SUNBEAM TRANSPORT LTD v FLYING PRINCE TRANSPORT LTD and Anor (ABU0060 of 2006S)

COURT OF APPEAL — MISCELLANEOUS JURISDICTION

SCOTT, MCPHERSON and FORD JJA

19, 23 March 2007

Practice and procedure — natural justice — application for issuance of road permit — on appeal application granted — failure of Authority to afford Respondent an opportunity of examining and commenting on further load check information — whether failure amounted to breach of natural justice — tribunal had conducted a full hearing where parties were free to adduce further evidence under s 46(1) of the Land Transport Act 1998 — tribunal did not exercise its discretion wrongly or contrary to law — Court of Appeals Act s 12(1)(c) — Land Transport Act 1998 ss 9(1), 40, 46(1), 46(3), 47 — Land Transport (Public Service Vehicles) Regulations 2000 reg 5(1).

The original application was filed by the Respondent for the issuance of a road permit to conduct a new express bus service. The Appellant opposed the application of the Respondent. The Appellant claimed that the Respondent failed to establish the rules under reg 5(1) of the Land Transport (Public Service Vehicles) Regulations 2000. In defence, the Respondent presented affidavits from various individuals who claimed to support the application of the Respondent for the new express service. The Authority had considered that the evidence adduced by the parties on these matters was incomplete or unsatisfactory and intended to order checks on the passenger loadings along the routes. The Respondent's application was dismissed on the ground that the need was not established because of the very poor loadings on the existing buses on the route. On appeal, the Respondent's application was granted on the ground that the failure of the Authority to afford the Respondent an opportunity of examining and commenting on the further load check information amounted to a breach of natural justice or procedural fairness that was fatal to the validity of the Authority's decision to refuse the application.

Held — (1) The Court of Appeal would only allow appeals "on points of law" under s 12(1)(c) of the Court of Appeals Act.

(2) The Appellant had the onus to establish that there was no evidence at all on which the primary finding or findings were based, or that those findings were incapable of supporting the inference from which they were drawn.

(3) The tribunal had conducted a full hearing where the parties were free to adduce further evidence under s 46(1) of the Land Transport Act 1998. Accordingly, the tribunal did not exercise its discretion wrongly or contrary to law.

Appeal dismissed.

Case referred to

R v Deputy Industrial Injuries Commissioner; Ex parte Jones [1962] 2 QB 677; [1962] 2 All ER 430; [1962] 1 WLR 1215, cited.

V. Kapadia for the Appellant

P. Naidu and *D. Kumar* for the first Respondent

A. Vakaloloma for the second Respondent

[1] Scott, McPherson and Ford JJA. This is now the fourth stage in a series of hearings of applications or appeals in proceedings conducted under the Land Transport Act 1998. The original application was made by Flying Prince

Transport Ltd for the issue of a road permit to conduct a new express bus service from Vaileka (Rakiraki) departing at 5.45 am and arriving at Suva at 9.30 am, together with a return service departing Suva at 4.40 and arriving at Vaileka at 8.25 pm. The application was supported by an accompanying timetable providing for 11 or 12 stopping places at specified times along the proposed route.

[2] Before the Land Transport Authority, which heard it, the original application was opposed by Sunbeam Transport Ltd, which conducts an existing return service to Suva at times which, if Flying Prince's proposed service is permitted, will be after those proposed by Flying Prince. Sunbeam therefore has an obvious commercial interest in opposing the issue of a permit for the new service, which it is claimed will compete with its existing service. The application was also opposed by Lodoni Transport, which conducts a daily service leaving Suva at 4 pm on weekdays and Saturdays.

[3] Under s 9(1) of the Act the Authority is given power to regulate and control all means of land transport. Its functions are performed by seven members of the Authority who are advised by a public service officer with specialist knowledge of the passenger transport industry. In considering an application for a new bus service like this, the Authority is bound by reg 5(1) of the Land Transport (Public Service Vehicles) Regulations 2000. It requires the Authority to have regard inter alia to:

> (a) the needs of the public and the desirability of ensuring that services to passengers are maintained or enhanced;
> (b) the effect of the proposed service on other public service operators;
> (c) …

[4] At the hearing by the Authority of the application for the proposed service, Flying Prince presented some 19 affidavits from various individuals, some of whom deposed on behalf of associations or interested groups whom they claimed to represent For various reasons they supported Flying Prince's application for the new express service. There were disputes with Sunbeam about the need for a new or additional service and about the passenger loads or loadings on existing services on the proposed route. The Authority considered that the evidence adduced by the parties on these matters was incomplete or unsatisfactory, and at the hearing it announced its intention of ordering checks on the passenger loadings along the routes. These checks were said to have been carried out after adjourning the hearing and before the decision was given refusing the application. While, therefore, the parties were aware that further such checks were envisaged, the decision by the Authority was given on 18 December 2001 without this new information being made available for analysis and comment by Flying Prince or indeed any of the other parties to the application. Stated in its very brief terms, the application was dismissed on the ground that "the need was not established because of the very poor loadings on existing buses on the route".

[5] The failure of the Authority to afford Flying Prince an opportunity of examining and commenting on the further load check information collected and acted upon after the hearing was adjourned amounted to a breach of natural justice or procedural fairness that was fatal to the validity of the decision to refuse the application. See, for example, *R v Deputy Industrial Injuries Commissioner; Ex parte Jones* [1962] 2 QB 677; [1962] 2 All ER 430; [1962] 1 WLR 1215 (*Ex parte Jones*), to cite only one example. In consequence, Flying Prince moved to institute the second stage of these proceedings by appealing to

the Land Transport Appeals Tribunal under s 40 of the Act. The tribunal in this instance was constituted by Sir Vijay Singh sitting alone.

[6] For the purpose of hearing such an appeal, s 46(1) confers on the tribunal extensive powers including power to summon and examine witnesses on oath or affirmation, to call for production of books, and to admit any evidence, written or oral, whether or not admissible in criminal proceedings. Section 46(2) authorised the tribunal to dismiss the appeal or to make such orders as are just and reasonable including an order directing the Authority to issue a permit, etc. Generally, s 47 provides that the tribunal is to have regard to those matters to which the Authority is also required to have regard. Section 46(3) confers a complete discretion as to the costs of the appeal.

[7] It is clear from these provisions that what is envisaged in an appeal at this second stage of proceedings is a complete rehearing in the full sense, or what is sometimes described as a re-hearing de novo, using any evidence including the material before the Authority on the original application. In fact, Sir Vijay Singh considered both that material as well as the oral testimony of Mr Vaurasi, who was called, gave evidence and was questioned before the tribunal. He was the Authority's Regional Manager Western, since promoted to general manager operations, of whom Sir Vijay Singh formed an adverse impression as a witness. It was on his report or recommendation (Mr Vaurasi's report) that the Authority had acted in making the decision refusing the application on 18 December 2001.

[8] In the end the tribunal, in a fully and carefully reasoned decision dated 1 December 2003 concluded that the appeal should be allowed and that the permit for new route should be granted or that the Authority should be directed to grant it to Flying Prince.

[9] In the formal order dated 2 December 2003, the tribunal:

(A) Declared that the Authority had acted unfairly in failing to provide Flying Prince with the passenger load check reports and recommendations; and in failing to afford Flying Prince an opportunity to make submissions on those reports and recommendations.

(B) Declared that there was a public need for a daily fast bus service from Vaileka to Suva and return.

(C) Directed the Authority to grant a permit to operate such a service on specified terms.

(D) …; and

(E) Directed that the Authority pay to Flying Prince by way of costs the sum of $3500 plus VAT.

[10] The appeal to the tribunal represented the second stage of these proceedings. The third ensued when the Authority and Sunbeam each appealed to the High Court. Their appeals were heard together and came before Hon Mr Justice Pathik, who delivered his decision dismissing both appeals except for allowing the Authority's appeal by reducing the amount of costs from $3500 to $3500.

[11] The appeal from the tribunal to the High Court was instituted under s 46 of the Act, which permits such an appeal "only on points of law." From there to this fourth or current proceeding, an appeal is permitted to the Court of Appeal only under s 12(1)(c) of the Court of Appeal Act, which provides for an appeal:

> (c) on any ground of appeal which involves a question of law only …

The result therefore is that the appeal to the High Court against the tribunal decision was limited to "a point of law", while the appeal from the High Court to the Court of Appeal is in turn confined to a ground or ground involving "a question of law".

[12] In the appeal from the tribunal to High Court, a decision in point of law was readily identifiable. It amounted to the failure of the Authority to afford an opportunity to Flying Prince of considering the final report and recommendation before the Authority acted on it in giving its decision. On behalf of the Authority on appeal, Mr Vakaloloma submitted that no duty was imposed by the Act to comply with any such obligation. But, as Lord Parker said in *Ex parte Jones* a tribunal "is not entitled, apart from express provision, to continue privately to obtain evidence between the end of the hearing and its decision without notifying the parties thereafter of the advice or information received". See Benjamin and Whitmore, *Principles of Australian Administrative Law*, 3rd ed, pp 160–1; Craig, *Administrative Law*, p 428. In this instance, there was no expression in the Act or Regulations that relieved the Authority of the duty of advising Flying Prince of the report and recommendation before adopting it in the course of making its decision. It was obliged by law to act in conformity with the dictates of natural justice.

[13] The tribunal recognised that the two "core" issues that had to be considered were:

(a) whether there was a need for the proposed service; and

(b) whether the proposed timetable was "seriously detrimental" to Sunbeam or Lodoni Transport, or both.

These two requirements are derived from paras (a) and (b) of s 5(1) of the relevant Land Transport Regulation 2000. Use of the expression "seriously detrimental", was not challenged by Sunbeam, and indeed the terms in which it was so stated were favourable to Sunbeam in this court and below, and placed a heavier onus on Flying Prince. The issues as they were stated by the tribunal were essentially matters of fact and not of law capable of constituting or giving rise to an appeal to the Court of Appeal.

[14] The tribunal determined those issues as a matter or matters of fact, holding that there was a public need for the express service in accordance with the timetable proposed. To demonstrate that this conclusion is wrong as a matter of law, it is incumbent on Sunbeam or the Authority to establish either that there was no evidence at all on which the primary finding or findings were or could be based, or that those findings were incapable of supporting the inference or inferences from which they were drawn.

[15] The tribunal's reasons were careful and thorough, and they leave little room for argument that the decision could be wrong in law or even in fact. Sir Vijay Singh was at pains to show that, contrary to the finding of the Authority, its conclusion of "'very poor' loadings on existing buses on the route" was unsustainable and "conveyed a substantially false picture of available passengers". The tribunal listed a number of factors that operated in favour of the new service —

- that it would not be at the expense of Sunbeam's service but of the Vatukoula express service;
- that there would be no "clash" with Sunbeam except at Navasou, where the Flying Prince express was due to depart at 6.50 am, 5 minutes ahead of its competitor;

- that the minimum gap between the two services would increase as the express service moved ahead, thus avoiding clashes between them;
- that between Navasou and Karasou Sunbeam has 11 stops to pick up and put down, whereas Flying Prince has only two, and there are only four points overall for potential clashes between them;
- that there is likely to be only a negligible number of passengers being picked up at Sunbeam's expense at places and in numbers that the tribunal identified.

[16] Using load checks carried out by or on behalf of the Authority, the tribunal interpreted those load checks as showing that the figures for Vatukoula Express showed "a good load all the way". No load check report for Sunbeam's express trips over the whole Vaileka/Suva sector was produced; and no load check for Lodoni Transport's services between Korovou and Suva was conducted or presented.

[17] In addition, evidence was, as we have noted, called from Mr Vaurasi the Regional Manager Western, and he was questioned at the tribunal hearing. His evidence about what he had done and reported to the Authority was so unsatisfactory that the tribunal rejected his testimony. This was a clear adverse finding or series of findings on a matter of credibility which is not capable of being challenged on an appeal like this that is confined to a question of law. In consequence, the Authority's original finding that there was no public need for the express service was overtaken by the tribunal finding that there was such a need, and the finding of the tribunal stands as a matter of fact.

[18] Besides the evidence of Mr Varasi, there was other evidence capable of sustaining the finding of public need. The affidavits of the 19 or so interested deponents have already been mentioned. Mr Kapadia for Sunbeam was disposed to treat them as mere flourishes not worthy of credence; but they were not the subject of questioning or cross-examination at any of the hearings, and, not being challenged or contradicted, the tribunal was entitled to ascribe to them such weight as he saw fit. Even standing alone, they were sufficient to amount to evidence on which the tribunal decision could have been founded. In consequence, it is not possible to say that there was no evidence on which the tribunal decision could be based. In fact, the tribunal went out of its way to analyse and criticise on its merits the material before it.

[19] It was only at one point that Mr Kapadia's submission in this court came anywhere close to demonstrating (whether successfully or not) a point of law capable of being brought to the High Court or on to this court. It was said that, for Flying Prince to succeed in its application, it was necessary to demonstrate the need for the proposed service from its point of origin (Vaileka) and not for it to rely on passenger load build-up along the route. There is nothing in the Act or reg 5(1) that justifies any such interpretation or conclusion as a matter of law. The tribunal gave as one reason for rejecting it that, if that were so, only those population centres that could sustain such a service from the beginning to the end of the route would be allowed to have one. This is clearly not the law. As it is, the tribunal found that, properly understood, there already was a demonstrated need for Sunbeam itself to provide supplementary services on its existing route every Monday and Friday, and possibly on other days as well in order to cater for children travelling to and from school.

[20] Mr Kapadia also submitted that the tribunal ought to have remitted the application to the Authority to rehear instead of disposing of it itself. But s 46(2) of the Act authorises the tribunal to dismiss the appeal, or to make such order as it thinks just and reasonable in the circumstances directing the Authority to issue a permit or licence. There may have been good reasons why the tribunal adopted the latter course rather than sending it back. The tribunal conducted a full hearing at which the parties were free to adduce further evidence under s 46(1) of the Act. It cannot be said that, in adopting the course it did, the tribunal exercised its discretion wrongly or otherwise contrary to law.

[21] Finally, the Authority on this appeal showed an interest in challenging the costs order of $3500 reduced by Pathik J to $1800 made against it, although it is not clear that it appealed against it to this court. It was said to be most unusual for the tribunal to make a costs order against the Authority, or in such a large sum; but the tribunal was conscious of the unusual circumstances of the case, and of the time (3 days) which Flying Prince, its representative and counsel needed to devote to the appeal before the tribunal. The learned judge on the appeal to the High Court was sufficiently impressed with the size of the costs order as to reduce it in amount by almost half from $3500 to $1800. We assume that in doing so his Lordship acted on the principle that the tribunal must necessarily have made some error of law in exercising his discretion; but there is no basis for removing the costs award altogether, and we do not do so.

[22] In our opinion Hon Mr Justice Pathik did not err in law in the decision that he reached in the High Court.

[23] The appeal from his Lordship should be dismissed, with the costs of this appeal fixed at $1000.

Appeal dismissed.