

25

IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 57 of 1984

Between:

TRANSPORT WORKERS' UNION

Appellant

- and -

VATUWAQA TRANSPORT CO. LTD.

Respondent

V.P. Maharaj for the Appellant

D.C. Maharaj & K.C. Chaganlal for the Respondent

Date of Hearing : 11th March, 1985.

Delivery of Judgment : 22 March, 1985.

JUDGMENT OF THE COURT

Roper, J.A.

This is an appeal against the refusal of Kermode J. to make an order of certiorari quashing a decision of the Arbitration Tribunal, it being alleged before him that the Tribunal had breached the rules of natural justice in depriving the Union of the opportunity to call witnesses in support of its case.

On the 28th July, 1983, one Jagdishwar Prakash, a bus driver employed by the Respondent company was summarily dismissed on the ground of dishonesty, it being alleged that he had not accounted for all fares received.

The Union took up his case, and in accordance with the Master Agreement between the company and its employees, and the provisions of the Trade Disputes Act the matter was finally referred to the Arbitration Tribunal, which in this case was the Permanent Arbitrator Professor F.J.L. Young, with the parties being the Union and the Company. The Tribunal's term of reference was "to decide on the claim by the Union that Jagdishwar Prakash's dismissal was unfair and should be reinstated." The Master Agreement specifically provides for reinstatement and compensation for loss of wages in the event that an employee is proved to have been unjustly dismissed.

As the decision of the Tribunal and the transcript of the tape recording of the hearing before it indicates the hearing did not proceed smoothly and this led the Tribunal to issue general guidelines to those who appeared before it concerning the future conduct of dispute hearings. The first hearing was on the 27th September, 1983, when Mr. M.D. Benefield appeared for the Company, and Mr. Hasmukh Patel and the Union Secretary, Mr. Dhan Palan, for the Union. After some preliminary discussion Mr. Patel sought an adjournment for a short period while he appeared in another Court, and on his return he and Mr. Benefield addressed the Tribunal on the matters in issue in the dispute. Mr. Benefield then called Mr. Jagdishwar Singh, a director of the company, and at the conclusion of his evidence in chief Mr. Patel sought a further adjournment before cross examining Mr. Singh on the ground that he had a Supreme Court fixture that afternoon. Because of the Tribunal's and Counsels' other commitments the hearing was then adjourned to the 13th October. On that date Mr. Palan appeared and asked for an adjournment on the ground that Mr. Patel was sick. It is apparent from

the record that by this time the Tribunal was becoming understandably annoyed. After expressing his concern at the delay to Mr. Palan the Tribunal granted the adjournment and informed those present that they could reckon on a firm fixture in the third or fourth week in November. On the 15th November Mr. Benefield was told by the Secretary to the Tribunal that the hearing would resume on the 25th November. Mr. Patel was not informed of the hearing date until the 24th November. Kermode J. saw it as strange that one party should receive 10 days notice and the other less than one day but there was a reason for it. It appears that the Secretary to the Tribunal had difficulty contacting Mr. Patel. He left messages for Mr. Patel at his office over a period of 10 days asking him to call. He never did. When the Secretary finally managed to speak to him he was told by Mr. Patel that prior Court commitments prevented his attendance. In fairness to Mr. Patel it seems that Mr. Palan had not told him of the "third or fourth week in November" arrangement, but to make for further confusion Mr. Patel did not tell Mr. Palan of the 25th November fixture with the result that on that day no one appeared to represent the Union. The Secretary located Mr. Palan at a seminar and requested him to attend before the Tribunal, which he did. The hearing then continued with Mr. Palan representing the Union. He cross examined Mr. Singh and another witness called by Mr. Benefield, and apparently because of his professed inexperience as an advocate was allowed some latitude by the Tribunal, his cross-examination being interspersed with informal unsworn evidence and submissions. Mr. Palan called no witnesses but made a final address.

In the proceedings before Kermode J. the Union sought relief on three grounds but in the result relied on

only one which was :-

"That the Arbitration Tribunal was in breach of the rules of natural justice in failing to avail to the Plaintiff an opportunity to call Jagdishwar Prakash to give evidence in his defence and to call witnesses on his behalf."

Kermode J. began his consideration of that issue with the comment that the ground of complaint indicated some confusion or misunderstanding of the nature of the proceedings before the Tribunal. He said :-

"The parties involved in the dispute were the Union and the Company. Jagdishwar Prakash was a member of the Union but he was not a party to the dispute although very much interested in the outcome. He was not charged with any offence into which the Tribunal was enquiring and it was not for him to defend himself or call witnesses on his behalf."

On the question of whether the Union was deprived of the opportunity to call witnesses there was a real conflict between the affidavit evidence of Mr. Palan and Mr. Benefield. According to Mr. Palan he was not given the opportunity to call Jagdishwar Prakash and his witnesses, nor was he asked by the Tribunal whether he wished to call witnesses. Mr. Benefield, on the other hand deposed :-

"14(b) The applicant's secretary was asked by the Tribunal whether he would call any witnesses and the Secretary replied to the effect that he had Jagdishwar Prakash in mind but as it would be difficult to locate Jagdishwar Prakash immediately he would not call any witnesses.

(c) At this stage the Union Secretary made no application for an adjournment to call a witness or for any other purpose."

Kermode J. found nothing in the Tribunal's transcript which helped to resolve that conflict and after holding that the onus was on the Union to establish that it was denied a fair hearing said :-

"Faced with two such affidavits as those of Mr. Benefield and Mr. Palan there would have been difficulty in coming to a decision but for the fact that it is for the applicant to satisfy the Court that the Union was not given a fair hearing. That it has been unable to do."

Because of the way in which the appeal before us was conducted it is of little importance but in fact there is something in the transcript which tends to support Mr. Benefield's version. The Tribunal has recorded that Mr. Palan "called no witnesses but submitted ..." which seems to indicate that the question of Mr. Palan's calling witnesses was referred to.

In the present appeal Mr. V.P. Maharaj relied on the following grounds :-

"1. THE learned judge erred in law and in fact in treating Mr. Mike Benefield's affidavit as part of the Record of the Tribunal and further erred in relying upon the said affidavit in holding that the Appellant was given a fair hearing and that there was no breach of Natural Justice.

2. THAT the learned judge erred in holding that the Appellant had not established that there was a breach of Natural Justice committed by the Tribunal when in fact it was established by the Appellant and in fact it was apparent from the Official Record itself supplied by the Tribunal that there was an error on the Face of the Record.

3. THAT the learned Judge erred in holding that Jagdishwar Prakash was not charged with any offence into which the Tribunal was enquiring and it was not for him to defend himself or call witnesses on his behalf. It is submitted with respect that the learned Judge came to the erroneous conclusion and misconstrued the function of the Tribunal."

Grounds 1 and 2 can be dealt with together.

Mr. V.P. Maharaj submitted that this was a case where relief should be granted on the basis of error of law on the face of the record, the error being that the record does not disclose that the Tribunal explained to Mr. Palan, who was an inexperienced advocate, the possible consequences and implications of his failure to call witnesses. That being the case said Mr. Moharaj it was not competent for Kermode J. to rely on the affidavits of Messrs. Palan and Benefield. In our opinion, and Kermode J. was of the same mind, this is not an error on the face of the record case, where the record must stand unadorned. It is an enquiry into the conduct of the hearing to determine whether or not the Union was treated fairly and in accordance with the rules of natural justice, it being common ground that this is a case where such rules apply and we agree with Mr. D.C. Maharaj that recourse to affidavits, which are permitted by the rules, was appropriate.

All the Union was entitled to was the right to a fair hearing, not a hearing that would guarantee success. We agree with Mr. D.C. Maharaj that the rules of natural justice were met. The Union was represented by an advocate who cross examined witnesses and addressed the Tribunal and indeed was handled with some consideration; and we know of no rule of natural justice which requires a Tribunal to

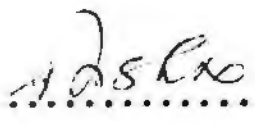
warn Counsel of the probable effects of his inadequate or misconceived handling of a case. A fair hearing is what is called for and the Appellant has not satisfied us that it did not get one.

As for the third ground of appeal, Mr. Maharaj argued that in fact Mr. Prakash was also a "party" who was entitled to be heard. Mr. Prakash was never a "party" to the proceedings, although it may have avoided a good many problems if he had been and there is no rule that a potential witness has a right to be heard even though he may have a very real interest in the outcome.

We find no basis for allowing this appeal which is dismissed - with the Appellant to pay costs as taxed if they cannot be agreed.


.....
Vice President


.....
Judge of Appeal


.....
Judge of Appeal