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PARMESHWAR

v.

THE MINISTER FOR TOURISM, TRANSPORT & CIVIL AVIATION & THE
ATTORNEY-GENERAL IN AND FOR THE FIJI

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[SUPREME COURT—Kermode J.— 29 October 1982]

Civil Jurisdiction

Industrial Law—Trade Disputes—Shipyard Manager—Notice of Downgrading invalid—Declaration therefor purported regrading null and void.

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V. Maharaj for Plaintiff

J. K. L. Maharaj for Defendant

Application by plaintiff for a declaration that a purported regrading of him by the Shipyard Manager of the Government Shipyard was null and void and an order reinstating him to his former grading as an employee.

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The plaintiff was in a category "Government Unestablished Employee", in respect of which written conditions and rules for employment were agreed to by the Joint Industrial Council (JIC) for Government Unestablished employees on 29 December 1976 and came into force on 1 January 1968.

Facts proven or accepted by the court included:

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In 1978 plaintiff was engaged by the Public Works Department (PWD) as an Assistant Plumber.

On 17 February 1981 he completed an application form seeking employment in the Marine Department as a Boilermaker disclosing therein that he was then employed by the PWD as an Assistant Plumber.

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Upon interview it was noted that plaintiff would be suitable for employment as a Welder or an Assistant Platemaker and that he was already employed as an Assistant Plumber.

The Supervisor who tested him recorded that the test result was "very good" and recommended he should start immediately as a Platemaker.

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The Shipyard Manager confirmed the Supervisor's recommendation.

The plaintiff was engaged as a Platemaker on 6 March 1981.

On or about 16 September 1981 without prior notice or explanation plaintiff received a Marine Department "regrading sheet" notifying him of his new classifi-

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cation as Assistant Platemaker with a rate of pay lower by \$1.41 (per hour). The date of commencement of the new classification was 11 September 1981. A

This regrading sheet was one of downgrading and reduction to plaintiff's hourly rate with retrospective effect.

The Senior Supervisor of the Government Shipyard said in evidence he had no complaints about the plaintiff's work which previously was up to standard. B

The Plaintiff's Foreman said he had at no time complained of plaintiff's work or recommended downgrading, that the standard of his work was very good, that the Shipyard Manager wanted to downgrade him and he told the Manager not to do so because of (plaintiff's) past good performance.

In reply to a letter dated 23 September 1981 from plaintiff querying his new grading the Shipyard Manager set out his reasons which include: C

"Your regrading has been made, because it is now apparent that you were a plumber assistant in the Public Works Department prior to joining Marine Department on transfer. The circumstances of your joining us this way is similar to promoting a Plumber 'C' in our Plumber Shop to become a Platemaker in our Boilermaking Shop, which you will have to agree lacks basic natural justice, considering others who have been working in this department for ages now. Under the circumstances, it is only fair that you should follow the proper channel of promotion. You, therefore, should first serve as a Trade Assistant, become an Assistant Platemaker, before you can be promoted to become a Platemaker. The action taken therefore is merely to normalize the breach of our system of promoting people; the breach which was created when you jumped from a Plumber Assistant to become a Platemaker. We have allowed one step though, that you become an Assistant Platemaker. D E

Furthermore, while it can be said that you have experience in platemaking generally, there is no proof available to say that you have had experience in ship construction, to warrant your direct promotion to the position of Platemaker." F

The Court found the reasons expressed were not valid. It did not accept that the Manager had downgraded him for those reasons or believed he could do so.

The Court accepted that the real reason for purported downgrading was the Manager's capitulation to Union pressure as evidenced by later paragraphs of the letter quoted in the judgement which included that one of the Manager's jobs was to keep industrial peace. G

The Court commented that "the Manager's way of keeping industrial peace was to pacify the Union by riding roughshod over the plaintiff and ignoring his rights and feelings."

The plaintiff, then being a member of the PWD Employees Union, received no satisfaction from it when he complained and was told to "go to hell." H

Rule 32 provided for regrading of employees thus:

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"(a) Where an employee is to be regraded, the officer in charge will give such notice in writing as is reasonably possible to the employee and to the section representative."

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The Shipyard manager had deliberately ignored this rule and purported to notify the plaintiff that he had downgraded him some days before the date of the notice which was of notice to downgrading and not, as the rule mentioned, notice of intention to regrade.

The first defendant should not have been a party and action against him was dismissed.

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Held: The purported regrading without prior notice and with retrospective effect was not within the Shipyard Manager's powers and must be considered a nullity.

The Crown Proceedings Act S.15(1) (Proviso (a)) did not permit an order reinstating. The Court was empowered to make a declaratory order which it made in the following terms:

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"I order and declare that the purported regrading of the plaintiff from the classification of Platemaker to Assistant Platemaker with effect from 11 September 1981 was ultra vires. The authority of the officer empowered to regrade the plaintiff is null and void and of no effect."

KERMODE, Mr Justice:

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Judgment

The plaintiff is a Government employee working at the Marine Department Suva. He is what is termed a Government unestablished employee.

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In respect of such unestablished employees there are written conditions and rules for employment agreed to by the Joint Industrial Council for Government Unestablished Employees on the 29th December, 1967, which came into force on the 1st January, 1968.

In 1978 the plaintiff was engaged by the Public Works Department as an assistant plumber.

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On the 17th February, 1981, he filled in an application seeking employment in the Marine Department as a boilermaker. Of relevance in this action, he clearly disclosed in his application that he was at the time of his applications employed by the Public Works Department as an assistant plumber. He was interviewed and given tests to assess his capabilities.

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The person who interviewed him noted on the application form that the plaintiff would be suitable for employment as a welder or assistant platemaker. The interviewer also noted that the plaintiff was already employed by the Public Works Department as an Assistant Plumber.

The Supervisor who tested him, Peni Koroi, has recorded on the form that the test result was "very good", the highest rating on the form. He recommended "It good. To start as a platemaker. To start immediately". The Shipyard Manager confirmed the Supervisor's recommendation and the plaintiff was engaged as a plate-maker on the 6th March, 1981. A

The only document given to the plaintiff on his engagement was a Marine Department "Engagement Sheet" signed by the Personnel Officer. The sheet specifies the job title "Platemaker" and the Rate of Pay \$155 c.p.h.". B

On or about the 16th September, 1981, without any prior notice or explanation, the plaintiff received a Marine Department "Regarding Sheet" which notified him of his new classification as Assistant Platemaker and of his new rate of pay at the lower figure of \$1.41 (an hour). The sheet, or notice if it is considered as such, stated that the date of commencement of the new classification was 11.09.81.

If this Regrading Sheet was intended to be a notice, it was notice of a downgrading and reduction of the plaintiff's hourly rate of pay with retrospective effect. C

The defendants in their original defence, as an alternative defence, alleged the downgrading was effected with the consent and acquiescence of the plaintiff and arose because (inter alia) his work was below standard. An amended defence was filed omitting this alternative defence.

The Senior Supervisor of the Government Shipyard was called as a witness by the plaintiff. He said he had no complaints about the plaintiff's work, which previously was up to standard. He did say, however, that since he was downgraded the plaintiff's work was not so good. D

The plaintiff's foreman said he had at no time complained about the plaintiff's work or recommended that he be downgraded. He said that, from the start to the time he was downgraded, the standard of the plaintiff's work was very good. This witness said the Shipyard Manager, Mr A. T. Naigulevu, wanted to downgrade him and he told the Manager not to do so because of his past good performance on the job. He said he was surprised when the plaintiff was downgraded. E

The Shipyard Manager in reply to a letter from the plaintiff querying his new grading set out in his letter of 23/9/81 his reasons for the downgrading. F

Two reasons are given in the letter as follows:

"Your regrading has been made, because it is now apparent that you were a plumber assistant in the Public Works Department prior to joining Marine Department on transfer. The circumstances of your joining us this way is similar to promoting a Plumber 'C' in our Plumber Shop to become a Platemaker in our Boilermaking Shop, which you will have to agree lacks basic natural justice, considering others who have been working in this department for ages now. Under the circumstances, it is only fair that you should follow the proper channel of promotion. You, therefore, should first serve as a Trade Assistant, become an Assistant Platemaker, before you can be promoted to become a Plamaker. The action taken therefore is merely to normalize the breach of our system of promoting people; the breach which was created when you jumped from a Plumber Assistant to become a Platemaker. We have allowed one step though, that you become an Assistant Platemaker. H

Furthermore, while it can be said that you have experience in platemaking generally, there is no proof available to say that you have had experience in ship construction, to warrant your direct promotion to the position of Platemaker."

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These were not valid reasons for downgrading the plaintiff after he had been appointed to the new position and had been working in it for over six months and I do not accept that the Manager in fact downgraded him for those stated reasons or believed he could do so.

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The real reason was the Manager's capitulation to Union pressure and evidence of this appears in paragraphs 5 and 6 of his letter which are as follows:

"In any case, (if I could please digress) I am really surprised, that you have been able to get on the wrong side of your own Union in such a short time of employment in this department. You must understand that Fiji has reached a stage where Union recognition is compulsory, and I would expect all workers in the Shipbuilding Section, which is under my command to be Union members. How on earth you got the Union to petition us, against your own position is absolutely inexplicable, and perhaps you would like to enlighten me on the matter.

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One of my jobs is to keep industrial peace in this Section, and I suggest to you that you should make your peace treaty with your Union."

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The Manager's way of keeping industrial peace in his section was to pacify the Union by riding rough shod over the plaintiff and ignoring his rights and feelings.

The plaintiff at the time he was downgraded was a member of the P.W.D. Employees Union. He received no satisfaction from the Union when he complained to officials about the downgrading. When he went to see his Union delegate the delegate said "you go to hell".

E

Mr Sukulu Tabi, a platemaker who worked with the plaintiff, said he was "a representative of the people of the Union and members". He signed a petition organised by the Union about the plaintiff setting out the grievances of the Union. He said the Union considered there were members in the Union better qualified than the plaintiff for the position. He admitted that on 19.8.82 he threw a stone at the plaintiff.

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In answer to a question from the Court he said that one Kitione Tavaga, an assistant platemaker, was entitled to the job ahead of the plaintiff.

The Union, its then office bearers and the Shipyard Manager have no reasons to be complacent or proud of their actions and conduct so far as the plaintiff is concerned. They treated him most unfairly.

Rule 32 provides for regrading of employees. Paragraph (a) provides as follows:

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"(a) Where an employee is to be regraded, the officer in charge *will* give such notice in writing as is reasonably possible to the employee and to the section representative."

(Underlining is mine to emphasise the mandatory nature of the rule)

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Other paragraphs of the Rule provide a procedure that enables an employee to invoke the grievance procedure (Rule 43). There is also provision that the Controller of Organization and Establishment can allow or reject an appeal.

The Shipyard Manager deliberately ignored this rule which he must have known and purported to notify the plaintiff that he had downgraded him some days before the date of his notice. A

The Manager apparently has authority to downgrade an employee but he had no authority to downgrade him in breach of the mandatory Rule 32(a). The notice mentioned in this rule is notice of intention to regrade and not notice of the downgrading.

The purported regrading without prior notice and with retrospective effect was not within the Shipyard Manager's powers and must be considered to be a nullity. B

The purported regrading was in breach of contract but it did not terminate the contract of employment as might have been the situation in the case of wrongful dismissal.

If the Shipyard Manager made a mistake in recommending the plaintiff to the position with knowledge that he was already employed in the P.W.D. as an Assistant Plumber and the Union had valid grounds for complaint then it behoved him to find a niche for the plaintiff in the Public Works Department where his experience could be utilised without any loss of pay. C

The Union for its part should also have pressed for this, if it had a justifiable complaint and not taken the course of unfairly persecuting and ignoring the rights of one of its members. So much so that the plaintiff felt compelled to resign from the Union. The plaintiff had breached the Union rule in applying for a position in the Marine Department. D

Before considering the relief claimed, I would point out that the first defendant should not have been made a party. He is not the employer of the plaintiff. The action against him is dismissed with no order as to costs. E

The plaintiff seeks a declaration and an order reinstating him and damages.

An order reinstating him would have the effect of either a mandatory injunction or an order for specific performance, relief which this Court is not legally empowered to grant. Section 15(1) Proviso (a) of the Crown Proceedings Act provides as follows:

"15.(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require. F

Provided that—

(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and G

(b) H

All the Court is empowered to do is to make an order declaratory of the rights of the plaintiff.

A I order and declare that the purported regrading of the plaintiff from the classification of Platemaker to Assistant Platemaker with effect from the 11th September 1981 was ultra vires the authority of the officer empowered to regrade the plaintiff and is null and void and of no legal effect.

The plaintiff is to have the costs of this action.

Judgment for the Plaintiff against second defendant.

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