S.I. NATIONAL UNION OF WORKERS -v- S.I. PLANTATION LTD

High Court of Solomon Islands
(Palmer J.)
Civil Case No. 317 of 1992
Hearing: 9 December 1992
Judgment: 14 January 1993

R. H. Teutao for Applicant
T. Kama for the Respondent

PALMER J: The applicant, Solomon Islands National Union of Workers **(SINUW)** applies by originating summons for the following orders -

> "**(1) a declaration that the Respondent (Solomon Islands Plantation Limited) had contravened section 10(1) as read with section 10(2) of the Trade Disputes Act 1981 when the Respondent dismissed 99 of its employees on or after 12th October 1992 after a trade dispute had been referred to the Trade Dispute Panel by the applicant on 12 October 1992.**
>
> **(2) Consequent upon the declaration sought in (1) above for a further declaration that the dismissal of the 99 employees on 12th October 1992 by the Respondent is unlawful and void and that the said 99 dismissed employees are still employees of the Respondent.**
>
> **(3) An order directing the Respondent not to continue with the contravention of section 10(1) as read with section 10(2)(c) of the Trade Disputes Act 1981 and that the Respondent reinstate the 99 dismissed employees.**
>
> **(4) An order requiring the Respondent to pay, if appropriate, loss of income suffered by the 99 dismissed employees since 12th October 1992."**

The first important question to consider here is whether there is a trade dispute. The Applicant says, there is, whilst the Respondent says, no.

The word '***trade dispute***' is defined by the Trade Disputes Act 1981 in the Schedule. The relevant part reads:-

> *"A dispute between employees and employers, or between groups of employees, which is connected with one or more of the following matters -*

(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment of one or more employees."

Mr Teutao, counsel for the Applicant submits that the dispute is between Solomon Islands Plantation Limited (**SIPL**) and SINUW about the termination of the Managing Director's (Mr Martin Collins) employment with SIPL. On the other alternative it is a dispute between SINUW and the Managing Director as employees of SIPL.

Mr Kama submits that the Managing Director, Mr Collins is not an employee of SIPL. He bases this on an employment agreement between Mr Collins and the Commonwealth Development Corporation (**CDC**) dated the 3rd day of March 1988. He relies on this document as showing that Mr Collins is an employee of CDC and not SIPL.

The gist of Mr Teutao's submission on the other hand is that there is a nexus or a casual link to the day to day running of the company and this is sufficient to regard him as an employee of the said company. There is an involvement which links him to the company so much so that he should be rightly regarded as an employee of the company although his remunerations are paid for by a third party.

Mr Collins occupies the post of Managing Director with SIPL. He is the Manager as well as a Director of the company.

SIPL is a private limited company, duly incorporated on the 26th of April 1971. The shareholders include Mr Collins, Mr Shone and landholding groups and trustees of various parcels of land where the company carries on business. The directors as at the 4th of November 1992 are:

Colin Gatt, Brian Glassock, Martin Collins, all of British Nationality and John Kaitu, a Solomon Islander.

SIPL has a very close link with CDC, a body corporate whose head office is located at London, England. The ties go as far back as 1971 and were reflected in a document signed on the 30th June 1971. That document has now been superseded by another document signed on the 14 December 1983. This document is marked **Exhibit 2.**

That document is of vital significance. Its title reveals what it is all about. It is a management agreement and at section 2 of the agreement at page 2, CDC is appointed specifically as the corporate manager of SIPL's Undertakings and Business.

I will pick out what I consider to be the applicable sections and clauses in the agreement.

Section 3 deals with the basis of the co-operation between the parties and their responsibilities.

Clause 3.01 states:

*"The Company's Board of Directors (hereinafter referred to as **'the Board'**) shall determine the policies of the Company and CDC shall be responsible for implementing those policies."*

Clause 3.03 then states and this is the important clause to note:-

*"**The Board shall appoint as Chief Executive of the Company** the person for the time being provided by CDC pursuant to clause 6.01 to fill that post. Such Chief Executive shall be responsible, under the direction and supervision of CDC, for the day to day management of the company's affairs and the Board shall invest him with all necessary authority and powers for this purpose."* (Underlining mine)

The other clause that should be read with clause 3.03 is clause 6.01. The relevant parts read:

"..... CDC shall provide, by way of secondment of persons employed by CDC or any subsidiary or associated company of CDC, throughout the Contract Period two suitably qualified and experienced person to serve as Chief Executive and Financial Controller / Secretary respectively of the Company who shall devote the whole of their time and attention to the discharge of CDC's duties hereunder. The person for the time being so provided to serve as Chief Executive shall be required to perform his duties in accordance with directions given to him by CDC."

What we can see quite clearly from these two clauses is that although the Chief Executive is provided by the CDC, the power of appointment is vested in the Board. It is the Board who appoints the Chief Executive and when this happens it is my view that the Chief Executive then becomes an officer of the company; in other words an employee and referred to as the Managing Director.

What one can glean from clause 3.03 is that the Chief Executive ***"shall be responsible, under the direction and supervision of CDC, for the day to day management of the Company's affairs and the Board shall invest him with all necessary authority and powers for this purpose."***

In clause 6.06 it say that the Chief Executive ***"shall devote the whole of their time and attention (except during illness, normal off-duty hours and periods of leave) to the discharge of CDC's duties hereunder"***.

In other words, one of the crucial tasks of the Chief Executive is to perform the management responsibilities of CDC as required under clause 2.03.

In Halsbury's Laws of England 4th Edition paragraph 501, the learned author cites a test which has emerged from recent authorities on the issue of whether an employer and employee relationship exists. That test is and I quote:

"whether on the one hand the employee is employed as part of the business and his work is an integral part of the business, or whether on the other hand his work is not integrated into the business but is only accessory to it or it is done by him on his own account."

If I apply this test to the circumstances of the Managing Director's work, there is no way I can find that his work is not an "***integral part***" of SIPL's business and that he was not, employed as part of the business!

He was appointed by the company and therefore employed by the company as its Managing Director. He is wholly committed to the company's affairs in the performance of his management duties, although he is directed by CDC and remunerated by CDC.

There are other things such as housing accommodation, travelling and medical expenses and other related expenses which the company provides. **(See clause 6.04 paragraphs 1 - 4).**

I am unable to find applying the test that his work is not integrated into the business and that it is only accessory to it, or that it is done on his own account.

Perhaps one of the reasons that may have contributed to the confusion or misunderstanding is the separate employment contract that Mr Martin Collins signed with CDC. A copy of that contract was submitted as **Exhibit I.** It is a normal employment contract.

One of the clauses **(Clause 3(1))** stipulates that and I quote -

".....the Employer shall have the right from time to time -

(a) to vary the nature and place of the employment;

(b) to require the Employee to serve, visit or reside in such country or countries as the Employer thinks fit;

(c) to direct the Employee to serve any associate."

The argument that Mr Kama sought to press is based on the ***control test*** as generally recognised by this Court and applied in the case of ***Tri-Ed Association -v- S.I. College of Higher Education*** *1985/86 SILR 173.*

At page 179, Sir John White, President of the Solomon Islands Court of Appeal quoted with approval the indicia of employment as set out in ***Fridman's Modern Law of Employment*** *at page 20* and I shall set that out also here as follows -

"(a) The master's power of selecting his servant.

(b) The payment of wages or other remuneration.

(c) The master's right to control in a general manner the work to be done.

(d) The master's right of suspension or dismissal."

The argument propounded by Mr Kama is that the payment of wages of Mr Collins is paid for by CDC. He is under the direction and control of CDC and the powers of suspension or dismissal are exercised by CDC. The conclusion therefore is that he is not an employee of SIPL, although he lives and works at SIPL's premises and works for the company on a full time basis.

This is an attractive argument from the perspective of the control test. But we need to bear in mind that the question of "***whether or not, on any given case, the relationship of employer and employee exists is a question of fact***". (See **Halsbury 4th Ed. Volume 16 paragraph 502**).

Secondly, the same author in **Fridman at page 20** and also quoted at **page 180** by the learned President stated:-

> *"Looked at ..... the most important test of service is whether the person alleged to be a servant was under the control of the alleged master, in other words the question to be answered is whether the master retained the power of controlling the work to be done by the servant ..... The greater the amount of direct control ..... the stronger the grounds for holding it to be a contract of service."*

In support of this the opinion of Lord Thankerton in the case of ***Short -v- J and W. Henderson Ltd*** *(1946) 39 B.W.C.C. 62* was cited by Sir John White in which he refers to the principal requirement in such a relationship as ***the control in some reasonable sense, of the method of doing the work***, and the "***factor of superintendence and control as decisive of the legal quality of that relationship***".

I accept these statements sum up the law as applied to the control test. However when applying it to the facts of this case, there appears to be a flaw in the submissions of the Respondent.

The misconception that has arisen has been caused in my view by ignoring or forgetting the link or relationship between SIPL and CDC contained in the management agreement. The link can be traced right back to the inception of the company's business undertakings and activities. The company was incorporated in April of 1971 and the first agreement was made two months later.

There is no doubt that CDC plays a major role in the running of SIPL's affairs. It is not only the corporate manager, but it also furnishes personnel, equipment, funds, expertise and the majority of the directors of SIPL.

The "**brains**" or the "**mind**" of SIPL therefore to a large extent come from CDC, through its directors.

The important factor to note in their relationship is that they are so intertwined with each other that to try to separate or make distinctions as to their running or

involvement in the company's affairs would be quite difficult. In other words, the control exercised over the Managing Director by CDC in reality is vested in SIPL.

SIPL sets the policies, through its directors but it is CDC that implements them. In implementing those policies an employee of CDC, Mr Collins, is employed by SIPL as its Managing Director or the Chief Executive.

The direct control and supervision may be exercised by CDC but the overall or general control is vested in the company. In the case of ***Cassidy -v- Ministry of Health*** *(1951) 1 All E.R. 574 at page 588*, Denning LJ brings out this general power of control quite vividly in the example he gave of the hospital authorities which employ surgeons, doctors and nurses. He says that there is no direct control or supervision over and as to how a surgeon does his work. But there is the overall control through the power of appointment; and accordingly the hospital authorities are the employers of the surgeon.

In **Halsbury's Laws of England, 4th Edition Volume 16 paragraph 502** the learned author states that a "***person may be an employee part time or to different employers***", again recognising the fact that an employee may have more than one employer. Also at the same paragraph, the learned author states:

> *"A person may be the employee of another even if a third party has the power of appointing or dismissing him or of requiring his dismissal or has powers of direction and control in regard to his work or pays him his wages."*

This statement sounds so similar to the facts of this case.

My findings of fact are that Mr Martin Collins occupying the post of Managing Director of SIPL is an employee of that company. Accordingly the referral made by the Applicant contained in its letter of the 12 October 1992 to the Panel was a trade dispute and within paragraph (b) of the Schedule to the Trade Disputes Act 1981.

Having established that there was a trade dispute, the second important question that this Court should now consider is whether there was a referral made, and when was it made.

There is no dispute that by a letter dated 12 October 1992, Mr David Tuhanuku, the General Secretary of SINUW, being the Union representing the 99 workers, delivered a letter to the Secretary of the Trade Disputes Panel referring the trade dispute over a demand by the Union member employees of SIPL for the removal of the Managing Director, Mr Collins. A copy of that letter is marked **Exhibit G** in the affidavit of Mr David Tuhanuku filed on the 23 October 1992.

It is not disputed that a copy of that referral letter was faxed to the Respondent's Head Office at Tetere on the same day at about 9.00 a.m. It is not disputed that this was duly received by the Respondent. In the affidavit of John Anita filed on the 30 November 1992 at paragraph 5 he states that Mr Jimmy Hilly, the Assistant Mill Manager told him that the Respondent had received the Applicant's

referral and that the management would hold a meeting to discuss the referral. This was on the 13 October 1992. In paragraph 9 of Mr John Adifaka's affidavit filed on the 20 November 1992 he acknowledges that a letter of referral was sent by the Applicant dated the 12 October 1992 to the Trade Disputes Panel. I am satisfied that a copy of the letter of referral by the Applicant was received by the Respondent on the same day.

The Applicant contended that service of that copy of the referral letter is sufficient notice of a ***duly referred dispute*** to the Panel.

The Respondent on the other hand argues that that is not notice of a referred dispute. The notice of a referred dispute it argues was received on the 15 October 1992 at 17.15 hours by facsimile. A copy of that letter from the Secretary is marked **Exhibit JA7** and annexed to the affidavit of Mr John Adifaka filed on the 20 November 1992.

Section 4(1) of the Trade Disputes Act 1981 states:-

"A party to a trade dispute may at any time refer the dispute to the Trade Disputes Panel."

The provisions of Rule 3 of the Trade Disputes Panel Rules 1981 sets out the procedure for making a referral to the Panel.

Paragraph (1) of Rule 3 reads:-

"A person who wishes to refer a trade dispute to the Panel shall do so by giving to the Secretary to the Panel a written notice containing the following particulars -

(a) the name and address of the person making the reference;

(b) so far as reasonably practicable, the name and address of every other person alleged to be a party to the dispute; and

(c) the questions at issue between the parties."

The letter of the 12 October 1992 to the Chairman of the Trade Disputes Panel from the General Secretary of SINUW was made pursuant to Rule 3(1). It is a letter referring a trade dispute to the Panel. It is not an acknowledgment that a trade dispute has been referred to the Panel. Similarly, a copy of that letter faxed to the Respondent is not an acknowledgment by the Panel that a trade dispute has been referred. It is merely notice to the Respondent that the Applicant is referring a trade dispute to the Panel.

Paragraph 2 of Rule 3 states:

"On receipt of a notice under paragraph (1), the secretary shall give notice of the reference to each of the person named in the notice under paragraph (1)."

Has notice of the reference been given and when was it made?

The only evidence of notice being given by the secretary was that contained in the letter of the 15 October 1992 reference L5/12/92 and faxed to the Respondent on the same day. Copies were also sent to the Applicant.

There is no evidence of any communication whatsoever between the Secretary and the Respondent from the 12 October 1992 until the 15 October 1992.

The case of ***Solomon Islands National Union of Workers -v- Star Harbour Timber Co. Ltd*** *Civil Case 153/90 Unreported Judgment by Ward CJ on the 12 November 1990*, was referred to by Mr Teutao in support of the submission that the receipt of the copy of the letter of referral by SINUW to the Panel is sufficient notice that the trade dispute has been referred to the Panel.

The relevant statements of Ward CJ at page 6 were:

> *"Once the reference to the Trade Dispute Panel was communicated to it, the company was obliged to allow the men to return to work. Counsel for the company has suggested that, by Rule 3 of the Trade Disputes Panel Rules, the Secretary of the Panel must inform the other parties of a reference by notice in writing. I do not accept that. Rule 3 requires the original reference to be in writing but does not specify the form of the notice to the other parties. In this case, Mr Reeks accepts he was notified and spoke to the Secretary of the Panel on the 26th. As soon as that occurred, the company was bound by section 10."*

These statements in my view must be put into their proper context, and that context is that, communication of the reference was done by the Secretary to the company by phone.

Paragraph (3) of Rule 3 states:

> *"A notice under paragraph (2) shall be given in such manner (including a radio message) as in the opinion of the secretary is likely to bring to the attention of the person concerned the fact that the dispute has been referred to the Panel."*

Paragraph (3) enables in my view the secretary to give notice "***in such manner as***" in his/her opinion "***is likely to bring to the attention***" of the person concerned of the referral. It does not restrict her to give notice in writing only and have it delivered personally. She can give notice by service message through the radio, or by telephone as in the case of ***SINUW -v- Star Harbour Timber Co. Ltd,***, or even by registered post.

Paragraph 4 of Rule 3 is the crucial provision. It states:-

> *"For the purposes of the Act, a dispute is referred to the panel when the last notice in respect of that dispute is given under paragraph (2) (whether or not that and the other notices have been received); and, in the case of a notice sent by post, it shall be treated as given at the time at which it would be delivered in the ordinary course of post."*

Paragraph 4 refers to a '**last notice**' given under paragraph (2). Paragraph (2) in turn mentions two notices. The first notice is the letter of referral by SINUW. The second notice is the notice given by the secretary to each of the parties in the dispute.

It is this second notice that paragraph (4) of Rule 3 refers to. And it is when that last notice is given under paragraph (2) that sets or fixes the time limit as to when a dispute is deemed referred to the panel. This is important to note.

It is interesting and important to note that paragraph (2) of Rule 3 requires that the secretary shall give notice of the reference to each of the persons named in the notice under paragraph (1). Those persons that the secretary is required to give notice to include the person making the referral to the panel.

It is my view therefore that the referral is not deemed to have been made when the person making the referral delivers it to the secretary. That is not notification pursuant to paragraph (2).

It is deemed ***referred*** pursuant to the requirement of paragraph (4) and paragraph (2) when the secretary gives notice to the parties of its referral or in the absence of the secretary, the chairman.

The communication of that notice by the secretary was not made until the 15 October 1992, some 3 days later.

The faxing of a copy of the referral letter dated 12 October 1992 by the Applicant, on about the same time as the original letter was delivered to the panel, with all due respect, unfortunately, is not notice pursuant to paragraph (2), (3) and (4).

I am aware that my ruling will have unpleasant effects and be hard on the 99 workers, but where the law is plain and clear it must be applied. In this instance the requirements of Rule 3 in my view are so plain and clear and that the words used do not produce any uncertainty or ambiguity. Accordingly their plain and ordinary meanings must be used. It is therefore not necessary to consider the mischief that they were intended to remedy.

One final comment needs to be made as to the requirement imposed by paragraph (2) of Rule 3. That paragraph states that "***on receipt of a notice under paragraph (1), the secretary shall give notice*** ..... ". It imposes a mandatory requirement on the secretary that on receipt of the letter of referral she shall give notice to all the parties to the dispute as soon as is practically possible. This is the reason why paragraph (2) of Rule 3 does not impose a restriction as to the manner in which notification to the parties by the Secretary can be made.

I am aware that at times a referral may not be in order and unacceptable. If that is so then the person making the reference must be notified immediately of the rejection. If there are uncertainties or doubts, the secretary is still obliged by law on receipt to give notice to the parties to the dispute immediately. Paragraph (2) does not

contain the words immediately or as soon as possible, but that would be the intention of the paragraph as it is that second notice, for the purposes of the Trade Disputes Act, fixes the time as to when a trade dispute is deemed referred.

For this case, that second notice was issued and the company was notified as on the 15th October 1992. Section 10 of the Trade Disputes Act 1981 came into effect only on that date.

Accordingly, there can be no breach of section 10 of the Trade Disputes Act 1981 until the 15 October 1992.

The answers therefore to the issues raised in the originating summons are as follows:-

(i) **There was no contravention of section 10(1) as read with section 10(2) of the Trade Disputes Act 1981 when the Respondent dismissed 99 of its employees before the 15 October 1992 after notice of a trade dispute had been referred to the Trade Dispute Panel.**

(ii) **The dismissal of the 99 employees therefore on the 12 October 1992 was not unlawful and void.**

(iii) & (iv) **No orders granted.**

Costs of the Respondent are to be paid by the Applicant.

(A. R. Palmer)
JUDGE