THE STATE

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v.

SUVA CITY COUNCIL
ex parte:
SUVA CITY COUNCIL STAFF ASSOCIATION

[HIGH COURT, 1990 (Byrne J) 8 January]

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Revisional Jurisdiction

Employment- Judicial Review- award of Permanent Arbitrator- whether award exceeded the Arbitrator's terms of reference- Trade Disputes Act (Cap 97)- High Court Rules 1988 O. 53.

C The Suva City Council compulsorily retired a number of employees giving rise to a trade dispute which was referred to the Permanent Arbitrator. The Arbitrator's award not only interpreted the meaning of the Master Agreement between the Council and its employees but also ruled on the merits of the individual dismissals. The High Court HELD: that the Permanent Arbitrator had exceeded his jurisdiction and that accordingly that part of his award would be quashed.

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Cases cited:

Anisminic Ltd v. Foreign Compensation Commission [1969] 2 A.C. 147
O'Reilly v. Mackman [1982] 3 WLR 1096
Re Racal Communications Ltd [1980] 2 All E.R. 634

E *H.M. Patel* for the Applicant
H. Nagin for the Respondent

Judicial Review in the High Court.

Byrne J:

F The Suva City Council pursuant to leave given by this Court on 1st February 1989 applies for an Order for Judicial Review directed to the Permanent Arbitrator under the Trades Disputes Act (Cap. 97) seeking:

i) An Order for Certiorari to remove into this Court that part of an Award given by the Permanent Arbitrator on 24th November 1988 concerning persons named Jale Toki and Kesho Nand who were involved in an industrial dispute and to quash the relevant part of the Award;

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(ii) A Declaration that the Arbitration Tribunal was activated by extraneous considerations and erred in law and fact in making that part of the Award referred to in (i) and that the said Award is null and void;

(iii) An Order remitting the above part of the Award to the Arbitration Tribunal for further consideration in the light of the judgment of this court; and

(iv) An Order that the proposed retirements of Jale Toki and Kesho Nand from the Suva City Council are justifiable, fair and reasonable and that the part of the Award of the Arbitration Tribunal upholding their retirement as not justifiable therefore is null and void.

The issues arising in this case go back to the military coup of May 1987 and it is not in dispute between the parties that in September 1987 continuing through until at least September 1988 the Suva City Council was facing a financial crisis. It was said in evidence before the Arbitration Tribunal during the hearing of the dispute leading to the present Award that the Council's income had dropped 50 percent. The Council therefore took steps with a view to effecting cost savings and one of the ways it chose was staffing rationalization.

As part of this rationalization it decided to compulsorily retire eight of its employees including Messrs Jale Toki and Kesho Nand on the ground that each one of them had attained the age of 55 years and accordingly could be dealt with under the provisions of Clause 19(ii) of the Master Agreement between the Council and the Suva City Council Staff Association which was designed to regulate the conditions of employment by members of the Association with the Council. The employees concerned were duly notified of the Council's decision, which they opposed, and this led to the reference of their dispute by the Permanent Secretary for Industrial Relations on 7th July 1988 to an Arbitration Tribunal constituted by the Permanent Arbitrator. This was done pursuant to Section 6 of the Trade Disputes Act Cap. 97.

The hearing began before the Permanent Arbitrator on l0th August 1988 when all parties were legally represented and when, with the consent of the parties, the final terms of reference to the Tribunal were settled. These, as they appear in the record of the proceedings before the Tribunal are as follows:

"(a) The council's action in unilaterally invoking subsection 19(11) of section 79 of the Master Agreement to meet the requirements of its cost cutting measure when it failed to reach any agreement with the Association resulting in the issuance of retirement notices to Messrs Nand, Ali, Tawake, Subramani, Shankar, Gonewai, Toki and Savou.

(b) That the council negotiated in bad faith and breached registered agreement No. CA.16/88.

(c) (Amended) The council is stopped from issuing retirement notices under section 19(11) of Master Agreement in that it

had always allowed a member of the Staff Association over 55 years to carry on working if his work was satisfactory.

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(d) That the council claims that under section 19(11) of the Master Agreement it has the right to retire employees attaining age 55 upon giving 6 months notice of its intention to do so."

I consider it fair to imply at the beginning of paragraph (a) before the phrase
B "The Council's action" the words "The propriety of ...." so as to make the meaning of the paragraph clearer.

On 24th November 1988 the Permanent Arbitrator made his Award. During the course of the hearing the Suva City Council relied heavily on Clause 19(ii) of the Master Agreement and it is helpful to set this clause out at this point. It reads:

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"Clause 19 - Retirement

The normal age of retirement from the council service will be sixty years (60), except that -

(i) On or after attaining the age of 50 years an officer may
D retire with the approval of the council;

Provided that the officer must give six months' notice of his intention to retire.

(ii) On or after attaining the age of 50 years, an officer may be compulsorily retired by the council;

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Provided that the officer must be given six months' notice of the intention so to retire him.

Provided that in the case of an officer appointed on or after 1st January, 1960, the age of 55 years shall be substituted
F for the age of 50 years in (i) or (ii) above.

(iii) Any officer may, in special circumstances and at the discretion of the council be allowed to remain in the service after he has attained the age of 60 years.

(iv) An officer may be required to retire by the Council on
G recommendation of a Medical Board consisting of one registered Medical Officer appointed and paid for by the Council and one appointed and paid for by the Association.

In his Award the Arbitrator rejected evidence by the Association that Clause 19(ii) was to be read subject to the condition of prior consultation and agreement with the Association and that it was never the intention of the parties that the

Clause should be read literally. At page 221 of the Award the Arbitrator said this, when referring to Minutes of a meeting between the Suva City Council and the Association on 4th April 1978:

> "This communication, written on 4/4/78, does indicate that even at this time the Council had a policy "of enforced retirement" for employees over the age of 45". Later he said on the same page "I am satisfied that the intent and spirit of subsection (ii) is clear it empowers the Council to resort to an act of enforcement of early retirement of employees who are 55 years of age or over (for those joining on or after 1st January 1960). I take it all the present employees involved fall in this category. This is what I was informed. They are over 55 years anyway."
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> Than at page 222 he said this:
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> "The Association's contention that there are antecedent factors requiring a departure from the literal application of section 19 subsection (ii) is not borne out by evidence, and there is no justification to permit such a departure. The intentions of the parties are expressly stated in this section. If the Association feels that the clause should not be there, it should then negotiate for its revocation or modification. This Tribunal has no jurisdiction to modify or re-write the Master Agreement for the Association."

In its written submissions to me the Council relied on three main grounds in seeking to have the Award set aside. These were:

(i) That the Permanent Arbitrator exceeded his jurisdiction when he attempted to deal with the merits of each employee affected by the Council's decision;

(ii) Bias; and

(iii) Hearsay evidence and breach of the Rules of natural justice.

As to ground (ii) I am not satisfied that the Arbitrator showed any bias towards Messrs Toki and Nand when he ordered their reinstatement. Bias in its normal sense indicates partiality or prejudice towards a particular view or a person. Although the effect of the Arbitrator's decision was to allow Messrs Toki and Nand to remain in the employment of the Council whereas he confirmed the dismissal of the other six employees, in my judgment this does not indicate any bias but rather an opinion honestly formed by the Arbitrator as to the relative merits which each employee could show so as to justify his continued employment. To hold that such action indicated bias in my view would be a misuse of language. I therefore find no merit in this ground.

As to ground (iii) I likewise find no merit. On reading the evidence of Jale Toki

I am satisfied that when he was commenting on the work of his fellow employees he did so from his own senior position in the Council and from his personal knowledge as the President of the Suva City Council Staff Association. Also I note that although the Council was legally represented at the hearing no objection was taken to this evidence. I do not regard his evidence as being hearsay.

Ground (i) however presents different and more difficult problems. In the 5th Edt. of his authoritative book Administrative Law by H.W.R. Wade at page 38 the learned author says:

> "The simple proposition that a public authority may not act outside its powers (ultra-vires) may fitly be called the central principle of administrative law." Any act by a tribunal whose powers are limited, which is for any reason in excess of power is often described as being "outside jurisdiction" and consequently void in law, i.e. deprived of legal effect.

In the well known landmark decision on jurisdictional questions in administrative law, Anisminic Ltd v. Foreign Compensation Commission [1969] 2 A.C. 147 Lord Reid said at p. 171:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account."

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 E.R. 208, [1969] 2 A.C. 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."

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In O'Reilly v Mackman [1982] 3 W.L.R. 1096 at page 1103 Lord Diplock referred again to the Anisminic case when he said that it had "liberated English public law from the fetters that the courts had heretofore imposed upon 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 the Anisminic case 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."

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In the present case the jurisdiction of the Permanent Arbitrator was limited by his terms of reference agreed to by the parties, to decide whether the meaning of Clause 19(ii) of the Master Agreement was that the Council was not obliged to have the consent of the Staff Association before retiring any employee over the age of 55, provided it gave the employee six months' notice. The Arbitrator was asked to make a finding on one of his terms of reference. Whether or not his finding was correct is irrelevant in an application for Judicial Review. It is not this Court's function to enquire into the merits or otherwise of his decision or to substitute its own decision for that of the Arbitrator. The only function of this Court is to see that his decision was made in accordance with the decision-making process, in the sense in which that term is now well understood. To this point I am satisfied that the Learned Arbitrator committed no error.

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However having found that the Council could compulsorily retire employees who attained the age of 55 years mandatorily and that in so doing the Council did not act capriciously but from proper and valid motives (see page 230) the

Arbitrator then in my opinion fell into error. He then proceeded to consider the individual merits of each of the employees affected by the Council's decision, holding that the Council was correct in terminating the services of Mumtaz Ali, Viliame Tawake, Subramani, Shiu Shankar, Samisoni Gonewai and Taniela Savou, but not those of Messrs Toki and Nand. In so doing in my opinion by clear implication the learned Arbitrator added a term of reference to those which had been given him namely whether the Council was justified in terminating their services in the light of their particular circumstances. He was not asked in the terms of reference to make any findings as to this.

Accordingly I hold that in directing the continued employment by the Council of Messrs Toki and Nand the Permanent Arbitrator acted beyond his jurisdiction, and that part of his Award affecting these employees is therefore a nullity. I therefore remit the matter to the Permanent Arbitrator for further consideration of this part of his Award and order Certiorari to go in accordance with the Motion. I also order that the Respondent is to pay the Applicant's costs of these proceedings.

(Motion partly allowed; certiorari issued)