHARY in his capacity as General Secretary of the Fiji Public Service Association. Defendants

Mr. N. Prasad with Mr. M.V. Bhai for the Plaintiff.
Mr. G.P. Lala with Mr. J. Singh for the Defendants.

JUDGMENT

By this action the plaintiff seeks declarations:-

(1) That he is and continues to be a bona fide member of the Fiji Public Service Association (F.P.S.A.) notwithstanding the amendment to section 6(a)(i) of the F.P.S.A.'s Constitution dated the 1st November, 1979 and

(2) That the letter dated 13th March, 1980 from the General Secretary of F.P.S.A. is null and void.

It is not in dispute that the plaintiff has been a member of F.P.S.A. since 1970 and an executive member of its Lautoka Branch since 1976.

Prior to the 1st November, 1979 the relevant portion of Clause 6(a) in the F.P.S.A.'s Constitution read as follows:-

"6(a) Membership of the Association shall be open to persons, not being unestablished staff, who are employed by :-

(i) The Fiji Government as bona fide civil servants."

On the 31st October, 1979 an amendment to Clause 6(a) was approved, presumably by the members of the Association, in General Meeting by adding a proviso in the following terms:-

" Provided they are not eligible for membership of any other registered trade union."

The plaintiff is a school teacher and it is the view of the second defendant, if not also of F.P.S.A.'s executive, that since the plaintiff is considered to be eligible for membership in the Fiji Teachers Union (F.T.U.) he no longer qualifies for membership in F.P.S.A. and his membership has lapsed.

The second defendant by letter dated the 13th February, 1980 notified the plaintiff that his membership in F.P.S.A. had lapsed with effect from the 1st November, 1979, the date of registration by the Registrar of Trade Unions of the amendment of Clause 6(a) of F.P.S.A.'s Constitution.

It was only after the plaintiff had on the 5th February, 1980 submitted certain motions and nominations to the second defendant for consideration at the Annual General Meeting of F.P.S.A. on 1st March, 1980 that the second defendant notified the plaintiff his membership had lapsed.

Mr. Prasad, who appeared for the plaintiff, sought to inform me of a personality clash between the plaintiff and the second defendant but, as I informed him, I am concerned only with the facts disclosed by the affidavits filed in this action. The facts are not in dispute. What is in dispute is whether the amendment to Clause 6(a) automatically terminated the plaintiff's membership or

entitled the executive of F.P.S.A. to strike the plaintiff's name off its register of members.

The defendants rely on two clauses, 10(b) and 15(a)(v), in the Constitution of F.P.S.A. Clause 10(b) provides as follows:-

> " A person whose name has been entered in the roll of members and is subsequently found to be ineligible for membership, may be removed from membership by notification in writing whereupon he shall be deemed never to have been a member and any subscription paid by him shall be refunded. "

Clause 15 provides for Cessation of Membership and Clause 15(a)(v) provides:-

> "(a) A person shall cease forthwith to be a member of the Association if:-
>
> (v) he subsequently fails to qualify under section 6 of this Constitution. "

The defendants argue that the plaintiff is eligible to join the F.T.U. Clause 6 of that Union's Constitution provides:-

> "(6) The Union is open to any person resident in Fiji of either sex employed in the teaching profession. "

The F.T.U. Constitution does not have a provision in it similar to Clause 6(c) of F.P.S.A.'s Constitution declaring that a person who is a member of another registered trade union is not eligible for membership of the Association. The absence of such a provision in the F.T.U.'s Constitution is immaterial in my view since section 32(2) of the Trade Unions Ordinance provides that:-

> " No person shall be a voting member in more than one trade union."

Section 32(2) refers only to voting member and would not cover honorary, associate, or other form of membership provided such membership carried no voting rights.

The plaintiff on the 1st November, 1979 had the qualifications required for membership in the F.T.U., as he was resident in Fiji and was engaged in the teaching profession. He was, however, on that date a full member of F.P.S.A. with voting rights and in my view the F.T.U. executive could not legally admit him to full membership i.e. with voting rights in F.T.U. in breach of section 32(2) of the Ordinance. Until he terminated his membership in F.P.S.A. he was not in my view eligible to join the F.T.U. on the 1st November, 1979.

The amendment by F.P.S.A. of Clause 6(a) is also unfortunately worded. The amendment uses the word "eligible" where the proper word should have been "qualified". "Eligible" means "fit or proper to be chosen (for an office etc.)". "Qualify" means "to make oneself competent for something by fulfilling some necessary condition."

The executive of F.P.S.A. can readily determine whether a person is qualified to be a member in another union by perusing that union's constitution but it is not competent to determine whether that person is eligible for membership in that union. It is the executive of that union and only that executive which could decide on the eligibility of that person.

If the amendment to Clause 6(a) only affects applicants for membership after the date of the amendment it is immaterial whether the amendment uses the word "eligible" or "qualified". The F.P.S.A.'s executive is not bound to accept a new member and can refuse membership if the executive considers the applicant could possibly join another union.

If however, the amendment is interpreted so as to divest an existing member of his membership his eligibility to join another union must be factual and not a mere possibility. As I have stated the executive is not in my view competent to decide on the eligibility of a person to join another union.

The defendants cannot rely on Clause 10(b) of F.P.S.A.'s Constitution. The wording of that provision makes it clear that it is intended to cover the situation where after admission as a member it is found that he was not eligible for admission at the time he was admitted. That is the reason for the clause stating that the member is "deemed never to have been a member" and providing for refund of any (which must be interpreted as "all" in the context) subscriptions paid by him.

Clause 15(i)(v) covers the situation where a member properly admitted subsequently loses his qualification. Before Clause 6(a) was amended Clause 15(i)(v) would have covered the situation where a member ceased to be a civil servant. On such cessation he ceases forthwith to be a member.

There has been no failure or loss of qualification by the plaintiff. He is still a bona fide civil servant with the qualification which gained him admission into F.P.S.A. There has been an amendment to the admission rules after the plaintiff became a member which could have prevented him becoming a member had it been in force at the time he applied for membership.

Quite apart from the views I have expressed regarding F.P.S.A.'s incompetence to adjudicate on the eligibility of a member to join another union, or my view

that there has been no failure by the plaintiff which would terminate his membership, the amendment in my view can only take effect from the date it was passed by the members in general meeting.

Counsel have not been able to refer me to any authority which is authority for the proposition that an amendment to a membership clause in a club's constitution would automatically terminate a member's membership. On the other hand B.L. Mathieson in Volume 1 of his work Industrial Law in N.Z. at p.160 says :

> "If a rule relating to qualification of office bearers is altered or repealed without provision being made to preserve existing offices for the time being, the repealed rule may still be looked at for some purposes. The offices of the existing incumbents are not necessarily terminated."

There is reference to the case of Higgins v. McGrane and Lynch (1961) Industrial Court which is not available for reference. Without perusing that case I am unable to determine what the author means when he says "The offices.... are not necessarily terminated".

I consider however that the authorities dealing with interpretation of statutes by analogy should be followed.

The law in that field is quite clear. Where a statute affects constitutional rights, unless a clear and unambiguous intention so to do appears from a statute, it should not be construed so as to confer or take away rights to vote on similar constitutional rights.

The law is also clear as to when a statute takes effect.

Halsbury in Vol.36 3rd Edition at p.423 states:-

"644 Presumption against retrospection. The general rule is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective effect is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature. "

Section 18(3)(c) of the Interpretation Ordinance provides:

"(3) Where a written law repeals in whole or in part any other written law, then, unless a contrary intention appears, the repeal shall not -

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed - "

In Colonial Sugar Refining Co. v. Irving (1905) A.C. 369 the Privy Council held that the appellants had a right of appeal to the Privy Council notwithstanding that the Australian States had abolished the right of appeal to the Privy Council. The Privy Council held the right had become vested i.e. if at the time of the action there was a right of appeal to the Privy Council the fact that the act abolished such appeals did not alter the position.

So far as statutes are concerned if I were considering a statutory amendment in the nature of the amendment to Clause 6(a) F.P.S.A. Constitution I would hold that such an amendment coupled with Clause 15(a)(v) could not divest the plaintiff of his membership in F.P.S.A. and could only take effect from the date of amendment and apply to new applications.

I see no reason why the effect of the amendment to F.P.S.A.'s Constitution should be considered any differently to an amendment of a statute. The plaintiff qualified for admission into F.P.S.A. and he has done nothing which would

make him liable to expulsion. He still retains the qualification which gained him admission into F.P.S.A.

He was not expelled from F.P.S.A. and, although he complains that F.P.S.A.'s actions were contrary to the rules of natural justice, there was no breach of such rules. F.P.S.A. purported to remove the plaintiff's name from its register on the grounds that he had ceased to be a member because he had lost his qualification for membership. It was held in James v. New Zealand Waterside Workers Industrial Union of Workers (1949) N.Z.L.R. 1 that removal of a member's name under a rule regulating the purging of that register, which does not in law amount to an expulsion, is proper and justified without notice or a hearing if the facts warrant and justify the purging; and, if they do not the displaced member has his remedy at law.

In my view the facts in this case do not justify the secretary or the executive of the F.P.S.A. purging the register by deleting the plaintiff's name from the register. The plaintiff in my view is a member of F.P.S.A. although that Union cannot now do much for him. The F.T.U. is the Union to effectively represent the plaintiff. However, I am only concerned with the legal situation.

I declare that the plaintiff is and continues to be a bona fide member of the Fiji Public Service Association notwithstanding the amendment to section 6(a)(i) of the Association's Constitution dated the 1st November, 1979.

In view of this declaration it is not necessary to make the second declaration sought by the plaintiff.

The plaintiff is to have the costs of this action and I so order.

(R.C. Kermode)
JUDGE

SUVA,
June, 1980.