IN THE FIJI COURT OF APPEAL
Civil Appeal No. 62 of 1985.

Between :

R. v. MINISTER FOR EMPLOYMENT AND INDUSTRIAL RELATIONSHIP — Appellant

v.

FIJI PUBLIC SERVICE ASSOCIATION — Respondent

Dr. Ajit Singh & Mr. J. Nadraiwiwi for the Appellant
Mr. S.M. Koya & Mrs F. Adam for the Respondent.

Date of Hearing : 30th October, 1985

Delivery of Judgment : 8th November, 1985

MEMORANDUM BY THE COURT

SPEIGHT, VP

The Ministry for Employment and Industrial Relations appeals against a judgment given by Rooney J. in proceedings brought in the Supreme Court by the Fiji Public Service Association whereby Judicial Review was sought in respect of an Order made by the Minister on 18th July, 1984 pursuant to Section 6(4) of the Trade Disputes Act (Cap. 97) declaring the continuance of a strike by certain members of the Association to be unlawful from that date.

Only brief mention of the facts need be made :

There had been a notified trade dispute between the Association and the CAAF (Section 3) as from 6th June, 1984 and the relevant members of the Association went on strike on 16th July. It was pro tanto a lawful strike (Section 16). On 17th July the Minister authorized the Permanent Secretary to refer the strike to an Arbitration Tribunal and it was so referred on that date (Section 6(2)(b)).

On 18th July the Minister issued an Order prohibiting the continuance of the strike and declared it unlawful from that date. (Section 6(4)). On 20th July the parties reached agreement over their dispute and the strike was terminated. On 10th October, 1984 the Association applied for Judicial Review in respect of the Minister's order seeking the following relief :

> "(a) An Order of Certiorari to remove to this Honourable Court and quash the order made by him and referred to in the preceding paragraphs;
>
> (b) A Declaration that (in any event) the Minister for Employment and Industrial Relations acted unreasonably and in breach of the relevant provisions of Trade Disputes Act;
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> (c) Further or other relief as this Honourable Court thinks fit;
>
> (d) Costs."

Leave was granted on 30th October 1984 and after a hearing, a judgment was given by Rooney J. on 14th June, 1985.

The concluding and operative portion of the judgment reads:

> " The Order is now a spent force. No useful purpose would be served by making an order of certiorari. There is a prayer, in the alternative, for a declaration that the Minister "acted unreasonably and in breach of the relevant provisions of the Trade Disputes Act". I am not prepared to issue a declaration in that form.
>
> I do however declare that the Order made by the Minister in Legal Notice 74 on Wednesday 18th July, 1984 should not have been made and was of no force or effect.
>
> The applicant is awarded costs against the respondent."

The Association had a formal order sealed in the following words :

> "..It is this day adjudged and declared that the order made by the Respondent (Minister) Should Not have been made and was of no force or effect and it is ordered that the Respondent do pay the Applicant its costs of the proceedings."

Dr. Singh appearing in this Court commenced submissions. He outlined the history of the matter and moved to a submission that if and in so far as the Judge's pronouncement purported to declare the Minister's order was invalid, it was erroneous. Questioned by the Court he agreed that on the two matters on which relief had been sought the Association had been unsuccessful, but he hoped to obtain from the Court a ruling that in cases of an order made pursuant to Section 6(4) relating to essential services the rules of natural justice do not apply. In particular he apprehended from the reasoning given in Rooney J's judgment that there was a pronouncement that the Order was void because the Association had not been accorded a hearing. As we understood it he was endeavouring to have the Court hold that in "essential services" cases there would never be a right of hearing.

We indicated to Dr. Singh that in our view there had been no pronouncement of invalidity of the order - for the relief sought to that effect had been refused and to hold the order to be invalid would be contradictory. We suggested that the judge's final words were an expression of opinion - a repetition of criticism made in the course of the judgment that the Minister ought, in the circumstances of the case, to have accorded the parties a hearing.

We drew attention to the passage in the Supreme Court Practice (The White Book) (1985) Order 59 Rule 1 r.4.

"Appeals are against orders, not reasoned judgments - Appeal lies against the Order made by the Judge, not against the reasons he gave for his decision (Lake v. Lake [1955]p.366; 1955 2 All E.R. 538, C.A.). Thus a party who has succeeded in obtaining, or, as the case may be, resisting, all relief sought cannot appeal even though he disagrees with the reasons which the Judge has given for deciding all points in his favour. On the other hand, if a party has succeeded in obtaining, or resisting, only part of the relief sought, he can, of course, appeal against the order to the extent that he was unsuccessful."

We also now note a passage in de Smith's Judicial Review of Administrative Action (4th Ed.) of particular relevance. Under a general heading (p. 499) Classes of Cases in Which Declarations Will not be Awarded, the following appears : (pp. 504-505):

"Where there is no existing justiciable controversy between parties. In an action for a declaration under Ord. 15, r. 16, it must be shown that "a real and not a fictitious or academic question is involved and is in being between two parties." Similarly, on an originating summons under Ord. 5, "it is not within the province of the court to expound obscure provisions in Acts of Parliament for use in future hypothetical hostilities with hypothetical opponents." And there is no reason to believe that a different attitude will be adopted when declaratory relief is sought under the new Ord. 53, r. 1(2). A declaration will not be awarded to a plaintiff or an applicant who is unable to show that he is engaged in a controversy in which his legally recognised interests are directly affected. Although it is a function of the declaratory judgment to dispel doubts and uncertainty in legal relations, the courts will normally decline to exercise jurisdiction save in a situation that bears the essential characteristics of a lis inter partes."

We expressed the view that, as the strike was now over, and the Minister's order had no longer any effect on the parties, there was no longer a lis.

After taking time to consider his position Dr. Singh advised the Court that he accepted that there was no order in the true meaning of that word made against his client and he now accepted that it was an expression of opinion - accordingly he wished to withdraw the appeal.

Mr. Koya however wished to oppose this course if the withdrawal was, as he said, a conditional one. He claimed that he had an order in his favour, and he wished to be heard in full to persuade the Court to make "a declaration of future applicability" - he claimed to be entitled to an opinion on an issue of law - namely that the rules of natural justice always apply before a Section 6(4) order can be made - the converse of Dr. Singh's submission.

In particular he relied upon a later passage in de Smith (4th Edition) at p. 508-9:

> "An issue that could have been made the subject of an action for a declaration may cease to be justiciable because the situation on which a claim might have been founded no longer exists. The courts will concern themselves only with living issues. But even this rule appears to be subject to a limited exception : if proceedings raise an important question of law, a court may in its discretion award an appropriately framed declaration, although by the time judgment is delivered the issue has ceased to be a live one inter partes."

We accept that the Court might embark upon such an enquiry if the "important question of law" could be so framed on a hypothesis which would be of universal applicability in future cases. But that would be very rare and certainly one could not frame a question to cover all cases of the Minister's duty when faced with a Section 6(2)(b) situation. Indeed in the judgment of the learned judge, the very highest the matter was put appears at page 92 of the case :

> " It was in my view contrary to natural justice for the Minister to have made the Order in this case without first giving the Association the right to make representations against his doing so" (Emphasis added).

This accords with our view that whatever the meaning of the supposed declaration, whether it was an order, or an expression of opinion, it related to the particular statute and the particular circumstances which had arisen.

Professor Wade in the Fifth Edition of Administrative Law (p. 472) says:

> " On the other hand, it must be emphasised that "it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter. The application of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility".

Even in the most powerful (and most recent) pronouncements on the right to a hearing - and in a case very similar to the present - Lord Diplock has said :

> "But in any event what procedure will satisfy the public law requirement of procedural propriety depends on the subject matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made."
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> Council of Civil Service Unions v. Minister for the Civil Service (1984) 3 All E.R. 935 @ 951(j).

The foregoing is an amplification, as we promised, of the reasons we gave in Court for allowing the withdrawal of the appeal and for refusing Mr. Koya's request to argue the matter in full.

We said then and we repeat now that whether or not there is a right to be heard before such a Minister's Order is made will depend on all the circumstances, including particularly the events immediately prior to it, and the urgency of the situation. As the issue between the parties was no longer a live one, this Court would have been embarking on a futile, indeed an unhelpful course if it endeavoured to make a pronouncement of what might be appropriate in different circumstances, and indeed Rooney J. would have been justified in refusing to proceed to a hearing.

Mr. Koya asked for costs. He is entitled to an order, and costs will be awarded to the Respondent to be fixed by the Registrar.

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Vice-President

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Judge of Appeal

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Judge of Appeal