IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 65 OF 1992
(High Court Civil Action No. 445 of 1991)

BETWEEN:

THE PUBLIC EMPLOYEES UNION	APPELLANT
-and-	
THE UNIVERSITY OF THE SOUTH PACIFIC	1ST RESPONDENT
THE ATTORNEY GENERAL	2ND RESPONDENT

Mr. S. Sharma for the Appellant
Mr. F.G. Keil for the First Respondent
Mr. N. Nand for the Second Respondent

Date of Hearing : 3rd May, 1994
Date of Delivery of Judgment 11th May, 1994

JUDGMENT OF THE COURT

On 11 June and 31 August 1990 the employment of two security officers, namely Mr Benjamin Ting and Mrs Irene Lata Whippy, was terminated by the First Respondent (USP). The Appellant union contended that these dismissals were unfair and unjustified and registered a trade dispute with the Permanent Secretary under the Trade Disputes Act Cap. 97. As efforts to resolve the dispute were unsuccessful the Minister, with the consent of the parties, appointed a Tribunal in the person of

Mr Tamesar Bhim to settle the dispute. Mr Bhim duly heard the parties and made his award in which he held that the dismissals were not unfair or unjustified.

The Appellant then applied by originating summons to the High Court for a number of declarations. The summons was heard by Scott J. who, in a judgment delivered on 13 November 1992, declined to make any of the declarations sought. The Appellant now appeals against that judgment.

It is necessary to give some more detail as to the course of events. Following complaints made as to the conduct of the two employees the USP in each case referred the complaints to a Disciplinary Committee of Inquiry. Following the reports of those Committees the Registrar of the USP dismissed each of the employees. Those employees were members of the Appellant Union which had registered a collective agreement under the Trade Disputes Act. The result of the dismissals was the registration of a trade dispute by the Appellant. The Permanent Secretary was unable to resolve the dispute and accordingly, in terms of the Act, reported to the Minister who appointed the Tribunal.

The Appellant's summons sought declarations :

1. *That the dismissal of Mr Ting was invalid*
2. *That the dismissal of Mrs Whippy was invalid*
3. *That the report of the Committee of Inquiry into Mr Ting's dismissal was invalid*

4. *That the report of the Committee of Inquiry into Mrs Whippy's dismissal was invalid*

5. *That the Tribunal's award was invalid*

6. *That Mr Ting and Mrs Whippy should be reinstated.*

Scott J declined to make any of the declarations sought. In so far as 1 to 4 above are concerned, these were the very matters which the Tribunal was appointed to resolve and so we think Scott J. correctly declined to consider them. Mr Sharma for the Appellants has sought to persuade this Court that the learned Judge should have reconsidered all the evidence relating to the original misconduct, the Committee of Inquiry and the Registrar's decision to dismiss the Appellants and reached his own decision. We disagree. The application to Scott J. was a challenge to the Tribunal's finding. In considering that, he was not to put himself in the position of the Tribunal and substitute his own opinion of the earlier evidence. If the Tribunal reached conclusions that could reasonably be drawn from the facts before him, the Judge should not interfere.

The principal matters referred to by the Judge and which require comment by this Court were these :

1. *That the Tribunal appointed under the Trade Disputes Act was subject to the Arbitration Act Cap. 38 and to the Rules of the High Court Order 73.*

2. *Whether there was evidence of bias on the part of the Tribunal.*

3. *Whether an action for a declaration lies at all against an inferior tribunal whose only function is to make a determination.*

We deal with these separately.

1. The Arbitration Act

What the Judge said in this regard was :

> *"When an Arbitrator is appointed under the Trade Disputes Act the arbitration is subject to the Arbitration Act (Cap. 38) and applications to the High Court in respect of the arbitration are subject to RHC O.73."*

His Lordship then observed that it was under s.12 of the Arbitration Act that the Court is given power to set aside an award. He also referred to the limitation period of 21 days prescribed by O.73 r.3 (1) (b) as the time within which an application to set aside must be brought. In the present case the application was not made for some 8 months after the award, and this was one of the reasons (although not the main reason) for the declarations being declined.

We understand that the application of the Arbitration Act to a trade dispute may have been the general practice in this country and, as we have had considerable difficulty in seeing what authority there is for this, we have thought it appropriate to give this matter close consideration.

We should observe first that nowhere in either Act can we find any express reference to the two Acts being applied together. Neither contains any reference to the other. Indeed,

there are a number of indications that each was intended to apply to distinct sets of circumstances :

(a) The Arbitration Act is stated in its long title to be "An Act to provide for the reference and submission of disputes to arbitration." Section 2 defines "submission" as meaning "a written agreement to submit present or future differences to arbitration ....." The Trade Disputes Act does not contemplate any written agreement between the parties. Although it requires the consent of both parties, the reference of a trade dispute to a Tribunal is the administrative act of the Minister.

(b) The Trade Disputes Act is clearly a comprehensive code intended to provide for a particular kind of disputes, and contains all the provisions necessary to achieve that. In a number of respects those provisions are inconsistent with the provisions in the Arbitration Act. For example, the Arbitration Act, in s.8, confers certain specific powers on arbitrators. By contrast, s.30 of the Trade Disputes Act empowers a Tribunal to regulate its own procedure and gives it the powers of a Commissioner under the Commissions of Inquiry Act (Cap.47).

(c) The Arbitration Act, s.15, empowers an arbitrator or umpire to state a case for the opinion of the court. The Trade Disputes Act, s.27, provides that any question of the interpretation of the award of a Tribunal is to be decided by the Tribunal itself.

(d) The Trade Disputes Act, s.23, provides that the Tribunal is to make its award within 28 days of the date of reference and section 26 requires that it be submitted to the Minister. The First Schedule to the Arbitration Act, which contains provisions to be implied in submissions to arbitration, requires arbitrators to make their award within 3 months after entering on the reference and section 9(2) requires that it be filed in the High Court.

We conclude that the Trade Disputes Act was intended to govern all matters in respect of the regulation of disputes arising in the course of industrial relations, and particularly all matters arising out of collective agreements registered under the Act. Order 73 of the High Court Rules applies in its terms only to the Arbitration Act, and cannot properly be applied to

the Trade Disputes Act.

There is in the Trade Disputes Act no express provision for an application to the Court to set aside the award of a Tribunal. This does not mean that the Court cannot have jurisdiction in respect of such an award. In the event of an allegation against a Tribunal of improper conduct there remains the power to seek a judicial review. We were informed by counsel that an application for judicial review was filed on 14th June, 1991 and withdrawn two months later. The precise remedy sought and the reason for the withdrawal do not appear on the record but it is relevant to state that the application was almost two months outside the time limit for certiorari under O.53 r.4(2). If such an application had been made timeously and if the allegation of bias which was made against the Tribunal had been established, the Court would have had the power to intervene.

To the extent, therefore, that the Judge placed any reliance in the present case on the failure of the Appellant to apply within 21 days of the award for it to be set aside, we are unable to agree with the learned Judge. As we will shortly indicate, this does not affect his decision not to make the declarations sought.

2. Bias

It was contended for the Appellant that the position of Chairman of the University Grants Committee meant that Mr Bhim

was not a disinterested person for the resolution of a dispute affecting the USP. It was alleged further that Mr Bhim received remuneration from the USP. These allegations were effectively answered in an affidavit by Mr Bhim to which there was no response. At the appeal hearing, counsel for the Appellants expressly stated they no longer suggested bias and withdrew this ground. We need say no more than to observe that such a step was well advised as there was no basis at all for any finding of bias and the Judge correctly declined to make any such finding.

3. Declaration

The learned judge's observation that "Furthermore it has been doubted whether an action for a declaration lies at all against an inferior tribunal whose only function is to make a determination (see *Anisminic v Foreign Compensation Commission* [1968] 2 QB 862, 910)", was in our view never more than obiter. Since he did not make any declaration we do not need to make any further comments except to say that we find no reason to interfere with the primary judge's exercise of his discretionary powers even though we are of the view that he erred in thinking that the tribunal was subject to the Arbitration Act and to the Rules of the High Court Order 73. The judge was clearly entitled, as a matter of general principle, to regard a delay of 3 months to be unacceptable, especially since he found no bias on the part of the tribunal.

He had good grounds for such a decision. The dismissals had

been in June and August 1990 and the Tribunal's award was on 25 January, 1991. The proceedings by way of judicial review were commenced out of time and the Appellants filed the originating summons a month after they were withdrawn.

This was a case of alleged wrongful dismissal. The First Respondent was entitled to replace the two dismissed members of staff and may have done so already. In such circumstances, a delay of 8 months, longer it should be said than the total time between the dismissals and the Tribunal's finding, before the action was commenced is clearly unreasonable.

The learned Judge referred to the need for expedition in such cases and we would endorse his comments. Although we have found he was wrong to include a consideration of the Arbitration Act and O.73 in reaching his decision, he had already plainly considered the general effect of the delay

> *"....Courts have repeatedly pointed out that it is in the overriding interest of good administration, whether of the public service or of a university, that applications for discretionary relief be sought expeditiously .... Ting and Whippy were dismissed over two years ago but it was not until September 1991 that application was made to the Court for a declaratory judgment."*

Those comments are apt and we would not interfere with the exercise of his discretion.

In the result, none of the grounds of appeal have been made out and the appeal is dismissed with costs.

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Sir Moti Tikaram
President, Fiji Court of Appeal

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Sir Mari Kapi
Justice of Appeal

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Justice Gordon Ward
Justice of Appeal