

STATE v ARBITRATION TRIBUNAL; Ex parte FIJI ISLAND TRADE AND INVESTMENT BUREAU and 2 Ors (HBJ0023 of 2001)

HIGH COURT — CIVIL JURISDICTION

5 PATHIK J

8 July 2005

10 **Administrative law — judicial review — ministerial discretion — 6 months' salary in lieu of reinstatement — re-employed after unjust termination from employment — higher salary than previous employment — whether error of law vitiates decision — Trade Disputes Act s 34(7).**

15 The second Interested Party's (IP2) employment was terminated. The Arbitration Tribunal (Tribunal) awarded IP2 6 months' salary as compensation in lieu of reinstatement from being unjustly terminated from employment. The Fiji Islands Trade and Investment Bureau (Applicant) applied for judicial review regarding the Tribunal's decision. IP2 was subsequently re-employed approximately 4 months after termination from employment with a much higher salary than her previous employment. The Applicant alleged that there was error of law with regard to the decision of the Tribunal since it was in excess of IP2's
20 actual loss.

Held — The decision of the Tribunal was not unreasonable as the Tribunal has more latitude in circumstances where there is room for difference of opinion. What must be shown is a relevant error of law, that is, an error in the actual making of the decision which affected the decision itself.

25 There was no doubt that the Tribunal was vested with discretionary powers; and the remedy was discretionary and not subject to judicial review.

Application dismissed.

Cases referred to

30 *R v Hull University Visitor; Ex parte Page* [1993] AC 682; [1993] 1 All ER 97; *R v Governor of Brixton Prison; Ex parte Levin* [1997] AC 741; [1997] 3 All ER 289; *R v Independent Television Commission; Ex parte TSW Broadcasting Ltd* (1992) [1996] JR 185; *R v Knightbridge Crown Court; Ex parte Marcrest Properties Ltd* [1983] 1 All ER 1148; [1983] 1 WLR 300; *R v Wolverhampton Coroner; Ex parte McCurbin* [1990] 2 All ER 759; [1990] 1 WLR 719; *Yashni Kant v Central Manufacturing Co Ltd* Civ App ABU0001 of 2001S; [2002] FJCA
35 39, cited.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680, considered.

40 *J. Apted* for the Applicant

J. Udit for the Respondent

45 **Pathik J.** This is an application for judicial review by Fiji Islands Trade and Investment Bureau (the Applicant) to review the decision of the Arbitration Tribunal (the Tribunal) contained in his award no 7 of 2001 (the Award). The Fiji Public Service Association (the Association) and Asenaca Caucau are the first and second Interested Party respectively.

The decision impugned

50 The decision impugned is contained on p 13 of award no 7 of 2001 and it reads as follows:

In the end result I am satisfied that Ms Caucau's termination was unjustified and a flagrant breach of the relevant Collective Agreement.

Since the grievor has not sought re-instatement I hereby award her six (6) months salary as compensation ...

5 **The Applicant's grounds for challenging the decision**

Although a large number of grounds were initially raised by the Applicant, it has now abandoned them all except that the: "Tribunal erred in overlooking the evidence before him that Ms Caucau had mitigated her loss by obtaining a higher
10 paid job with Central Queensland University (CQU) within a few months of her dismissal by the FTIB and as a consequence the Tribunal erroneously awarded her compensation amounting to more than her actual loss".

Applicant's submission

15 Counsel for the Applicant contends that Caucau's re-employment is not referred to in the summary of evidence contained in the Tribunal's award.

But, in para 22 of his affidavit in support of the application for judicial review, Mr Jesoni Vitusagavulu, the former chief executive officer of the FITIB, who conducted the trade dispute hearing for the FITIB, categorically states:

20 22. It was in evidence that within approximately four months of the termination of her employment, AC had commenced employment with the Queensland University of Technology at Laucala Bay at a salary of approximately \$40,000, approximately \$12,000 more than she earned at FITIB. At the time her employment was terminated, by the Applicant, she was earning \$28,623.

25 There is no contradiction of this evidence from either of the interested parties. Counsel submits that the evidence of Caucau's re-employment was clearly before the Tribunal.

Counsel refers the court to authorities stating the principles to be applied in case of breach of contract and mitigation of loss arising from the breach.

30 Mr Apted submits that "the principle clearly is that justice requires that a person who has been wronged should be compensated for his or her loss, but only for his or her actual loss. Justice cannot be used to give a Plaintiff a windfall as a result of the breach that they suffered. The clear and well established policy of the law is therefore against the recovery of what was not lost".

35 Counsel submits: "in this case, the basis of the Tribunal's award of what he called 'compensation' was according to the Award the breach of clause 34 of the collective agreement (which was an implied condition of Ms Caucau's contract of employment under s 34(7) of the Trade Disputes Act) and of general principles of 'procedural fairness' (which can only be aspects of the term of 'fair dealing'
40 implied by law into employment contracts (see *Yashni Kant v Central Manufacturing Co Ltd* Civ App ABU0001 of 2001S; [2002] FJCA 39))".

Counsel submitted that the Tribunal made a fundamental error of law which award was in excess of Ms Caucau's actual loss.

45 He said that any loss suffered by Ms Caucau as a result of the breach found by the Tribunal could only be in relation to the loss of employment that followed the breaches and only to the extent of the actual financial loss she suffered as a result of being unemployed.

Mr Apted submits that certiorari should issue to quash that part of the award. He further submits that in the absence of any record kept by the arbitrator of
50 evidence of Ms Caucau's re-employment by CQU, the matter should be remitted to the Tribunal for a rehearing on an appropriate remedy.

Respondent's (Tribunal's) submission

Counsel for the Respondent makes his submission specifically on the issue of law which is to assist this court. It was in the exercise of his discretion that the Tribunal made an award for compensation.

5 Counsel for the Applicant is not challenging the finding that Ms Caucau was unfairly dismissed. As a consequence of the finding, the remedy given was by compensating the griever a payment of 6 months' salary in lieu of reinstatement.

10 Counsel submits that the Tribunal after hearing all the evidence it evaluated it and in the exercise of his discretion ordered compensation for 6 months.

Mr Udit submits that the Tribunal is not restricted to the simple contractual analysis submitted by the Applicant as the appropriate remedy in cases of unlawful dismissal where compensation is awarded in lieu of reinstatement.

Consideration of the issue

15 This is a judicial review of part of the said decision of the Tribunal. I have set out hereabove the arguments put forward by both counsel. There was talk of settlement and hence the file lay dormant for quite sometime.

20 It is the accepted principle that O 53 is concerned with the decision-making process and not with the decision itself. However, courts when reviewing discretionary powers granted by arliament do interfere in findings of fact to a limited extent.

25 The Respondent does not challenge the finding that the dismissal was unlawful. It is the remedy that was given which is challenged in this judicial review.

Subject to what I say hereafter, I agree with Mr Udit, the learned counsel for the Respondent, that the tribunal was vested with discretionary powers.

30 In the matter of the exercise of discretionary powers in a review of a decision, I find the following passage from the judgment of Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; [1947] 2 All ER 680 at 682 apt:

35 When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognizes certain principles on which the discretion must be exercised, but within the four corners of those principles the *discretion is an absolute one* and cannot be questioned in any court of law. (emphasis mine).

40 There is no doubt that "a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider" (at 682–3).

The court's powers in interfering with a decision has been summarised by Lord Greene *ibid* at 685 thus which I have borne in mind:

45 The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account, or, neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion *so unreasonable* that no reasonable authority could ever have come to it. In such a case, I think the Court can interfere. (emphasis mine).

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The findings are entirely for the Tribunal and no one quarrels with that in this case. The only bone of contention is whether there is an error of law on the part of the Tribunal in providing the remedy which he did namely, 6 months' salary as compensation. Subject to what I say hereafter in the light of the authorities
5 submitted by Mr Apted, although there is an error of law in awarding 6 months' compensation, nevertheless it does not vitiate the actual decision made.

What is error of law?

10 Although there is an error of law, is the said decision as to remedy unreasonable or vitiated on the facts and circumstances of this case? The answer is in the negative.

In support of the above proposition, I refer to the reigning rule when a point of law arises, which is as stated by Wade, *Administrative Law*, 5th ed at 817 as follows:
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... the reigning rule today is more sophisticated and less legal. It is designed to give greater latitude to tribunals, where there is room for difference of opinion. The rule is, in effect, that the application of a legal definition or principle to ascertained facts is erroneous in point of law *only if the conclusion* reached by the tribunal is *unreasonable*.
20 If it is within the range of interpretation within which different persons might reasonably reach different conclusions, the court will hold that there is no error of law. (emphasis mine)

It is my view, that in the light of above-quoted "reigning rule" the Tribunal has come to a decision which is not "unreasonable" to give rise to it being declared
25 invalid on the ground of being an "error of law".

I think this concept of "error of law" as a ground for review could on the facts and circumstances of this case be properly explained and understood in so far as it is material here from the following passage from Notes 48.1.5, *Judicial Review Handbook*, 3rd ed by Michael Fordham:
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48.1.5. Need for material error of law/misdirection. *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 702 C–D; [1993] 1 All ER 97 at 108 (Lord Browne-Wilkinson, referring to a "relevant error of law, ie an error in the actual making of the decision which affected the decision itself"; there, counsel contended that "the recent decision of this House in *R v Independent Television Commission; Ex parte TSW Broadcasting Ltd* [(1992) [1996] JR 185], has thrown doubt on the proposition that all errors of law vitiate the decision. In my judgment this is a misreading of that authority. This House was asserting that the mere existence of a mistake of law made at some earlier stage does not vitiate the actual decision made: what must be shown is a relevant error of law, ie, an error in the actual making of the decision which affected the decision itself"), applied in *R v Governor of Brixton Prison; Ex parte Levin* [1997] AC 741 at 749A; [1997] 3 All ER 289 at 296; *R v Wolverhampton Coroner; Ex parte McCurbin* [1990] 2 All ER 759 at 768; [1990] 1 WLR 719 at 730 H–731 A (Woolf LJ: "The position here is that, in the case of any application for judicial review, the remedy is discretionary. If, albeit there has been a misdirection but the misdirection has not affected the outcome in any way, the court were to intervene, they would, in my view, be misusing judicial review. Judicial review is required to put right a situation where things have gone wrong and an in justice requires to be remedied"); *R v Knightbridge Crown Court; Ex parte Marcrest Properties Ltd* [1983] 1 All ER 1148; [1983] 1 WLR 300 (remedy refused where errors of law in oral judgment had not affected the decision or caused any prejudice).
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Conclusion

For the above reasons, I find that there are no merits in the ground advanced for judicial review. The application for judicial review is therefore dismissed with costs against the Applicant in the sum of \$400 to be paid to the Respondent's
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Application dismissed.

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