IN THE FIJI COURT OF APPEAL

Civil Appeal No. 49 of 1986

BETWEEN: SATISH CHANDRA Appellant

V.

THE ARBITRATION TRIBUNAL OF FIJI Respondent

Mr. G.P. Shankar and Mr. S.C. Maharaj for the Appellant
Mr. J.G. Singh for respondent
Mr. S.P. Sharma as amicus curiae

Date of Hearing: 5th November, 1986.

Delivery of Judgment: 14th November, 1986.

JUDGMENT OF THE COURT

O'Regan, J.A.

This case has its genesis in a trade dispute between Air Pacific Employees Association and Air Pacific Limited arising from the dismissal by the Company of one Satish Chandra.

On 22nd November 1984, the Permanent Secretary of Labour referred the dispute to the Permanent Arbitrator who by virtue of subsection 1 of section 20 of the Trades Disputes Act (Cap.97) is an Arbitration Tribunal. That reference was made pursuant to S.6 of the Act, which, so far as it is presently relevant, reads as follows:

> 1) where the Permanent Secretary or any person appointed by him or by the Minister is unable to effect a settlement the Permanent Secretary shall report the dispute to the Minister who may, subject as hereinafter provided, if he thinks fit and if both parties consent, and agree in writing to accept the

award of the Tribunal, authorise the Permanent Secretary to refer such trade dispute to a Tribunal for settlement -

2) .....

3) The Tribunal after hearing the parties to a trade dispute shall make an award and such award shall be binding on the parties to the dispute".

The underlinings are ours.

Section 2 of the Act provides that "unless the context and otherwise requires.....'Tribunal' means an Arbitration Tribunal constituted under the provisions of this Act".

The Minister's reference, therefore, is to an arbitration tribunal.

In his award dated 14th January 1985, the Permanent Arbitrator held that the action of Air Pacific Limited in dismissing the appellant was fair and justified and that the Company was not required to re-instate him.

On 4th October 1985 leave was given to the appellant to apply by way of Judicial Review for a Writ of Certiorari to bring up and quash the award of the Permanent Arbitrator.

When the application came on for hearing on 30th July 1986 before Kearsley J, that learned Judge, at the outset, raised the question of jurisdiction. He said:-

"It appears that the arbitration was voluntary under section 6 (1) (Cap.97). If that is so does certiorari lie to the Permanent Arbitrator's award?"

After hearing argument, during which Mr. Sweetman, counsel for the respondent, conceded that certiorari did lie, the learned Judge held to the contrary. In so doing he first referred to his own decision in R. v. Arbitration Tribunal Exparte Air Pacific Employees Association Judicial Review No. 17 of 1984 where, as he put it he had "ventured the following obiter dicta". We set out the passages to which he referred:

> "Perhaps I should record before expressing the substance of this judgment that I have considered the question, not raised by counsel, of whether certiorari is available, at all, to quash such an award".

In Regina v. National Joint Council for the Craft of Dental Technicians ex-parte Neate (1953) 1 Q.B. 704, at page 707, Lord Goddard, C.J. said:

> "I should....say that never during the many centuries that have passed since reports of the divisions of English courts first began is there any trace of an arbitrator being controlled by this court either by writ of prohibition or certiorari.

and, at page 708, his Lordship added:

> "There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator and a statutory arbitrator is a person to whom by statute the parties must resort".
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> (The emphasis placed on the word "must" is mine).

According to my understanding, those words of Lord Goddard are authority for saying that certiorari would not lie to an award of the Permanent Arbitrator on a trade dispute referred to him with the consent of the parties under Section 6(1) of the Act which requires the

written consent of the parties".

Neate's case was concerned with the question whether private arbitrators, not entrusted by law with legal authority or functions, but set up by contract between the parties, were amenable to judicial review. And, it is abundantly clear that in the first of the two passages cited from the judgment of Goddard C.J., his Lordship was speaking of such arbitrators. The decision of the Court was that private arbitrators are not susceptible to judicial review. That, of course, was consonant with principle which then obtained and still obtains. The passage however upon which Kearsley J based his judgment, ".....a statutory arbitrator is a person to who by statute the parties must resort". Was not necessary for the decision of the case and is clearly obiter. Accordingly it is not binding on either the Supreme Court or this Court. True, it fell from the lips of an eminent Judge but it seems to us to be a mere adumbration giving a compendious description of "a statutory tribunal". Certainly it is no basis, at least without more, for a decision in 1986, as to whether "a permanent arbitrator" appointed by the Governor-General of Fiji pursuant to S.21(1) of the Trades Disputes Act (Cap.97) and exercising power conferred by S.6(1) of that Act is susceptible to Judicial review. We think that the question cannot be answered without an examination of the nature of his statutory powers and an inquiry as to what extent, if any, the role, the parties played in the appointment process, was contractual.

The learned Judge also said:

> "Commenting on Neate's case, Professor de Smith says at page 385 of the 4th edition of his "Judicial Review of Administrative Action".
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> "In relation to arbitral bodies, it has been held that certiorari and prohibition will not lie unless resort to the tribunal is not only provided but also mandatorily prescribed by statute".
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> With respect, that is precisely the effect of Lord Goddard's words as I understand them".

With respect to the learned Judge the learned author of de Smith did not write that passage "Commenting on Neate's case"; he wrote it and cited Neate's case as an authority for the propositions of law stated therein. Strictly speaking, Neate's case is not authority for such a proposition. It is authority only for the proposition that an arbitrator appointed pursuant to a contract between private parties is not susceptible to review. The learned author cites R. v. Powell exp. Marquis of Camden (1925) 1 KB as supporting the proposition. It does not. It was a case where a statute provided for arbitration of questions or differences "arising out of the termination of the tenancy of the holding" and in that case the tenancy not having been determined, it was held that the matters at issue were not determinable by arbitration.

Unfortunately the other authorities cited in support of the proposition are not available in Fiji. Notwithstanding that we, from reasons which will follow, think that the proposition is too widely expressed and we do not accept it as stating the law.

Kearsley J in the judgment under review next cited two statements by Lord Diplock the first in C.C.S.U. v. Minister for the Civil Service (1984) 3 All ER 935 at p. 949:

> "For a decision to be susceptible to judicial review the decision maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions....."

and the second from O'Reilly v. Mackman (1982) 2 W.L.R. 1086 at 1102 where, commenting on R. v. Northumberland Compensation appeal Tribunal ex.p. Shaw, his Lordship said:

> "What was there discovered was that the High Court had power to quash by an order of certiorari a decision of any body of persons having legal Authority (not derived

> from contract only) to determine questions affecting the rights of subjects".

Kearsley J then went on to say:

> "No doubt what Lord Diplock said is authority for the proposition that, if an arbitrator, derives his arbitral power solely from contract or consent his decision cannot be attacked by certiorari. But that does not detract from what Lord Goddard said in Neate's case which, as I understand it was to the effect that certiorari will not lie to an arbitrator's decision unless resort to the tribunal is not only provided for but also mandatorily prescribed by statute".

First, it must be noted that in neither passage did Lord Diplock mention arbitration derived from "consent" of the parties. In view of the language of S.6(1), that is a matter of importance. Secondly, in both passages, Lord Diplock proclaims that in contrast with the decisions of arbitrators who derive their authority from private contract between parties, the decision of any decision makers "empowered by public law" or "having legal authority" are susceptible of review. These terms are for all practical purposes synonymous.

Certiorari and prohibition may issue in the circumstances which were outlined many years ago by Atkin L J in R. v. Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ltd (1924) 1 KB 171, 205:-

> "Wherever any body having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, acts in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs.....".

The questions for consideration, therefore, are whether the permanent arbitrator when appointed to exercise

jurisdiction under S.6(1) of the Trades Disputes Act has the duty to act judicially and has legal authority to determine questions affecting the rights of subjects.

The Permanent Arbitrator, once appointed to be an "arbitration tribunal" pursuant to S.6, is empowered to hear the parties and to make an award binding on the parties (subsection 3). And by virtue of S.30 he has the powers of a Commissioner under the Commissions Inquiry Act (Cap.47). Those powers include the summoning of witnesses, the calling for production of books, plans and documents and the examination of the parties and witnesses on oath (section 9(a). It is thus apparent that his powers are judicial in nature and that section 6 invests him with legal authority to determine questions affecting the rights of subjects.

The next question is whether the permanent arbitrator derives his jurisdiction from contract. If he does, of course he is not amenable to review. Neate's case (supra) decided that.

The reference of a trade dispute to an Industrial Tribunal is made, not by the parties, but by the Permanent Secretary -

> ".....The Minister may.....authorise the Permanent Secretary to refer such trade dispute to a Tribunal....."

There are, however three conditions precedent to the Minister so authorising, first, his thinking it fit to do so, secondly, both parties consenting in writing to his so doing and thirdly, both parties agreeing in writing to accept the award of the Tribunal.

The consenting by the parties does not put them in contract. One does not acquire rights vis-a-vis the other by doing so.

Where an act is to be done by A with the consent of B and C, the act is A's which either B or C or both may prevent by withholding consent, but which they cannot compel him to do.

The mere provision for the "Consent" of the parties bears the implication that the act is not theirs, but his - see Salisbury Gold Mining Company v. Hathorn (1897)AC 268 (P.C.) at p. 275.

Similarly, the agreement by each to accept the award, does not put them in a contractual relationship with each other. They state in writing to the minister their individual agreement so to do. If one of them, subsequent to the making of the award, refused to be bound thereby, the other would have no cause of action in contract against him. In our view, the agreeing in writing is no more than a submission to jurisdiction.

We accordingly hold that the consent and agreement required by the subsection does not put the parties to the dispute in contract and that, accordingly, the arbitration is not a contractual one.

Even if, contrary to what we have just held, the parties were in contract, the Tribunal would have been one exercising powers derived from contract but regulated by statute. In these circumstances we do not think it would have been beyond the purview of the courts exercising rights of review. In R. v. Barnsley Metropolitan Borough Counsel ex parte Hook (1976) 3 All E.R. 453, the applicant held rights to a stall at the market by virtue of a contract which contained some of the rights and duties of the parties; other rights and duties were prescribed by a private Act of Parliament and regulations thereunder regulating longstanding Common Law rights. Both Lord Denning and Lord Scarman held that a decision of the local authority affecting the applicant was subject to review, the latter saying:

> "Although, therefore, there is a contractual element in this case, there is also an element of public law; the enjoyment of rights conferred on the subject by the Common Law. I think, therefore, on analysis it is clear that the corporation in its conduct of the market is a body having legal authority to determine questions of law. I think also it must follow that it is under a duty to act, in the broadest sense of the term, judicially because, although the end product of a negotiation between the corporation and a would be trader is a contractual licence, that licence is available in accordance with the discretion conferred by a statute".

In Mallock v. Aberdeen Corporation (1971) 2 All E.R. 1278 (H.L.) a case where the relationship between the parties was governed partly by contract and partly by statute at p. 1293, Lord Wilberforce had this to say:

> "The appellant's challenge to the action of the respondents raises a question, in my opinion, of administrative law. The respondents are a public authority, the appellant holds a public position fortified by statute. The considerations which determine whether he has been validly removed from that position go beyond the mere contract of employment, through no doubt including it. They are to be tested broadly on arguments of public policy and not to be resolved on narrow verbal distinctions...."

In the result, we hold that the arbitration tribunal exercising power under S.6(1) of the Act is susceptible to judicial review.

There was also an appeal against the learned judge's refusal to grant leave to the appellant to amend his statement under order 53 rule 6(2) to embrace

applications for declarations. It seems clear from the tenor of his judgment that the learned Judge would have allowed the amendment if he had held that certiorari lay. In the circumstances now obtaining the leave should accordingly be granted.

The view expressed by Kearsley J in the judgment under appeal was shared by Dyke J, (who also followed Neate's case in Civil Aviation Authority of Fiji v. Arbitration Tribunal and Others - Judicial Review No. 2 of 1985 (Lautoka).

Rooney J also took the same view in R. v. The Arbitration Tribunal ex parte the Fiji Public Service Association - Judicial Review No. 2 of 1985 (Fiji) judgment dated 16th April 1985. He adopted the dictum of Kearsley J in R. v. Arbitration Tribunal ex parte Air Pacific Employees Association (supra).

In R. v. Arbitration Tribunal ex parte Subaiya Pillay - Judicial Review No. 23 (Suva) Sheehan J followed the above cases and ex parte Neate (supra).

All these decisions and of course the one under appeal are, by our present decision, overruled and the dictum of Kearsley J in R. v. Arbitration Tribunal ex parte Air Pacific Employees Association which we have set out above is disapproved.

The appeal is allowed. The judgment of the court below is vacated. In lieu thereof, orders that the appellant have leave to apply for certiorari and declarations are granted.

We record that the allowing of the appeal was supported by the respondent which made the same concession

in this court as it made in the court below.

In the circumstances obtaining we think the appellant and respondent should each bear their own costs. Mr. Sharma did not apply for costs.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL