Re EMPEROR GOLD MINING CO LTD (HBJ0015 of 1995L)

HIGH COURT — CIVIL JURISDICTION

CONNORS J

4, 12, 13 May, 11 June 2004

Administrative law — judicial review — Commission of Inquiry — whether or not report and recommendations of the Commissioner void and unreasonable — Commission of Inquiry Act (Cap 47) s 2 — High Court Rules O 53 r 1(2) — Interpretation Act ss 2, 35, 53 — Land Transfer Act s 169 — Trade Disputes Act (Cap 97).

In 1991, members of the Fiji Mine Workers Union (FMWU) staged a strike because of the refusal of Emperor Gold Mining Co (EGM) to recognise the FMWU for the purpose of collective bargaining. The workers refused to return to work and were subsequently dismissed after several warnings.

The Permanent Secretary of the Ministry of Employment and Industrial Relations purported to accept a report of a trade dispute under the Trades Dispute Act (Cap 97). Thereafter, the proceedings resulted to judicial review before the court.

A Commission of Inquiry pursuant to the Commission of Inquiry Act (Cap 47) was created and heard evidence from witnesses called by the interested parties. The commissioner delivered a report to the President and made recommendations.

EGM filed an application for leave to apply for judicial review of the report and recommendations of the Commission of Inquiry which was granted. The Respondent filed summons to dismiss the application for want of prosecution but was later dismissed.

EGM filed a notice of motion to adduce oral evidence which was granted. On the other hand, the reinstatement of the matter to the cause list sought by the Respondent was likewise granted. The matter then proceeded by way of submissions on behalf of EGM and the Respondent.

EGM argued that the report and recommendations by the commissioner was unreasonable and that the creation of the Commission of Inquiry was ultra vires.

Held — The recommendations made by the Commission were not supported by evidence of probative value. The period of appointment of the Commissioner was from 20 February to 10 May 1995. However, the Commission continued to receive evidence and hear submissions after the expiration of the period of appointment. Thus, the Commissioner must have been aware of the duration of his commission. Hence, the benefit of the de facto doctrine was not available to him. It was not possible to treat the continuation of the Commission of Inquiry despite the expiration of his appointment as "a minor procedural irregularity". The purported extension of the commission after 10 May 1995 was ineffective and thus the actions of the Commissioner after that time was ultra vires.

Determination made.

Cases referred to

Annetts v McCann (1990) 170 CLR 596; 97 ALR 177; 21 ALD 651; *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; [1947] 2 All ER 680; *Brettingham-Moore v St Leonards Municipality* (1969) 121 CLR 509; *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155; [1982] 3 All ER 141; *Cock v Attorney-General* [1999] 29 NZLR 408; *Emperor Gold Mining Co Ltd v Jone Cagi* (20/1991); *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149; 134 ALR 469; *Re Aldridge* (1893) 15 NZLR 361; *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864; [1967] 2 All ER 770; *Norton v Shelby County* [1886] 118 ES 425; *Nottinghamshire County Council v*

Environment State Secretary [1986] AC 240; [1986] 1 All ER 199; *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602; *R v Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299; [1972] 2 All ER 589; *State v Carol* [1871] 38 Con 449; *Whitfield v Attorney-General* [1989] LRC 126, cited.

Adams v Adams [1971] P 188; [1970] 3 All ER 572; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; 106 ALR 11; *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1; 93 ALR 1; *Council of Civil Service Unions v Minister for Civil Services* [1985] AC 374; [1984] 3 All ER 935; *Fawdry & Co v Murfitt* [2003] QB 104; [2003] 4 All ER 60; *Re James* [1977] Ch 41; [1977] 1 All ER 364; *Mahon v Air New Zealand Ltd* [1984] AC 808; [1983] NZLR 662; (1983) 50 ALR 193; [1984] 3 All ER 201; *R v Arbitration Tribunal Ex parte Fijian Teachers' Association & the Fiji Teachers' Union* (JR No 2/1984); *Re Anthony Stephens v Attorney-General of Fiji* (JR No HBJ0126/1993); *State v Permanent Secretary of the Ministry of Employment & Industrial Relations; Ex-parte Emperor Gold Mining Co Ltd* (JR No 32/1991), considered.

M. S. Sahu Khan and *S. Sahu Khan* for the Applicant

J. Udit and *S. Tabaiwalu* for the Respondent

K. Vuataki for the Interested Party

Connors J. The history of this matter commences prior to 1991 when the goldmine at Vatukoula (the Mine) was owned by Emperor Gold Mining Company Ltd (Emperor) and Western Mining Corporation (WMC) and was managed by WMC.

The involvement of WMC in the mine ceased in 1991 and management of the mine was then taken over by Emperor.

In or about February 1991, 436 miners, who were members of the Fiji Mine Workers Union (FMWU), went on strike. The reason for the strike was the refusal of Emperor to recognise the FMWU for the purpose of collective bargaining under the Trade Union (Recognition) Act (Cap 96A).

As a result of the failure of the workers to return to work and following various warnings, Emperor dismissed the striking workers between April and July 1991.

The Permanent Secretary of the Ministry of Employment and Industrial Relations on 14 August 1991, purported to accept a report of a trade dispute under the Trade Disputes Act (Cap 97) from a group of workers calling themselves *"the organizing committee of the mine workers"*. This resulted in proceedings for judicial review coming before the court — *State v Permanent Secretary of the Ministry of Employment & Industrial Relations Ex parte: Emperor Gold Mining Co Ltd, Jubilee Mining Co Ltd and Koula Mining Co Ltd* (unreported, JR No 32/1991) (*State v Permanent Secretary*), Suva.

In the course of these proceedings, the FMWU argued that the decision of the company to dismiss the 436 workers was unlawful. Byrne J at 22 of his judgment said:

> I see no reason to differ from Saunders J in his conclusions in *Emperor Gold Mining Co Ltd v Jone Cagi* – 205 of 1991 in holding that the 436 were in breach of their contracts and that accordingly their employment was terminated correctly.

The decision of Saunders J in *Emperor v Cagi* to which Byrne J refers was a decision where orders pursuant to s 169 of the Land Transfer Act were made with respect to the occupation of houses owned by Emperor by the sacked workers.

Without attempting to detail the history of events, the next relevant occurrence was the establishment of a Commission of Inquiry pursuant to the Commission of Inquiry Act (Cap 47).

The President by commission dated 24 January 1995 appointed Gyaneshwar Prasad Lala as the sole Commissioner of Inquiry and appointed him:

> To enquire and to examine the events surrounding and issues in connection with the Vatukoula Trade Dispute C36/H 20 and in particular to:
>
> 1. Enquire into the conditions of employment of mine and surface workers having regard to the appropriate legislation which regulate such conditions. Attention must also be focused on the treatment of employees according to race, gender, ethnic origin or creed.
> 2. Examine the existing industrial relations between mine management and workers, the focus being on conflict resolution. Particular attention is to be directed on avenues open to employees to air grievances and the subsequent addressing of those grievances by Management.
> 3. Review the occupational health and safety standards and conditions for both mine and surface workers, their consistency with criteria set by relevant legislation which affect mining; and the avenues available to remedy health and safety standards which fall below criteria set by legislations.
> 4. Examine tax agreements for mining operations and propose whether the current arrangement and concessions need to be changed.
> 5. Examine any other special royalties/tax concessions previously given in the mining operations; and recommend the future use of such concessions.
> 6. Examine the extent of police involvement in the handling of strike.
> 7. Review the nature of the housing scheme provided by the company and report on the obligations and contributions by employer and employee towards maintenance, sanitation and other support facilities.
> 8. Report on the nature of the relationship between the Mines Inspectorate and the Management of the mining companies;
> 9. Report on the environmental impact, if any, in the mining operations of the company; and whether there are any adverse repercussions to local habitation of flora and fauna.
> 10. Consider any other issues or matters that are deemed relevant to the Commission's work.

The commission was published in the government gazette, 3 February 1995.

The Commission of Inquiry commenced on 20 February 1995 when the Commissioner outlined the terms of reference and dealt with preliminary and procedural issues.

The Commission of Inquiry heard evidence from witnesses called by the interested parties and by the Commissioner himself.

Emperor, FMWU and the Vatukoula Mine Workers Council (VMC) were all represented before the Commission of Inquiry.

In or about July 1995, the Commissioner delivered his report to the President. That report at p 154 contains a summary of the recommendations made. The summary of recommendations is annexed to this judgment.

The application

On 7 September 1995, EMG filed an application with the court seeking leave to apply for judicial review of the report and recommendations of the Commission of Inquiry.

On 28 March 1996, the then Chief Justice, Sir Timoci Tuivaga, granted leave to apply for judicial review.

The Respondent filed a summons to dismiss the application for want of prosecution on 5 November 2001. This application was finally determined by Byrne J on 20 June 2003 when the summons was dismissed.

EGM filed a notice of motion on 5 February 2003, which was dealt with concurrently with the summons, referred to above, wherein they sought to adduce oral evidence at the hearing of the judicial review. This application was granted on 20 June 2003.

The Respondent, by notice of motion filed on 12 January 2004, sought to have the matter reinstated to the cause list. The motion was granted on 23 January 2004 and the matter listed for hearing on 4 May 2004.

At the commencement of the hearing Josefa Sadreu was substituted as the Interested Party on behalf of the 436 workers in lieu of the Fiji Mine Workers Union, it having been deregistered.

The only oral evidence was that of Mr Martin Jacobsen, who gave brief oral evidence on behalf of the Applicant.

The matter then proceeded by way of submissions on behalf of Emperor, the Interested Party and the Respondent.

What does Emperor seek?

The statement filed pursuant to O 53 r 1(2) of the High Court Rules by Emperor states:

> The reliefs sought are an *Order of certiorari* to quash the purported report and recommendations of the Commission of Inquiry … *a declaration* that the decision and/or report and/or the recommendations of the Commissioner … was unlawful, irregular, without jurisdiction and/or in excess of jurisdiction, unreasonable, capricious and/or arbitrary and/or null and void and in any event there was no power to so act and *a declaration* that the Commission of Inquiry could not be validly appointed and/or there was no jurisdiction to appoint such a Commission as had been done under the Commission of Inquiry Act.

The grounds upon which relief is sought, are the type often criticised, in that, they are an attempt to be all-embracing and the result is, that they are very unhelpful.

The validity of the appointment

The Commission of Inquiry was established under s 2 of the Commission of Inquiry Act, which states:

> 2-(1) The President may whenever he shall deem it advisable so to do issue a Commission under his hand and the Public Seal of Fiji appointing one or more Commissioners and authorizing such Commissioner or Commissioners to inquire into any matter in which an inquiry would in the opinion of the President be for the public welfare;
>
> (2) Every Commission shall specify the subject, nature and extent of the Inquiry, and may contain directions generally for the carrying out of the inquiry and in particular as to the following matters:
>
> - (a) the manner in which the Commission is to be executed;
> - (b) the appointment of a chairman;
> - (c) the constitution of a quorum;
> - (d) the place and time, where and within which the Inquiry shall be made and the report thereof rendered;
> - (e) whether or not the enquiry shall be held in public.
>
> (3) Every Commission issued under this Act shall be published in the gazette.

The only limitation imposed by s 2 is that the Inquiry is to be for *"the public welfare"*.

Counsel for the Respondent submits that *"the public welfare"* may be defined as:

> The prosperity, well-being, or convenience of the public at large or the whole community as distinguished from the advantage of an individual or limited class.

The *"Vatukoula Trade Dispute — C36/H/20"* would appear, from the evidence before the Commission of Inquiry, to have affected *"the prosperity, well-being and convenience"* of the community of Vatukoula and probably the community of Fiji due to the impact of the mine on the economy of the country at that time. In any event one can only assume that this was the view of the President, as there is no evidence before me, that he held a contrary view or was unable to form such a view.

In any event, it would seem that any challenge, at this late stage, against the creation of the Commission of Inquiry would have little chance of success. It is a challenge that should properly be made prior to the commencement of the inquiry and not 9 years after the appointment has been made, the inquiry held and the report submitted to the President.

Further it would seem, that even if a challenge could be maintained at this time that the President would need to be a party to the proceedings, which he is not.

Emperor argues that the creation of the Commission of Inquiry to inquire into the private affairs of the company is ultra vires. The authority relied on in support of this contention (*Cock v Attorney-General* [1999] 29 NZLR 408) is dependent on a very different enabling act. The New Zealand Commission of Inquiry Legislation is limited to the *"working of any existing law or regarding the necessity or experiencing of any proposed legislation or concerning the conduct of any officer in the public service"*. These limitations do not apply to the Fiji legislation.

The period of appointment of the Commissioner was from 20 February to 10 May 1995. The Commission continued to receive evidence and hear submissions after 10 May 1995.

By notice in the government gazette of 5 July 1995, the term of the Commission was sought to be extended.

This notice said:

> In exercise of the powers conferred upon him by section 2 of the Commission of Inquiry Act, His Excellency the President, has extended the period in which the Commissioner is to present his report to the 31st day of July 1995.
>
> Dated this 5th day of July 1995.
>
> By Order
>
> M. Rigamoto
>
> Official Secretary
>
> Office of the President.

As is apparent, the notice was under the hand of the official secretary and not of the President.

The notification would not appear to be in accordance with the provisions of ss 2 and 3 of the Commission of Inquiry Act. Section 3 states:

> In case any Commissioners shall be or becoming unable or unwilling to act, or shall die, the President may appoint another Commissioner in his place, and any Commission issued under this Act may be altered as the President may deem fit by any subsequent Commission issued by President or may be revoked altogether by notification to that effect published in the Gazette.

It would appear that this section would enable the President to alter the commission previously issued. An extension of the period of appointment would be an alteration to the commission. The section does not appear to enable the extension of the Commission in the manner that has been done. It is the period of appointment of the Commission that must be extended.

It is submitted on behalf of the Respondent that ss 2 and 53 of the Interpretation Act provide any necessary remedy. The application of these sections was considered by Kermode J in *R v Arbitration Tribunal; Ex parte Fijian Teachers' Association & the Fiji Teachers' Union* (unreported, JR No 2/1984) where the validity of the report issued by the arbitration tribunal was challenged on the basis that as no extension was given, the tribunal lacked jurisdiction to deal with the matter and at 9 his Lordship said:

> In any event section 53 of the Interpretation Act has application. It provides as follows:
>
> 53. Where in any written law a time prescribed for doing any Act or taking any proceeding, and power is given to a court or other authority to extend such time, then, unless the contrary intention appears, such power may be exercised by the court or other authority although the application for the same is not made until after the expiration of the time prescribed.
>
> ….
>
> In my view the Tribunal did not act without jurisdiction and the Minister was entitled to entertain the application for extension of time notwithstanding that time had expired before such applications were made.

The Respondent further refers of the court to the doctrine of de facto office which might be summarised as:

> The acts of an officer or judge may be held to be valid in law, even though his own appointment is invalid and in truth, he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he acted in the office under a general supposition of his confidence to do so." — *Wade & Forsyth — Administrative Law* 8th ed 2000.

Lord Denning MR in *Re James* [1977] Ch 41 at 65; [1977] 1 All ER 364 at 372 said:

> I cannot think it right that the validity of the divorce should depend on which particular judge hears the case. The decision [*Adams v Adams*], if correct, applies to any case coming before the High Court of Rhodesia during the interregnum. It makes the validity depend on which particular judge makes any particulars orders. That seems to me absurd. Not only absurd, but quite unjust. When a person applies after UDI to the court in Rhodesia seeking justice, he cannot choose his judge. He cannot say whether his case will come in front of a judge of that court who was appointed before UDI or a judge who was appointed afterwards. He may not even be able to find out. At any rate, he cannot say "I will not have Begg J — I want Goldin J." Simple justice demands that it should make no difference. No matter by whom the man was appointed a judge, no matter at what date he was appointed, he is sitting as a judge of the court and the order made by him is an order of the High Court of Rhodesia. He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge.
>
> Maybe he was not validly appointed … But, still, he holds the office. It is the office that matters, not the incumbent. I remember when I was first appointed the judge, a senior but disappointed member of the Bar raised his hat to me saying: "I raise my hat, if not to you, at any rate to the office." So long as the man holds the office, and exercises it duly and in accordance with law, his orders are not a nullity. If they are erroneous, they may be upset on appeal. But if not erroneous they should be upheld. Such as this theme which runs through the important case in the Supreme Court of Connecticut —

> *State v Carol* [1871] 38 Con 449 and the Court of Appeal in New Zealand in *Re Aldridge* (1893) 15 NZLR 361. The point is well put in the United States Supreme Court in *Norton v Shelby County* [1886] 118 ES 425 at 444–5; "where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions … the official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact. In the light of those cases, I think the decision of the Court of Criminal Appeal in *R v Cronin* was wrong. So was *Adams v Adams* [1971] P 188; [1970] 3 All ER 572".

After reciting the above quotation, Ward LJ, in *Fawdry & Co v Murfitt* [2003] QB 104; [2003] 4 All ER 60 said:

> I am quite satisfied that even if there were some defect in the appointment of Judge Davies, the de facto doctrine operates so as to protect her judgment from the charge that it was invalid.

The provision of the doctrine, however, does not apply where the judicial officer is aware of the lack of proper appointment.

The Respondent further submits that the adoption of a more purposive approach to the interpretation of s 2 of the Commission of Inquiry Act should be adopted to give full value to the intention behind the appointing of the Commission of Inquiry. The purpose of the appointment of the Commission of Inquiry being to inquire and report and that no purpose would be served if the Commission of Inquiry did not complete that task.

The Respondent further submits that the de minimis rule should be applied to ensure that the intention of the President is fulfilled by disregarding any minor procedural irregularity. In support of the proposition, the Respondent relies upon *Whitfield v Attorney-General* [1989] LRC 126.

It is submitted by the Respondent that s 35 of the Interpretation Act which provides:

> Where any written law confers any power or imposes any duty then unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion arises;

may be utilised in conjunction with ss 2 and 3 of the Commission of Inquiry Act to validate the somewhat belated and somewhat irregular extension of time of the Commission of Inquiry. I do not think this is so.

The Commissioner must have been aware of the duration of his commission and when he continued to take evidence and submissions after that time period had expired he was doing so while being aware of the lack of proper appointment and accordingly the benefit of the de facto doctrine is not available.

It is not possible to treat the continuation of the Commission of Inquiry after the expiration of the period of appointment set forth in the commission as "a minor procedural irregularity". The de minimis rule is not available to preserve the Commission of Inquiry.

Report and recommendations

It is now clear that certiorari will only lie with respect to reports when the final decision-making body is required to take the recommendations into account — *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149; 134 ALR 469.

In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; 106 ALR 11 (*Ainsworth*), Mason CJ, Dawson, Toohey and Gaudron JJ said at CLR 580; ALR 20:

> The function of certiorari is to quash the legal effect of the legal consequences of the decision or order under review. The report made and delivered by the Commission has, of itself, no legal effect and carries no legal consequences, whether direct or indirect. It is different when a report or recommendation operates as a precondition or as a bar to a course of action (*Brettingham-Moore v St Leonards Municipality* [1969] 121 CLR esp at p 525 per Barwick CJ), or as a step in a process capable of altering rights, interests or liabilities (*R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 at 884; [1967] 2 All ER 770 at 779, per Diplock LJ). A report or recommendation of that kind may be quashed, that is to say, its legal effect may be nullified by certiorari. But the Commission's report is not in that category.

Similarly, the report here under review is not in the category where the recipient of the report is obliged by legislation or otherwise to act in accordance with the report and its recommendations.

The President and the government may choose to completely ignore the report of the Commissioner and refuse or fail to implement any of the recommendations contained in it. The decision is entirely at the discretion of persons other than the Commissioner. Certiorari therefore is not available:

> It does not follow that, because mandamus and certiorari are inapplicable, the appellants must leave this Court without remedies. The law with respect to procedural fairness has developed in spite of the technical aspects of the prerogative writs. Moreover, had the appellants had advance notice of the Commission's intention to report adversely, its failure to observe the requirements of procedural fairness would have entitled them to relief by way of prohibition *R v Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 at 308–10; [1972] 2 All ER 589 at 594–6; *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602 at 615) preventing it from reporting adversely without first giving them an opportunity to answer the matters put against them and to put submissions as to findings or recommendations that might be made (See *Mahon* [1984] AC at 821, 828, 829; and *Annetts v McCann* (1990) 170 CLR 596 at 603–4; 97 ALR 177 at 182; 21 ALD 651 at 655, per Mason CJ, Deane and McHugh JJ; at CLR 612; ALR 169; ALD 660 per Brennan J. Instead, the report has been made and delivered in accordance with s 2.18 of the Act and although it had no legal effect or consequence, it had the practical effect of blackening the appellant's reputation. Prima facie, at least, these matters suggest that the appellants were entitled to declaratory of the kind granted in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155; [1982] 3 All ER 141. — *Ainsworth* (supra).

Their Honours went on to say that it is now accepted that superior courts have the inherent power to grant declaratory relief and it is a discretionary power which is not fettered by the laying down of rules as to the manner in which it might be exercised but that it is, however, confined by the considerations that limit judicial power.

The court in *Ainsworth* detailed the limitations to the exercise of the declaratory relief, which are:

(i) It must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions.

(ii) The persons seeking relief must have a real interest.

(iii) Relief should not be granted if the court's declaration will produce no foreseeable consequences for the parties.

In *Mahon v Air New Zealand Ltd* [1984] AC 808; [1983] NZLR 662; (1983) 50 ALR 193; [1984] 3 All ER 201 (*Mahon*) the rules of natural justice applicable to the appeal were reduced to two and were stated by the court as:

> The first rules is that the person making a finding in the exercise of an [investigative] jurisdiction must base his decision upon evidence that has some probative value. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.
>
> The second rule is that, he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that the person represented at the Inquiry, whose interests (including in that term, career or reputation) may be adversely affected by it, may wish to place before him, or would have so wished if he had been made aware of the risk of the findings being made … The second rule requires that any person represented at the Inquiry who would be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding, even though it cannot be predicted that it would inevitably have had that result.

It is on this basis, that the court must look to the application in this matter but in doing so, must take account of the limitations imposed that are expressed in *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 at 35; 93 ALR 1 at 25 by Brennan J where he said:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.
>
> The consequence is that the scope of the judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent of the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.
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> There is one limitation, "Wednesbury unreasonableness" (the nomenclature comes from *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; [1947] 2 All ER 680), which may appear to open the gate to judicial review of the merits of a decision or action taken within power. Properly applied, Wednesbury unreasonableness leaves the merits of a decision or action unaffected unless the decision or action is such as to amount to an abuse of power. *Nottinghamshire County Council v Environment State Secretary* [1986] AC 240 at 249; [1986] 1 All ER 199 at 203. Acting on the implied intention of the legislature that a power be exercised reasonably, the court holds invalid a purported exercise of the power which is so unreasonable than no reasonable repository of the power could have taken the impugned decision or action. The limitation is extremely confined.

Lord Diplock summarised the law on this issue in *Council of Civil Service Unions v Minister for Civil Services* [1985] AC 374 at 410; [1984] 3 All ER 935 at 950–1 (*CCSU*) where he said:

> Judicial review has, I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads, the grounds upon which the administrative action is subject to control by judicial review. The first ground, I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further

development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"(*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; [1947] 2 All ER 680). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

Finally, it is necessary to look to the application of these principles to Fiji. The then Chief Justice, Sir Timoci Tuivaga, in Sitiveni Ligamamada Rabuka & Commission of Inquiry into the deed of settlement dated 17 September 1992 *Re Anthony Stephens v Attorney-General of Fiji* (unreported, JR No HBJ0126/1993) considered the authorities and said at 33: —

> As regards the adverse findings that were against the applicant, it appears on the authorities I've referred to that the applicant should have been warned of the risk he faced in regard to those findings and accorded an opportunity to defend himself.

His Lordship, after identifying the findings which caused the applicant the most grievance then detailed the two important rules of natural justice referred to in *Mahon* as being *"classic in this area of the law"*.

Conclusion

The Commissioner made some 67 recommendations, which are annexed.

The first and most onerous group of recommendations relate to the establishment of a "Social Justice Fund" which was to be used to address the problems of Vatukoula and *"then the fund will be used to provide housing to the underprivileged in other parts of the country"* — Report p 14.

The provision of housing to the underprivileged in other parts of the country is outside the scope of the Commission of Inquiry.

The aim of the social justice fund is stated by the Commissioner on p 15 of the report to be *"a vehicle to enhance the welfare of the underprivileged and promote social justice in the country"*. This is outside the terms of reference of the commission. At p 16 of the report, the Commissioner says:

> I have recommended establishment of a Social Justice Fund to care for the needy sections of our community.

This recommendation is not limited to events surrounding and issues in connection with *"Vatukoula Trade Dispute — C36/H/20"*. The Commissioner at p 16 of his report says:

> The Social Justice Fund should redistribute resources from those who have to those who need for the progress and welfare of our community. The first beneficiaries will, of course, be the people from Vatukoula who have been dismissed.

The Commissioner then at p 16, says:

> This in no way contravenes our Terms of Reference or contravenes any earlier court judgments.

The welfare of the community at large does not fall within the terms of reference and the recommendation is therefore manifestly unreasonable.

While the interests of the community at large are outside the terms of reference of the Commission of Inquiry, there also appeared to be no evidence before the Commissioner with respect to the welfare of the community at large. It cannot therefore be said that the recommendation is based upon *"evidence that has some probative value" — Mahon*.

Emperor had no prior warning that the Commissioner intended to create a social justice fund or that he intended to make recommendations in accordance with recommendations 1–21. Emperor had no opportunity to make submissions with respect to these proposals. The recommendations impact on other members of the community and there is no evidence before me to suggest that anyone was given any opportunity to make submissions or to call evidence with respect to these recommendations. Therefore, Emperor at least, were *"left in the dark as to the risk of the finding being made, and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, might have deterred him from making the finding" — Mahon*.

Recommendation 4 recommends that Emperor contribute 2 million dollars ($2,000,000) over 5 years to the creation of the social justice fund. In addition, it recommends Emperor, together with all other employers in Fiji pay 1% of their gross payroll to the social justice fund for a period of 10 years.

Recommendation 19 says that 50 million dollars ($50,000,000) would be collected into the fund over a period of 5 years and the Commissioner says *"This will encourage proper housing for everyone in Fiji which is of paramount importance for a good living and I think this is the least a Government can do for its people"*.

This recommendation is not within the scope of the terms of reference of the Commission of Inquiry. Those affected, including Emperor, did not have the opportunity to be heard with respect to these recommendations.

The Commissioner at p 19 of the report says, *"I have no hesitation in accepting the submission, and the union's contention that the workers walked off their jobs because of poor payment and working conditions"*.

This is a finding that is contrary to the adjudication by the court in *State v Permanent Secretary* where Byrne J said at 2:

> The union admits that the 436 went on strike because of non-recognition of the union by the company as the representative for the purpose of collective bargaining under the Trade Unions (Recognition) Act, Cap 96A.

The Commissioner at p 20 of his report acknowledges that the strikers were lawfully dismissed as he recommends that the company should re-employ those workers.

After acknowledging that the workers were lawfully dismissed, the Commissioner in recommendation 21 recommends that the lawfully dismissed employees be paid compensation equal to 4 years basic salary plus COLA. Such a condition is manifestly unreasonable.

The recommendations for the establishment of the social justice fund and for the payment of compensation to the dismissed workers may be commendable recommendations but they are not recommendations that have been arrived at in a manner that makes them legally sustainable.

The commission might be summarised as requiring the Commissioner to:

> Enquire and examine the events surrounding and issues in connections with the Vatukoula Trade Dispute — C36/H/20 and in particular to:
>
> … report to his Excellency the President in writing … your findings and opinions on the matters aforesaid, together with such recommendations as you think fit to make in respect thereof.

The report of the Commissioner therefore must contain only findings, opinions and recommendations relating to the events surrounding and issues in connection with the *"Vatukoula Trade Dispute — C36/H/20"*.

I am of the opinion that the report of the Commissioner is so fatally flawed as not to be a report of the Commissioner's findings, opinions and recommendations with respect to the events surrounding and issues in connection with the "*Vatukoula Trade Dispute — C36/H/20*".

In reaching this conclusion, I take account of the fundamental significance to the report and recommendations of the social justice fund which facilitates the payment of compensation to the lawfully dismissed employees and is to fund the housing program. These recommendations and those that flow from them are, to paraphrase the words of Lord Diplock in *CCSU*, so outrageous in their defiance of logic that no sensible person who had applied his mind to the terms of reference contained in the Commission could have arrived at them. The affected persons, in particular Emperor, were not warned of the risk they faced in regard to those findings and recommendations and were not accorded an opportunity to defend themselves.

Those recommendations are not supported by evidence having some probative value.

The purported extension of the Commission after 10 May 1995 was ineffective and accordingly the actions of the Commissioner after that time are ultra vires.

I therefore declare that the report and recommendations of the Commissioner are null and void.

Annexure

Summary of recommendations

1. That one holiday be excluded each and the people of Fiji be required to work normally that day and all earnings from one day's wages be deposited into a Social Fund known "Social Justice Fund" for the next 15 years. For avoidance of doubt the holidays for exclusion should be rotated each year or the Government may wish to give away one holiday that would not adversely affect any particular Fiji community.
2. That all employees should be required to pay 1 per cent of their gross payroll in the Social Justice Fund for next ten years.
3. That the Emperor Gold Mining Company Limited should contribute $400,000.00 per annum towards the Social Justice Fund for the next five years.
4. That the Government of Fiji should contribute $800,000.00 a year to the said Social Justice Fund for the next five years.
5. That this Fund be administered by Ministry of Finance and Ministry of Labour.

6. That the Minister of Finance appoints a committee headed by a Chairman and six other members. The Committee shall consist of one representative from the Ministry of Finance, one representative from FTUC, one representative from Ministry of Labour, one representative from Employers Federation and one representative of the Leader of Opposition. The terms of appointment be for three years and *all* appointees serve on this committee on a *voluntary* basis.
7. That this Fund be utilized as follows:

   The Ministry of Finance, Ministry of Labour and Ministry of Lands in consultation with Native Land Trust Board make suitable land available for a housing project in Vatukoula for one thousand, 2 bedroom low income houses to be built on the land provided for low cost housing.

   I am also inclined to recommend that the housing project be completed under the supervision of the Housing Authority.
8. That the first expenditure out of the Social Justice Fund be towards housing. That the Housing Scheme be completed within two years of the creation of the Fund. That all housing structures apart from high class housing which has been discussed hereinafter be removed from Vatukoula Mining areas. That the housing land rental for five years be borne by the Fund to the Native Land Trust Board or the Crown Land whichever is applicable.
9. That after the expiration of five years all occupants be required to pay the rental to the respective landowners.
10. That the people who have already purchased housing structures from the company be refunded their money because the conditions of the houses are such that it cannot be made a proper habitation under any definition of law.
11. That Government draws up a proper legislation in respect of the recommendations, and Government should see to it that this scheme is carried out properly and effectively
12. That quarterly audit be carried out on any expenditure from the Fund.
13. That monies going into the Fund be kept in a Trust Account for the purposes herein.
14. That as far as possible each house be within the range of $15,000 to $20,000. That for further assistance the Government should grant duty free entry for terms imported for these houses so that the cost is cheaper. That 20 per cent of the total Fund money be always maintained in the Fund.
15. That if the Army Engineering Services are available (we have an excellent core of Army engineers) they should assist with the construction of the houses.
16. That these houses should have proper ventilations facilities, proper roof and ceiling, toilet facilities, and proper kitchen facilities.
17. That these houses be not in the mining area and all low cost housing be demolished, a new housing scheme be created away from the mining areas as there can be no permanent housing schemes in Mining tenements.
18. That for the Vatukoula Housing Project only, on the completion of the houses, each householder be given the necessary household furniture, such as, fridge, beds, stoves etc at a cost of not more than $2,000.00.

19. That after three years the benefit of the Fund should be expended and the Fund should be used for housing other people in the country on the basis of allocation being 70 per cent for the Indigenous Fijian housing and 30 per cent for the others. The Government should continue with the Fund for a further five years. It is my view that approximately $50 million will be collected over a period of five years. This will encourage proper housing for everyone in Fiji which is of paramount importance for a good living and I think this is the least a Government can do for its people.
20. That it would be correct to say that if you want the workforce to operate properly, it is only fair that one has a proper habitat and facilities where one can bring up his children properly, where one's children can study at night, and where one can talk and sit with his family without environmental hazards. I consider this an absolute right of an individual and we will go a long way in achieving social justice by providing some of these benefits to our workers.
21. That the strikers who were dismissed be paid, a lump sum in compensation equal to four years basic salary plus COLA for those years.
22. That the sum should only be paid when the dismissed strikers (ex-employees) have moved out of the company houses that they are illegally occupying.
23. That the dismissed employees, if they so desire, be given the first chance of employment with the company when a vacancy arises in their former occupation at the mines.
24. If recommendation is implemented it would enhance the company's image and illustrate to the people of Fiji that the "new management" is truly humanitarian in the outlook and willing to address in full the shortcomings of their predecessors.
25. In the event the company accepts and implements this recommendation, it should be emphasized that this type of payment would not be repeated in any other strike situation and it is only because this is a most exceptional case (rights and wrongs on both sides). In other words this humanitarian payment should never be considered to have created a precedent.
26. The miners" quarters in use at Vatukoula should be demolished and replaced with modern houses at a low cost, and with all modern conveniences contained therein.
27. Land for these houses should be given to the miners for free rental for 5 years, after which they could start paying rentals to the Director of Lands or Native Land Trust Board as the case may be.
28. That free transportation be provided by the company from the mines to the site of abode, but if someone decides to stay far away from the housing area, then I suggest that the company be not responsible for transport.
29. The Government of Fiji is to introduce a strict legislation in controlling environmental abuse, and if necessary in operating mining areas and workforce which operate in the mines for their protection.
30. A careful study be made of existing legislation in this area. New South Wales and Victoria have led mining in the new era of pollution control in Australia with legislative provisions now primarily contained in the

"Environmental Offences and Penalties Act 1989" and the "Environment Protection Act 1990". It is recommended that a careful study be made of these legislation and relevant provisions be adopted in Fiji.

31. The sulphur dioxide acid S02 emissions from the roaster stack are not monitored but can be clearly seen at the top of the stack. This could be a major health hazard, and Emperor Gold Mines claimed that they do not have any record of the amount of sulphur dioxide coming from the stack. The situation cannot be addressed by simply saying we do not know, when obviously there is a responsibility that they should known. Furthermore, they should do something about monitoring the sulphur dioxide, and if necessary, the fitting of scrubbers to roaster stacks to remove any sulphur dioxide before it is released to contaminate the surrounding areas. Sulphur dioxide released from the roaster could result in bronchial respiratory illness for the local population, it is problematical if this occurs, but one cannot help being suspicious when senior management who should know can only answer to the Commission, "we do not know". It is strongly recommended that the Emperor Gold Mining Company install a gas chromatograph in the roaster stack, showing readings in the Roaster Control Room of the volumes and the type of gases being discharged to the atmosphere. That a report of monitoring be sent to the Department of Lands and Mineral Resources on weekly basis.

32. The Safety of the Tailings Dam:

> The Commission did not have the expertise to determine the stability of the tailings dam. This is a specialized field and it is recommended that consultants who specialize in tailings dam wall should evaluate the Vatukoula dams. The stability of the dam walls should be established under all conditions such as cyclonic and earthquake loading, following this evaluation, an insurance policy should be taken out by the company via an independent international company to ensure against any unexpected breach of tailings dams resulting catastrophic damage to flora, fauna or the local inhabitants. Where tailing dams have collapsed in the past resulting in the loss of lives, senior management and the Board of Directors of the companies involved, have been prosecuted in Court for negligence that had resulted in death. One case comes to mind, where such action was taken in Italy and the Court rules that Board Members and senior management were guilty of negligent, and hence, it would be advisable to have an engineering study carried out on the stability of the tailings dam walls, and a report be sent to Ministry of Lands and Mineral Resources as urgently as possible.

33. One Environmental Audit completed recently at Vatukoula suggests that warning signs should be suitably placed advising people not to drink water from the streams in the mining lease. What this suggestion does not address is the question of how you inform young children, who cannot read, and wander around the lease areas of the dangers of drinking from streams, if it is hot and humid, as is often the case at Vatukoula. How do you stop a child who is thirsty that he or she cannot drink the stream water? It is recommended that immediate steps be taken as precautionary measures to prevent any mishaps which may create health hazards.

34. Tank rainwater is said to be suitable for drinking. One question that remains unanswered is, "what effect gases discharged from the roaster stack have on rain water?" It must have some effect, hence how can the rain tank water be classified as "uncontaminated" at Vatukoula? We have already suggested steps in regards to drinking water.
35. The transport of hazardous chemicals and explosives is normally carried out by contractors and the transportation of such materials should comply with the international standards. It is the responsibility of the Emperor Gold Mining Company to ensure that they employ competent contractors to do this work on their behalf and that such contractors know the dangers that could arise in emergencies with the transportation of such substances. The drivers of these vehicles used to transport dangerous substances should be fully trained in the action they should take in the vent of an emergency, that is, vehicle running off the road, a crash or a spill. That the chemical data sheet showing what steps should be taken in an emergency should be on display inside the driver's cabin and at the rear of the vehicle. Emperor Gold Mines have the responsibility to ensure that the contractors who carry hazardous substances, on their behalf, have been given all the relevant information, and that the drivers of such vehicles are fully trained in the action they should take in emergency situations.
36. That this should be done here, similar legislation be enacted in Fiji, and that mine employers should pay for these policies and there should be no deductions from employees pay regarding insurance premiums as at present. This should be a responsibility of the employer and the death benefit be increased from $24,000 to $30,000.
37. A national minimum wage be set for the mining industry.
38. Government may consider extending this to other industries.
39. There be no discrimination based on gender on payments for equal work.
40. That the above procedures be printed and given to every employee and if possible translated into Fijian language and a copy be given to each employee so that the employee is always aware of what necessary steps can be taken by him in the event a need arises to bring grievance to the notice of the management.
41. That every endeavour shall be made to amicably resolve any grievance or dispute which may arise by direct negotiations and consultations between parties to the dispute.
42. That while the above procedure is being followed, every endeavour should be made to ensure that work continues normally except in a case of genuine safety issue. No party shall be prejudiced as to final settlement by the continuance of work in terms of the procedure laid down.
43. The status quo existing before the emergence of the grievance or dispute is to continue while the above procedure is being followed.
44. These procedures will not restrict an employer or duly authorized representative of the employer or duly authorized official or the aggrieved party from making representations to each other. I accept the views expressed by the Counsel for the Emperor Gold Mining Company that this procedure is satisfactory and promptly independent system of conflict resolutions.

45. *There should be powers given through amendments to Mining Act which should contain proposals and mechanisms to ascertain the effectiveness of the measures the mine is taking for the protection and management of environment. The amended Act should provide for an environment inspection regime. The amendment should provide for environmental inspectors and they shall be given powers by Regulations to enter a mining operation which require any person to provide information about the mining operators and given directions to the tenement holder requiring modification or cessation of operations. There shall be a right of appeal to the Minister for Lands and Mineral Resources against a cessation order.*

46. *That required amendments be made to Mining Act to provide for proper environmental conditions. It is recommended that on the granting of any licence or at any subsequent time, conditions for the prevention of injury to the land or for its rehabilitation may be imposed. These conditions may be reasonable and must be imposed for the purpose of preventing or reducing or making good any injury to anything on the natural surface of that land or consequential damage to any other land. The power to impose such conditions should be with the Minister for Lands and Mineral Resources. The Minister shall have power to impose such conditions at any time.*

47. From the Social Fund that I have recommended earlier provision be made for scholarship to be given to the interested people for the next 5 years to receive training and to take over the positions in the mining inspectorate have the local staff to carryout these provisions which unfortunately are not available at present.

48. That our Mining Department's budget be increased to provide proper facilities to carryout proper tests regarding pollution and environment, and regarding heat and other matters in the mines on a regular basis, including night inspections.

49. That a resident inspector be appointed who can be stationed at Vatukoula for the next five years to give advice on the spot and to hear the grievances of the miners at the mines so that proper remedies be immediately take as and when required.

50. The river water should be filtered and chlorinated. Vatukoula might be one of the last mining towns in the world where untreated water is drawn from taps that is freely available to children. The staff at the mines state they drank untreated water for years without any ill effect.

It would be fool hardy to think that there is no risk where a mining company supplies untreated water to be drawn from village taps or in houses where the senior staff live, there is an obvious need for treated water. It is also true that people are urged to use tank water for drinking, and river water for domestic cleaning, washing etc.

Nevertheless, there are many times, during dry periods when tank "water is not available and many of the local population cannot be expected to know the dangers of drinking river water without boiling the water before use."

In the event of a serious outbreak of any disease that could be attributed to untreated river water, the company could not be considered blameless. There was no evidence presented at the Inquiry to show that

the drinking of untreated water does not have any chronic health effects on humans. The drinking water requires daily monitoring until better systems are installed.

51. That the company henceforth ceases to pump contaminated water in the pumps.
52. Efforts be made to immediately supply the Vatukoula community with treated water.
53. Disregard of the above should be viewed very seriously and if any infringements continue after a proper evaluation and consultation with the company (EGM) should be subject to prosecution.
54. That contract and piece worker or bonus worker shall be allowed in all classes of work provided that such contract and/or piece worker or terms of bonus shall be fixed and will enable the average employee to earn not less than 18 per cent over the weekly rate now prescribed for the class of work now performed, but in no case the employee should be paid less than the minimum rate fixed by the wage council.
55. *If a contract and/or piece work or bonus worker losses time through any default of the employer the workers shall be paid for such time lost at a rate which is to be agreed between the union and the company.*
56. The employer shall supply to all contract and/or piece worker or bonus worker as soon as they are available cut at least fortnightly the correct measurements of the work to be performed by them.
57. The contract and/or piece work price or bonus terms shall be submitted to each party prior to the commencement of the work to be carried out under the contract and/or bonus and each contract or bonus shall be in writing.
58. The contract and bonus documents requiring signatures of the parties shall be submitted for signature as soon as practicable before the commencement of contract and/or bonus work.
59. That one copy of the contract/bonus document shall be supplied to the union representative, or the worker if he is not represented for perusal.
60. That the said documents should be given five days in advance, so that it could be perused by the worker or his representative before it is signed. This five days period should not prevent work in accordance with the terms of contract or bonus.
61. That at the end of five days the documents must be signed by all employees which are party to the contract or bonus.
62. The Supervisor should give remainder 24 hours before the expiry of five days, and of the employees party to contract or bonus still have not signed that document, the company shall cease paying that employee the contract/bonus rate until such times as the employee does sign.
63. Employees working in wet places shall be paid 20 cents an hour in addition to the wages they are now receiving.
64. A place shall deemed to be wet:
    (a) where water other than rain is dripping from overhead, so that the clothing or workers employed there shall become saturated with water, or;
    (b) where a worker works without protective waterproof footwear in water and/or such under point to depth exceeding 50 mm.

65. On dangerous ground no person shall be employed alone unless there is some persons within easy hearing distance. If there is any dispute into whether ground is dangerous or not, it should be settled between the workers representative and the manager of the mine. In the event they are unable to agree, the matter should be referred to the Inspector of Mines for final determination.
66. Any employee who is required to work in rain heavy enough to wet the clothes of the employee shall at the option of the employer be either provided by the employer with waterproof protective clothing or shall be paid double the rate, which he is receiving. Where double rates are payable in accordance with this clause it shall be payable for the period commencing from the start of such work until the employee is able to change into drying clothing or until the employee finishes work, whichever is the earlier. Provided that if such an employee while properly using such protective clothing nevertheless gets their clothes wet in the performance of their duties, the employee shall be paid double rates for all work so performed.
67. Any employee engaged to do the work of higher grade shall receive the wages of such grade while so employed, but the event of a higher grade employee being put to work of a lesser grade such employee shall not suffer a reduction of their wages by reason of being temporarily out of his grade. For the purpose of this recommendation each day is to stand by itself.

Determination made.