IN THE FIJI COURT OF APPEAL
Civil Appeal No. 62 of 1987

BETWEEN:

AIR PACIFIC LIMITED Appellant

- and

AIR PACIFIC EMPLOYEES ASSOCIATION Respondents
VEER SATISH SINGH

Mr. B. Sweetman for the Appellant
Mr. H.M. Patel for the Respondents

Date of Hearing: 19 September 1988
Delivery of Judgment: 11 November 1988

JUDGMENT OF THE COURT

This is an appeal from the judgment of Sheehan J. in the Supreme Court (now called the High Court) which on an application for judicial review quashed the award of an Arbitration Tribunal in a trade dispute between Air Pacific Limited and the Air Pacific Employees' Association and Veer Satish Singh. The Tribunal was appointed under section 6(2)(a) of the Trade Disputes Act.

The issue for adjudication was whether:

> "the claim by Air Pacific Employees' Association that the termination of employment of their President, Mr. Veer Satish Singh by Air Pacific is unfair and that he should be reinstated."

On 12 July, 1984 the Tribunal gave its award on the above claim and that was to the effect that the termination of the appointment of Veer Singh was fair and that the company's action in that regard was justified.

On 25 January, 1985 that award was quashed on judicial review by Kearsley J. in the Supreme Court.

On 20 July, 1985 the Court of Appeal unheld the order but for a different reason. The Appeal Court held that the Tribunal had asked itself the wrong question, and thereby stepped outside its jurisdiction. The question which it ought to have asked and answered:

> "Was Veer Singh's dismissal unfair having regard to the nominated grounds of dismissal?"

The Court of Appeal comprising Speight V.P., Roper J.A. and Mishra J.A., held that that issue was put aside by the Tribunal.

The matter thereupon went back to the Tribunal for reconsideration in the light of that judgment.

On 29 October, 1985 the Tribunal gave its award on the claim to the effect that having regard to the nominated grounds for dismissal he found that the termination of the appointment of Veer Singh Air Pacific was not unfair.

On 1 July, 1987 the award of the Tribunal was quashed on judicial review by Sheehan J. in the Supreme Court.

In his judgment Sheehan J. stated inter alia:-

> "The conclusion of the Tribunal on the criteria that laid down for itself is plainly wrong. I find that the Tribunal asked itself the correct initial questions to assess whether Mr. Singh's dismissal was fair or not, in its assessment of the evidence as to the inquiry required by the collective agreement and the demands of natural justice, the Tribunal

> misdirected itself so as to lead to a wrong conclusion. Therefore the declaration sought that the Tribunal failed to recognise the breach of natural justice ought to be made."

This long and tortuous arbitral and judicial saga reflects poorly in our view on the much vaunted Judicial Review Procedure under the new Order 53 which was introduced in January 1981 and was widely regarded as a cheap and speedy procedure for resolving administrative and industrial disputes.

In the present case it all started against the background of the following circumstances:-

On 1 November, 1983 Veer Singh, President of the Air Pacific Employees' Association, received a letter from Air Pacific informing him of its intention to hold an inquiry into a number of allegations which, if substantiated, could lead to disciplinary action being taken against him. The date of inquiry was fixed for 3 November, 1983 and in the meantime Veer Singh was suspended from work. The letter of 1 November indicated that Air Pacific had been very disturbed by the activities of Veer Singh in his capacity as an employee of the company.

The letter reminded him of the following matters:-

> "As a senior staff of the company you have acted against the best interests of the company in using the APEA to take industrial actions on matters with no substance.
>
> These industrial actions have also been imposed without the activation of agreed procedures.

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Your conduct when dealing with senior employees of the Company has been noted and is the subject of recent complaints.

The charges that you have been abusive and disorderly in your conduct."

The letter also mentioned that any disciplinary inquiry would be held in accordance with the procedures laid down in the relevant agreement.

The inquiry was held on 3 November and reconvened on the morning of 9 November. Later that day Veer Singh was handed this letter:-

"09 November 1983 DP:PF/211

Mr Veer Singh,
88 Princes Road,
Tamavua,
SUVA.

Dear Sir,

I refer to my earlier advice to you regarding what action Management would consider on the matters raised with you and as stated in my memo DP:PF/209 of 01 November, in relation to your position as a senior employee of the Company.

The 'explanations' you gave to me were not satisfactory.

We remind you of the following instances in which you as a senior staff of the Company made use of your position within the APEA and improperly ordered overtime bans during the last 10 weeks:

Your demand to have an APEA rep in the interview panel for senior staff vacancies whereas no agreement for this exists

Your demand that M. Wong be paid acting allowance when he had not even begun acting in order to attract such allowance

Your disputing our transfer of V. King to learn driving which would have qualified him for more pay. You are well aware that transfers are an established right of Management

Your disputing our transfer of A. Rahiman to Quality Control, which eventually was accepted

Your disputing our appointment of casual staff at Nadi where management overted industrial action by delaying the appointments, although management was not in breach of any agreement

Your own travel advance problem for duty travel which was fixed but industrial action had already been taken by you and maintained for 3 days, although this too had nothing to do with any agreement being breached.

Regrettably these incidents and industrial actions were also taken without any consideration for laid down procedures and your actions have been contrary to the best interests of the Company. You have been advised previously that overtime bans in an essential service constitute a breach of contract of employment. Management must note the adverse effect this has on safety and the commercial interests of the Company. The above events have been considered by the Company which is of the view that these incidents have been serious enough to warrant your dismissal. I also draw your attention to the Personnel Administration Manual, Clause 20-06 on 'Employee obligations' relevant parts of which are quoted here:

'2. The public and in particular the airline travellers, are sensitive to careless or irresponsible behaviour on the part of employees of the Company.

3. The Company expects all employees irrespective of their work in the Organisation, to adopt a responsible attitude toward their work and to conduct themselves in such a manner so as to maintain and promote the operations and commercial interests of the Company.'

Therefore, the Company has decided to terminate your services with effect from today. You will be paid one month's salary in lieu of notice. Your final pay and all other monies due to you will be paid into your bank account tomorrow.

In passing, I wish to point out that as a result of the disciplinary Inquiry (in which you were present) carried out in respect of allegations contained in my memo dated 01 November, Management has concluded that the said allegations against you were substantiated. It is also noted that you have once been warned in respect of a similar incident. These would normally warrant your dismissal subject to the requisite procedures being followed. In view, however, of your termination for the reasons outlined above, Management feels that no further action is necessary.

Yours faithfully,

(sgd) G.P. Singh
DIRECTOR PERSONNEL "

Commenting on the substance of this letter the Court of Appeal stated:

> "It is to be noted that the letter of dismissal raised six complaints concerning overtime bans which had not been referred in the inquiry of 3 November and did not purport to rely on the matters that had been discussed at the meeting as grounds for dismissal."

On his reconsideration of the claim under adjudication the Tribunal gave his award in terms that the termination of the appointment of Veer Singh was not unfair. The Tribunal expressed his conclusion in this way:

> "In view of these considerations, the Tribunal finds that the disciplinary procedure involved in Veer Singh's dismissal was seriously defective but did not lead to substantial unfairness. No evidence was placed before the Tribunal to convince it that the decision to dismiss would have been different had a more satisfactory procedure been followed.
> .....
> .....
>
> In determining the matter before it, it has been required to balance deliberate flouting of agreed procedures for settlement of disputes against procedural inadequacy in handling the dismissal itself. In this particular case, the Tribunal judges that the flouting of procedures was far more serious behaviour than the procedural inadequacy which occurred.
> .....
> .....
>
> The nominated grounds for dismissal involved Veer Singh's improper imposition of overtime bans not his taking part in such industrial action. It was not alleged that Veer Singh himself took part in the bans. He persuaded others to do so without proper authority and so breached his contract of employment. Similarly in imposing the bans he went beyond his powers as President of APEA. Other APEA officials cannot be held responsible for such misuse of authority."

The Tribunal's award on this second occasion was considered on judicial review by Sheehan J. in the Supreme Court under Order 53 of the High Court Rules.

The learned judge in his judgment was of opinion that though the Tribunal asked itself the correct initial questions to assess whether Singh's dismissal was fair or not, in its assessment of:

(i) the evidence as to the enquiry required by the collective agreement; and

(ii) the demands of natural justice the Tribunal misdirected itself so as to lead to a wrong conclusion.

Air Pacific has brought this appeal against the judgment of Sheehan J. on the following grounds:-

1. The learned Judge erred in fact and in law in holding that the Tribunal misdirected itself so as to lead to a wrong conclusion and that the decision of the Tribunal should therefore be quashed.

2. The learned Judge erred in fact and in law in failing to have proper regard to the issue referred back to the Arbitration Tribunal for decision namely whether the dismissal of Veer Satish Singh was unfair having regard to the nominated grounds of dismissal.

3. The learned Judge erred in failing to have proper regard to the findings of the Tribunal that although the dismissal procedure was not well conducted this did not lead to substantial unfairness and the flouting of procedures by Veer Singh was far more serious behaviour which warranted dismissal.

4. The learned Judge erred in imposing his own findings of fact for those of the Tribunal and thereby stepped out of his jurisdiction in Judicial Review and treated the Application as an Appeal against the decision of the Tribunal.

5. That in all the circumstances the learned Judge should not have exercised the discretionary remedy of this Honourable Court in making an Order of Certiorari to quash the decision of the Tribunal.

In the argument on appeal counsel for appellant submitted that the learned judge went wrong because he failed to distinguish the fact that he was not sitting on appeal in the matter but as a reviewing court under Order 53. As a reviewing court it is not concerned with the merits of the decision of the Tribunal but with the question whether the Tribunal acted lawfully in arriving at its decision, i.e. whether it did so within the jurisdiction conferred on it by virtue of the appointment made under the Trade Disputes Act. It was submitted that there were no grounds to suggest that the Tribunal had not considered the correct question on the second award such as to render its decision unlawful. According to counsel this is clear from the reasons given by the Tribunal for the award.

A number of authorities were cited by counsel in support of the appeal.

Counsel for respondents in his submissions accepted that there was a distinction to be drawn between judicial review and appeal but he did not accept that the judge erred in failing to treat this case as one of judicial review. Counsel referred to the note in the 1985 Supreme Court Practise which states:-

> "The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself."

Counsel also referred to the case of Chief Constable of North Wales Police v. Evans (1982) 3 All.E.R. 141 where at 143 Lord Hailsham L.C. said:

> "It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

Counsel also made the valid point based on Lord Brightman's speech in Evan's Case at page 154 where he said the function of the Court is to see that lawful authority is not abused by unfair treatment. If the Court were to attempt itself the task entrusted to that authority by the law, the Court would under the guise of preventing abuse of power, be

guilty itself of usurping power. That applies, whether or not there is some avenue of appeal against the decision on the merits. If there is no avenue of appeal on the merits, it follows that the decision of the body concerned is meant to be final, provided that the decision-making process was properly carried out.

As a reviewing court the learned judge's role is essentially a supervisory one and that is to review the decision-making process of the Arbitration Tribunal and not to usurp its power to decide the case on the merits. That process must necessarily involve an enquiry into the nature of the alleged misconduct which formed the basis of Veer Singh's dismissal. It is now common ground that the misconduct alleged against Singh was his improper imposition of overtime bans on the operations of Air Pacific and that he was not given any opportunity to answer the charges of misconduct. The learned judge took the Tribunal to task in its attempt to play down and exculpate Air Pacific for what he apparently considered as Air Pacific's reprehensible omission to give Veer Singh a hearing on those allegations of misconduct. The learned judge attached great significance to the matter as he made clear at page 149 of the record where he said:

> "I cannot see that in fact Mr. Singh was accorded any hearing on the charges of the overtime bans. It seems to me that the Tribunal is straining the reality of the situation when it says: "The enquiry began on 3rd November, 1983 and concentrated (emphasis added) on the instances of abusive and disorderly conduct." In fact on the evidence that the Tribunal did accept it is plain that the enquiry was solely concerned

with abusive behaviour and disorderly conduct. Therefore if there was no enquiry regarding the overtime bans prior to dismissal any subsequent pursuit or token pursuit of appeal procedures by Mr. Singh or the Union could not be said to constitute such a hearing."

The learned judge was also critical of the non-observance of the laid down procedure for conducting disciplinary proceedings. However, account should be taken of the fact that the Arbitration Tribunal was the statutory body or authority specifically vested with jurisdiction to adjudicate the question as to whether the claim by Air Pacific Employees' Association that the termination of employment of their President, Veer Satish Singh was unfair.

In exercising its jurisdiction in this regard the Tribunal held a formal hearing of the claim at which both sides were represented. It was after hearing evidence on the question that the Tribunal concluded that Veer Singh's dismissal was not unfair. It was this enquiry by the Tribunal which is the subject of judicial review and not the disciplinary proceedings carried out by a domestic or private tribunal. The distinction which is important appears to have been overlooked and may explain why the learned judge gave undue prominence to the judicial review concept of natural justice and the quasi-contractual requirement of a hearing in the disciplinary action taken by Air Pacific against Veer Singh. The cases show that the remedies of judicial review are available only to public or administrative tribunals as opposed to purely private or domestic tribunals.

In Law v. National Greyhound Racing Club Ltd. (1983) 3 All.E.R.300 it was held that the jurisdiction which the court had under Order 53 to grant an injunction or declaration on an application for judicial review was confined to the review of activities of a public nature as opposed to those of a purely private or domestic nature.

In R v. BBC, ex Lavelle (1983) 1 All.E.R.241 it was held that under Order 53 certiorari and the other prerogative remedies were only available to impugn a decision of a tribunal which was performing a public duty, and were inappropriate to impugn a decision of a domestic tribunal as an employer's disciplinary tribunal. Similarly, it was held that although judicial review by way of an injunction or declaration under Order 53 was wider in ambit than relief by prerogative order, it was nevertheless confined to the review of activities of a public nature as opposed to those of a purely private or domestic character. Since the disciplinary procedure under which the applicant was dismissed arose out of her contract of employment and was purely private or domestic in character, the applicant was not entitled to relief by way of certiorari, or an injunction or declaration.

The employment of Veer Singh with Air Pacific was apparently based on contract and was in the nature of master and servant. In these circumstances an employee cannot in administrative law insist upon a hearing before he could be dismissed. His remedy lies in damages for breach of contract. This is the general position which in certain circumstances may be modified. A full explanation for this is given in the case of Malloch v. Aberdeen Corporation (1971) 1WLR 1578 at 1591-92 where Lord Wilberforce stated as follows:

> "The argument that, once it is shown that the relevant relationship is that of master and servant, this is sufficient to exclude the requirements of natural justice is often found, in one form or another, in reported cases. There are two reasons behind it. The first is that, in master and servant cases, one is normally in the field of the common law of contract inter partes, so that principles of administrative law, including those of natural justice, have no part to play. The second relates to the remedy:

it is that in pure master and servant cases, the most that can be obtained is damages, if the dismissal is wrongful: no order for reinstatement can be made, so no room exists for such remedies as administrative law may grant, such as a declaration that the dismissal is void. I think there is validity in both of these arguments, but they, particularly the first, must be carefully used. It involves the risk of a compartmental approach which, though convenient as a solvent, may lead to narrower distinctions that are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre. A specialist surgeon is denied protection which is given to a hospital doctor; a University professor, as a servant, has been denied the right to be heard, a dock labourer and an undergraduate have been granted it; examples can be multiplied (see Barber v. Manchester Regional Hospital Board (1958) 1 WLR 181, Palmer v. Inverness Hospitals Board of Management, 1963 SC 311, Vidyodaya University Council v. Silva (1965) 1 WLR 77, Vine v. National Dock Labour Board (1957) AC 488, Glynn v. Keele University (1971) 1 WLR 487). One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called "pure master and servant cases," which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void."

In the context of present case it appears to us that there was no legal basis for the learned judge as a reviewing court to hold that the Tribunal misdirected itself in failing to act "on the demands of natural justice."

The disciplinary proceedings held against Veer Singh were conducted by a domestic tribunal which on available evidence could not be said to be bound to observe the requirements of natural justice as applied in administrative law.

On the other hand the Tribunal was bound by the requirements of natural justice. As we have noted the Tribunal held a hearing on the claim of unfairness of dismissal in which full opportunity was given to both sides to make suitable representations. The conclusion the Tribunal came to was that the dismissal of Veer Singh was justified on the ground of misconduct arising from his improper imposition of overtime bans on the operations of Air Pacific.

The Tribunal came to that conclusion after evaluating the evidence and directing itself on the competing issues as appear at page 98 of the record:

> "In determing the matter before it, the Tribunal has been required to balance deliberate flouting of agreed procedures for settlement of disputes against procedural inadequacy in handling the dismissal itself."

In reaching its conclusion that Veer Singh's dismissal was not unfair, the Tribunal was in our view doing no more than acting within its jurisdiction by correctly dealing with the questions it set out to probe and answer.

We believe that the conclusion of the Tribunal was open to it on the evidence. The fact that a reviewing court may come to a different conclusion on the evidence is irrelevant and quite beside the point. In these circumstances we are of opinion that the Tribunal's conclusion cannot be seriously impugned unless it could be shown that the Tribunal acted in excess of jurisdiction or committed an error of law going to jurisdiction with regard to the arbitral process carried out in reaching such conclusion. Nor in our view can the Tribunal's finding be attacked on the grounds that it is irrational, in the sense that no reasonable authority would have made the decision.

The landmark case on jurisdictional questions in administrative law is of course Anisminic Ltd. v. the Foreign Compensation (1969) 2 AC 247. In Re Racal Communications Ltd.(1980) 2 All E.R.634 Lord Diplock at pages 637/639 commented on the case as follows:

> "In Anisminic (1969) 1 All ER208, (1969) 2 AC 147 this House was concerned only with decisions of administrative tribunals. Nothing I say is intended to detract from the breadth of the scope of application to administrative tribunals of the principles laid down in that case. It is a legal landmark; it has made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires. It proceeds on the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined, and if there has been any doubt as to what that question is this is a matter for courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and

> expounders of the common law and rules of equity. So, if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity.....
> .....
> Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity."

In O'Reilly v. Mackman (1982) 3 All. E.R. 1124 Lord Diplock returned to the same theme and it is instructive to quote this paragraph at page 1129:

> "It was this provision that provided the occasion for the landmark decision of this House in Anisminic Ltd. v. Foreign Compensation Commission (1969) 1 All. E.R. 208, (1969) 2 AC 147, and particularly the leading speech of Lord Reid, which has liberated English public law from the fetters that the courts had theretofore imposed on themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that Anisminic made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine, its purported 'determination', not being a 'determination' within the meaning of the empowering legislation, was accordingly a nullity."

We think the Tribunal had asked and answered the correct ...tions in dealing with the particular trade dispute between Air Pacific and the Air Pacific Employees' ...ssociation. If that was so, then clearly the Tribunal could not be said to have acted in excess of its jurisdiction. The result would be that the decision-making process of the Tribunal was intra vires and therefore lawful.

Professor H.W.R. Wade at page 271 of his leading work "Administrative Law" (Fifth Edition) observed broadly:

> "If a public authority or tribunal is given power to determine some question, and keeps within its jurisdiction, its determination ought to be conclusive, whether right or wrong, unless statute has provided for appeal. In other words, a grant of jurisdiction inherently includes a power to make mistake within the area of authority granted."

In the same vein we too wish to emphasise that we say nothing on the merits of the Tribunal's decision. We content ourselves by saying that the finding of the Tribunal does not come within the prohibited ambit of the Administrative law which entitles intervention by Court of Law by way of Judicial Review.

Industrial law in Fiji is still fairly rudimentary as compared to what has been achieved in other countries for the general protection of workers. In the United Kingdom radical changes in the rights of contractual employees were made by the Industrial Relations Act 1971 which has been replaced by the Employment Protection (Consolidation) Act 1978 giving protection against unfair dismissal. This new right is enforceable in industrial tribunals, which must have regard to a designated code of practice which requires formal procedure and an opportunity for the employee to state his case. Apparently a concept behind the legislation is that a dismissal without a hearing is intrinsically unfair, even though fully justified.

Fiji has much to catch up on with regard to legislation on industrial relations.

For the reasons given we are satisfied that the Tribunal exercised its powers lawfully to reach the conclusion that the termination of appointment of Veer Singh was not unfair and that the learned judge misdirected himself in law and fact in his review of the Tribunal's award.

Accordingly, the appeal is allowed and the judgment of the Supreme Court is set aside. The award of the Tribunal is confirmed. Each side will bear its own costs here and below.

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President, Fiji Court of Appeal

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Justice of Appeal

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Justice of Appeal