IN THE SUPREME COURT OF FIJI

Judicial Review

Action No. 17 of 1984

000137

BETWEEN : R E G I N A — Applicant

AND : ARBITRATION TRIBUNAL — Respondent

EXPARTE : AIR PACIFIC EMPLOYEES ASSOCIATION AND ANOTHER

Sir Vijay Singh for Applicants
S. Matawalu for Air Pacific Ltd
S. P. Sharma for Attorney-General

J U D G M E N T

This is an application for certiorari and a declaration in relation to an award made by the Permanent Arbitrator under Section 6 of the Trade Disputes Act(Cap 97).

Perhaps I should record before expressing the substance of this judgment that I have considered the question, not raised by counsel, of whether certiorari is available, at all, to quash such an award.

In Regina v. National Joint Council for the Craft of Dental Technicians ex-parte Neate (1953) 1Q.B. 704, at page 707, Lord Goddard, C.J., said:

> "I should ..... say that never during the many centuries that have passed since reports of the divisions of English courts first began is there any trace of an arbitrator being controlled by this court either by writ of prohibition or certiorari"

and, at page 708, His Lordship added:

> "There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator and a statutory arbitrator is a person to whom by statute the parties must resort."
>
> (The emphasis placed on the word "must" is mine)

According to my understanding, those words of Lord Goddard are authority for saying that certiorari would not lie to an award of the Permanent Arbitrator on a trade dispute referred to him with the consent of the parties under Section 6(1) of the Act which requires the written consent of the parties. However, in the present case the reference was under Section 6(2) which reads as follows:

> "(2) The Minister may authorise the Permanent Secretary, whether or not the parties consent, to refer a dispute to a Tribunal where -
>
> (a) a strike or lock out arising out of a trade dispute, whether reported or not, has been declared by order of the Minister to be unlawful as provided for under section 8; or
>
> (b) a trade dispute, whether reported or not involves an essential service; or
>
> (c) the Minister is satisfied that a trade dispute, whether reported or not, has jeopardised or may jeopardise the essentials of life or livelihood of the nation as a whole or of a significant section of the nation or may endanger the public safety or the life nof the community.
>
> (I have underlined the words which relate to the present case)

It seems to me that, once the Minister authorises the reference and the reference is made under Sub-section (2), the Permanent Arbitrator becomes, in Lord Goddard's words, "a person to whom by statute the parties must resort" and that it cannot be said that certiorari does not lie to his award.

So, in my view, certiorari does lie to quash an award of the Permanent Arbitrator, on a trade dispute referred to him under Section 6(2), on any of the available grounds - want or excess of jurisdiction, breach of the rules of natural justice, error of law on the face of the record, and fraud or collusion. What I must do is decide whether any such ground has been established. If my finding is affirmative, I must then decide whether I should, in the exercise of this court's discretionary power, quash the award. I will first say something about the background to this application.

The joint applicants are the Air Pacific Employees Association (commonly known as "APEA") and Mr. Veer Singh, who is a member of the senior staff of Air Pacific Limited, this country's national airline.

For some time prior to 1st November. 1983, Veer Singh's superiors in the company had been concerned about certain of his activities as an official of APEA. Besides that, complaints had been made by other employees of the company that he had behaved offensively towards them.

On that day, 1st November, 1983, Veer Singh received from the company's Director of Personnel a letter which referred to his union activities and also to his allegedly offensive behaviour. The letter stated that the company's management was "convinced" that he was being "intentionally disruptive to the company" and that is was "considering the line of action to pursue in these matters".

The letter also advised that a "disciplinary inquiry" would be conducted into the complaints of offensive behaviour in the following terms:

> "Moreover, as advised earlier, because of recent complaints on your conduct and an earlier warning in this regard a disciplinary inquiry will be held in accordance with the procedures laid down in the relevant agreement:

(i) the purpose of the interview is to investigate complaints laid against you

(ii) the charges are that you have been abusive and disorderly in your conduct

(iii) you are warned that disciplinary action will result if these allegations are upheld

(iv) you have the right to be accompanied and represented by an official of the Senior Staff Association, if you so wish"

I have underline the words "inquiry" and "interview" to show that they were used as if they were interchangeable. I will hereinafter use the word "inquiry" as it best describes the nature of the proceedings.

On the appointed day, 3rd November, 1983, an inquiry was held into those complaints of offensive behaviour. The Director of Personnel was present and he seems to have presided. The company's Industrial Relations Manager was also present as were Veer Singh and several representatives of APEA. None of the complainants was called. Nor was any witness called. The Director of Personnel outlined the complaints and Veer Singh gave his version of the incidents in question.

Then the Director of Personnel stated that the Industrial Relations Manager would "inquire further". That is shown by notes which the Director of Personnel made of the proceedings which conclude as follows:

> "DP then stated that the IRM would inquire further into the explanations given especially where witnesses could be spoken to. He would then report back to the inquiry on his findings and if either party wished to call in anybody for further clarifications they would be free to do so."

Thereafter, the Industrial Relations Manager interviewed several witnesses, including two of the complainants. He concluded that the complaints had been substantiated and he so reported when the inquiry resumed on 9th November, 1983.

Now that inquiry was, presumably, conducted in pursuance of the provisions of an agreement between another union, Air Pacific Senior Staff Association (APSSA) and the company. It is common ground that, Veer Singh being a member of the senior staff, it formed part of his contract of employment with the company. That was not altered by the fact that he was President of APEA. Article 4.6 of that agreement says:

> "4.6 A senior staff may be disciplined for an offence. When such disciplinary action is contemplated the Company shall take such action in accordance with the procedures laid down in the Disciplinary Procedure of this Agreement."

"Disciplinary action" is defined in Article 27(f) as follows;

> "(f) 'Disciplinary Action' shall mean any action taken to reduce permanently or termporarily an employee's rate of pay or classification and shall include suspending without pay for a period not exceeding 20 working days or dismissal."
>
> (The underlining is mine)

So, it seems to be clear enough that, before disciplinary action in the form of dismissal for misconduct could be taken against a member of the senior staff, the disciplinary procedure would have to be followed. I turn to Article 27, the material parts of which, for present purposes, read as follows:

> "(27) DISCIPLINARY PROCEDURE
>
> (a) When it is proposed to interview

an employee in connection with an alleged irregularity which may lead to disciplinary action against the employee he shall be informed in writing by the Department Head or his representative of:

(i) the purpose of the interview
(ii) the charge(s) against him
(iii) the fact that disciplinary action may result and
(iv) his right to, if he so wishes, to be accompanied and represented by an official of the Association ....

(b) If following such interview, the Company proposes to take disciplinary action, the employee shall be informed of the proposed disciplinary action. Such advice may be given in writing and a copy given to the Association if requested by the employee.

(c) An employee upon whom the Company has imposed disciplinary action shall have the right to appeal against such disciplinary action .....

(d) ..... Any appeal under this Article shall be heard by the Chief Executive or his nominee.

(e) .....

(f) (Definition of "disciplinary action" already quoted)

As I have said, the inquiry resumed on 9th November, 1983, when the Industrial Relations Manager reported his finding that the complaints of offensive behaviour had been substantiated. It seems that Veer Singh did not then ask that any of the complainants or witnesses whom the Industrial Relations Manager had interviewed in his absence be called before the inquiry to give their versions of the relevant incidents in his presence. According to the part which I

have already quoted of the notes made by the Director of Personnel, he was free to "call in anybody for further clarifications". One can only wonder why he did not.

Later that day, 9th November, 1983, Veer Singh was handed a letter bearing that date, signed by the Director of Personnel. The letter advised him that the company had decided to terminate his services immediately. It also advised him that one month's salary in lieu of notice would be paid into his bank account the next day. Presumably, that payment was made.

Veer Singh subsequently appealed, unsuccessfully, to the company's Chief Executive, presumably in pursuance of the provisions of Article 27(c) and (d) quoted above.

Because its meaning and effect is of the utmost importance, I will quote that letter of 9th November, 1983, in full:

> "Dear Sir,
>
> I refer to my earlier advice to you regarding what action Management would consider on the matters raised with you and as stated in my memo DP:PF/209 of 01 November, in relation to your position as a senior employee of the Company.
>
> The 'explanations' you gave to me were not satisfactory.
>
> We remind you of the following instances in which you as a senior staff of the Company made use of your position within the APEA and improperly ordered overtime bans during the last 10 weeks:
>
> . Your demand to have an APEA rep in the interview panel for senior staff vacancies whereas no agreement for this exists

- Your demand that M Wong be paid acting allowance when he had not even begun acting in order to attract such allowance

- Your disputing our transfer of V King to learn driving which would have qualified him for more pay. You are well aware that transfers are an established right of Management.

- Your disputing our transfer of A Rahiman to Quality Codntrol, which eventually was accepted

- Your disputing our appointment of casual staff at Nadi where management averted industrial action by delaying the appointments, although management was not in breach of any agreement.

- Your own travel advance problem for duty travel which was fixed but industrial action had already been taken by you and maintained for 3 days, although this too had nothing to do with any agreement being breached

Regrettably these incidents and industrial actions were also taken without any consideration for laid down procedures and your actions have been contrary to the best interests of the Company. You have been advised previously that overtime bans in an essential service constitute a breach of contract of employment. Management must note that adverse effect this has on safety and the commercial interests of the Company.

The above events have been considered by the Company which is of the view that these incidents have been serious enough to warrant your dismissal. I also draw your attention to the Personnel Administration Manual, Clause 20-06 on "Employee

obligations" relevant parts of which are quoted here:

> "2 The public and in particular the airline travellers, are sensitive to careless or irresponsible behaviour on the part of employees of the Company.
>
> 3 The Company expects all employees irrespective of their work in the Organisation, to adopt a responsible attitude toward their work and to conduct themselves in such a manner so as to maintain and promote the operations and commercial interests of the Company.'

Therefore, the Company has decided to terminate your services with effect from today. You will be paid one month's salaray in lieu of notice. Your final pay and all other monies due to you will be paid into your bank account tomorrow.

In passing, I wish to point out that as a result of the disciplinary Inquiry (in which you were present) carried out in respect of allegations contained in my memo dated 01 November, Management has concluded that the said allegations against you were substantiated. It is also noted that you have once been warned in respect of a similar incident. These would normally warrant your dismissal subject to the requisite procedures being followed. In view, however, of your termination for the reasons outlined above, Management feels that no further actions is necessary.

Yours faithfully,

sgd. G. P. Singh
DIRECTOR PERSONNEL"

It is common ground that the letter shows that the reason for the company's decision to terminate Veer Singh's employment was his trade union activities, not his behaviour towards other employees.

The trade dispute that emerged from that background was in due course referred to the Permanent Arbitrator. The reference was in the following words:

> "NOW THEREFORE I do hereby refer the said trade dispute to the Permanent Arbitrator for settlement in relation to the following matter:-
>
> > "A claim by the Air Pacific Employees' Association that the termination of employment of their President, Mr. Veer Singh, by Air Pacific Limited is unfair and that he should be reinstated".

The Permanent Arbitrator heard evidence and argument as to the rights and wrongs of the matter. He eventually decided in favour of the company. His reason is shown in the penultimate paragraph of his award:

> "The dispute can be resolved in terms of the conduct expected of employees in modern organisations. Employees should not be subjected to the type of hectoring experienced either by Mrs Cornish or by those who faced Mr Veer Singh's wrath over the travel advance (the sixth incident by the Director of Personnel). It is quite proper for any employer to terminate an offending employee in such circumstances. The Tribunal consequently finds that the termination of Mr Veer Singh by Air Pacific was neither unfair nor discriminatory."

So the Permanent Arbitrator found that the termination of Veer Singh's employment was justified by his offensive behaviour towards other employees. But that had not been the company's reason for terminating his employment - the letter of 9th November, 1983, clearly shows that the company had decided to terminate his employment because of his activities as an official of APEA.

It was submitted to me that the Permanent Arbitrator's decision was so unreasonable that he had no jurisdiction to make it. The argument, as I understood it, went as follows: Under the agreement, Veer Singh could have been dismissed for misconduct only in accordance with the disciplinary procedure, properly followed. The disciplinary procedure was not properly followed - it was conducted unfairly in that the Industrial Relations Manager went off and interviewed complainants and witnesses in Veer Singh's absence. For that reason alone, Veer Singh's dismissal was abundantly unfair. To make matters worse, he was actually dismissed because of his union activities which had not even been considered in the course of the disciplinary proceedings. The dismissal was therefore super-abundantly unfair. As no reasonable tribunal could have decided that the dismissal was fair, the Permanent Arbitrator's decision was ultra vires. Therefore that decision should be quashed.

I might here note that, whereas, according to the fourth (1980) edition of de Smith's "Judicial Review of Administrative Action", at page 397, "there is no reported case in which certiorari has issued to a tribunal solely because its final discretionary decision is manifestly unreasonable", the following passage in the fifth (1982) edition of Wade's "Administrative Law", at page 362 was approved by the Court of Appeal in the United Kingdon in R. v. Boundary Commission for England, ex-parte Foot (1983) 2 W.L.R. 458, 475:

> "The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to make the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."
>
> (The underlining is mine)

An additional submission was made, as I understood it, that, in law, an employer, having dismissed an employee for a certain reason, can never justify the dismissal by another reason.

With respect, I cannot accept that submission. In the United Kingdom, "the traditional attitude of the common law to an employer's right to dismiss has been completely overridden" by the Trade Union and Labour Relations Act, 1974 - see para 630, Vol. 16, Hal., 4th ed. Consequently, the employer's reason for dismissal, of which an industrial tribunal must dertimine the fairness, is the set of facts known to the employer, or beliefs held by him, which caused him to dismiss the employee. That is because the courts in the United Kingdom have so construed paragraph 6(8) of Schedule1 to the Trade Union and Labour Relations Act, 1974, which provides that

> "... the determination of the question whether the dismissal was fair or unfair,

> having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonably in treating it as a sufficient reason for dismissing the employee."

See Devis and Sons v. Atkins (1977) A.C. 931 at page 954. But I am not aware of any such statutory provision in Fiji.

Under the common law, on the other hand, "justification of dismissal can be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time" - see para 647, Vol. 16, Hal., 4th ed. - and, as I have said, I am not aware of any overriding statutory provisions to the contrary in Fiji.

Turning back to the first submission, I must say that it seems to me that it is based on the premise that Veer Singh's dismissal was in the exercise of an employer's common law right to dismiss an employee for misconduct, as modified by an agreement as to essential procedural requirements i.e. the disciplinary procedure referred to in Article 4.6 and spelled out in Article 27. If Veer Singh really was dismissed for misconduct in pursuance of the agreed disciplinary procedure, it is arguable that the dismissal was unfair in that the spirit at least of the agreed procedure was dishonoured. But was he really dismissed for misconduct in pursuance of the disciplinary procedure? I think that the answer to that question is to be sought in the letter of 9th November, 1983. Its penultimate paragraph reads as follows:

> "Therefore, the company has decided to terminate your services with effect from today. You will be paid one

month's salary in lieu of notice. Your final pay and all other monies due to you will be paid into your bank account tomorrow."

It is arguable that that paragraph shows that Veer Singh's employment were really terminated under a provision of the agreement which I have not yet quoted, Article 4.5. I will quote it now:

"4.5 The employment of senior staff covered by this Agreement may be terminated by either the Company or employee by giving in writing one months notice of termination or the payment or forfeiture of one month's salary. In the event of termination by the company written reasons shall be given to the employee."

It is true that the Director of Personnel, by that part of his letter of 1st November which I have already quoted, had set in motion the agreed disciplinary procedure as if Veer Singh's dismissal for misconduct was under consideration. It is also true that the disciplinary procedure was followed, after a fashion. However, it is arguable that the last paragraph of the letter of 9th November, which in effect said "We could dismiss you in accordance with the agreed disciplinary procedure, the charges of offensive behaviour towards other employees having been substantiated, but we prefer not to exercise that right", shows that the company put aside any right it may have had to dismiss for misconduct in pursuance of the disciplinary procedure provisions of the agreement. It is arguable that the penultimate paragraph, read with the rest of the letter shows that the company really acted under Article 4.5. It terminated Veer Singh's services immediately, as allowed by

Article 4.5; it paid him a month's salary in lieu of notice, as required by Article 4.5; and it told him that its reason for terminating his services was his union activities, as required by Article 4.5. It is arguable that the fact that that reason was not even considered in the course of the disciplinary proceedings shows that Veer Singh was not dismissed in pursuance of the disciplinary procedure but that, in reality, his employment was terminated under Article 4.5.

It may well be that, in the United Kingdom, the exercise by an employer of a contractual right to terminate the employment, by notice or salary in lieu of notice, would be deemed to be a "dismissal" and therefore subject to the statutory right an employee has in the United Kingdom not to be "unfairly dismissed" - see paras 615 and 616 Vol. 16, Hal., 4th ed. I am not aware that freedom of contract has been so curbed in Fiji.

So,the following is arguable: The company is free to terminate employment under Article 4.5 regardless of misconduct. Article 4.5 has nothing to do with dismissal for conduct. If the reason for the company's decision to act under that article happens to be that it considers that the employee has been guilty of misconduct, it must say so in accordance with the second sentence but that does not mean that misconduct is a condition precedent. Veer Singh's employment was really terminated under Article 4.5. The question whether or not he had been guilty of misconduct did not arise. Provided the company had observed the letter and spirit of Article 4.5, nobody could say that the termination of his employment was unfair.

It seems to me that the Permanent Arbitrator had first to decide whether the termination of Mr. Veer Singh's employment

was a dismissal for misconduct under Articles 4.6 and 27 or a termination of employment under Article 4.5.

If it was a dismissal for misconduct under Articles 4.6 and 27, a number of questions might well have occurred to the Permanent Arbitrator in relation to the principal issue, raised by the terms of reference, of whether or not the termination of Mr. Veer Singh's employment was unfair. Was the net effect of those articles that the company could dismiss for misconduct only in pursuance of the disciplinary procedure fairly conducted? If so, did either the fact that the Industrial Relations Manager interviewed complainants and witnesses in the absence of Mr. Veer Singh or the fact that the dismissal was for misconduct not even considered in the course of the disciplinary procedures mean that they had been unfairly conducted? If the disciplinary proceedings were unfairly conducted, did it follow that the dismissal, when it was effected, on 9th November, 1983, was unfair, however great the misconduct revealed to the course of the arbitration proceedings?

If, on the other hand, it was a termination of employment under Article 4.5, the principal issue of whether or not the employment had been terminated unfairly had to be decided in the light of that article, the meaning of which it was for the Permanent Arbitrator to construe. He would certainly have had to decide whether misconduct was relevant at all. Was misconduct a condition precedent to the operation of the article or did it permit the company to terminate employment regardless of misconduct? Did the company observe the letter and spirit of the article? If it did, could it be said that the termination of Mr. Veer Singh's employment was unfair?

In Reg. v. Southampton Justices ex parte Green (1976) Q.B. 11,

Mrs Green had stood surety for the appearance of her husband in the sum of £3,000 and he had failed to appear. The justices ordered that she must forfeit the whole of the £3,000 and gave her only two months in which to pay. Because they had failed to inquire into the extent to which she was to blame for her husband's non-appearance and because they had taken into account the irrelevant fact that the husband had money from the sale of a boat of which he was the sole owner, the Court of Appeal decided that certiorari should issue to quash the justices' order. Lord Denning, M.R., said, at page 21:

> "This case comes within the category of 'want of jurisdiction.' The scope of this category is very wide, as is shown by Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 A.C. 147, where Lord Pearce said, at p. 195:
>
> > 'Lack of jurisdiction may arise in various ways ... while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction.'
>
> Applying these words, it seems to me that if the justices fail to take into account matters which they should take into account, or vice versa, they step outside their jurisdiction.... the justices failed to consider the culpability of Mrs. Green, as they ought to have done - and they took into consideration the husband's boat - when they ought not to have done. The justices did fall into error and their

decision must be set aside."

I have concluded that, as the Permanent Arbitrator did not consider at all the question of whether the termination of Mr. Veer Singh's employment was a dismissal for misconduct under Article 4.6 and 27 or a termination of employment under Article 4.5, an order of certiorari must issue to quash his award and that he should reconsider the question posed in the terms of reference in the light of this judgment and such further evidence and argument as it may be proper for him to receive and hear. I order accordingly.

The applicants also seek, in effect, two declarations in the following terms:

> "A DECLARATION that the Arbitration Tribunal was activated by extraneous considerations and erred in law and in fact in making the Award in the above dispute, AND that the said Award is null and void."

The first declaration sought does not specify the "extraneous considerations" by which the Permanent Arbitrator was "activated". I do not think I should make a declaration in such vague terms. The award having been quashed, I see no point in declaring it null and void. I therefore decline to make either declaration.

R. A. Kearsley

(R. A. Kearsley)

JUDGE

LAUTOKA

25th January, 1985