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IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0021 OF 1996S

(High Court Judicial Review No.HBJ 027 of 1994)

BETWEEN:

PACIFIC TRANSPORT COMPANY LTD.

APPELLANT

A N D:

MOHAMMED JALIL KHAN F/N RAHMAT ALI  
KHAN AND TRANSPORT CONTROL BOARD

RESPONDENTS

Mr.H. Lateef for the Appellant  
Mr. H.Nagin for the 1st Respondent  
Mr. V. Tuberi for the 2nd Respondent

Date and Place of Hearing:

5 February 1997, Suva

Date of Delivery of Judgment:

12 February 1997

JUDGMENT OF THE COURT

The appeal in this case is against an order made by Byrne J. granting the first respondent ("Khan") certiorari and quashing a decision of the second respondent ("the TCB"). That decision had granted the appellant ("Pacific") an amendment to its Road Service Licence No. 12/17/12, under which licence, Pacific operated a bus service along a certain route in Lautoka.

The amendment of Pacific's licence granted by the TCB gave Pacific the right to operate a bus service from a newly-developed residential area, "Chameli Park", on the outskirts of

Lautoka, to Lautoka Hospital and to the bus terminal in Lautoka. Khan was also granted an extension of an existing licence by the TCB to operate a bus service from Chameli Park to the Lautoka bus terminal. However, Khan's route was to be different from Pacific's. Broadly speaking it may be described as running clockwise through the outer parts of Lautoka into the centre of the town, while Pacific's may be described as running anti-clockwise through different outer parts of the town into the terminal. Also, as stated above, Pacific's service was to operate to the hospital.

Both Khan and Pacific had operated bus services in Lautoka for some years; each, however, served different parts of the town from the other. His Lordship found, incorrectly according to the appellant, that their services from the part of the town adjacent to Chameli Park commenced on different sides of Tavakubu Creek.

Chameli Park is situated on the same side of the creek from which Khan's bus service commenced. Pacific's route from Chameli Park crosses the creek before it reaches the area in which, according to His Lordship's finding, Pacific had been operating bus services previously. In the judicial review proceedings, Khan adduced evidence that in 1977 the government's

Transport Officer, Higher Grade (Western) had set the creek as the dividing line. The TCB, which was also a respondent in the High Court, admitted that arrangement. Further, the Secretary of the TCB stated in his affidavit that in 1985 there was "mutual agreement between the two bus operators not to encroach in one another's area of existing operation" but that at the time Chameli Park, as such, was not in existence. The road to it was completed in December 1993. He stated further that in 1985 the TCB made a decision "on the basis of that agreement" and that "the operation of bus services were controlled likewise."

At a meeting of the TCB held on 30 April 1985, counsel representing Pacific informed the TCB that Pacific would not object to Khan operating a bus service in the Chameli Park area when the road to it was completed. When the road was opened, Pacific had initially objected to Khan's application for an extension of the route for which he held a licence but withdrew its objection after being reminded of the assurance given by its counsel in 1985. However, it made the application for amendment of its own licence which resulted in the decision of the TCB, the subject of the application for judicial review, namely to grant Pacific's application.

In 1989, the TCB resolved to approve procedures and guidelines which it would follow in dealing with applications for

new licences and for renewal, transfer and amendment of existing licences. They included the following:-

"1. (b) Applications by outside operators into an existing operators areas of operation will not be granted unless part of the route of the proposed application falls on the route or part of the route of an existing operator as a consequence thereof and no alternative routing is possible or the existing operator is unable to provide adequate and efficient service in the area.

(c) Application for new route will not be granted unless it is absolutely necessary or desirable in the public interest with the minimum effect on other operators. Whenever possible the Board will try to extend the existing trip to cater for such needs rather than give new trip altogether.

3. The Board shall wherever possible give reasons for its decisions."

The TCB's power to grant road service licences and to amend them is contained in section 65(4) of the Traffic Act (Cap.176) ("the Act"). So far as is relevant in this appeal that section reads:-

"(4) After receiving any evidence and any representations for or against any application in respect of the proposed service, the Board may, subject to the provisions of this Act and in its discretion, grant or refuse any application in respect of the proposed licence or may grant a provisional road service licence stating the terms and conditions upon which a road service licence will be granted and compliance with those terms and conditions within a period of 3 months of the issue of the

provisional road service licence shall entitle the applicant to receive a road service licence."

The grounds on which judicial review of the decision was made were as follows:-

- "(a) That the TRANSPORT CONTROL BOARD has acted unfairly in granting the amendment of the Road Service Licence No. 12/17/12 to Pacific Transport Limited when Pacific Transport Limited had expressly agreed that only the Applicant should be allowed to operate in the Chameli Park Area.
- (b) That the TRANSPORT CONTROL BOARD abused its discretion under the Traffic Act in that:-
  - (i) It took into consideration irrelevant matters; and
  - (ii) It did not take into consideration relevant matters; and
  - (iii) It acted arbitrarily and/or in bad faith and/or unreasonably; and
  - (iv) It failed to follow its own Guidelines.
  - (v) It wrongly allowed Pacific Transport Limited to breach its Agreement and Undertaking.
- (c) That the Transport Control Board exceeded its jurisdiction under the Traffic Act.
- (d) That the Transport Control Board has acted contrary to the legitimate expectations of the Applicant."

Byrne J. made no findings in respect of grounds (a), (b) (i), (ii), (iii) and (v) and (c). Although in a written submission counsel for Khan addressed several of those grounds,

at the hearing before Byrne J counsel did not persist with them. In his judgment, His Lordship refers to "both grounds submitted to me" , namely 'legitimate expectation' and failure of the TCB to give reasons for its decision. He upheld the application for judicial review on both grounds.

The Judge expressed the legitimate expectation as having been that Khan "would be allowed to operate without a competitor in the Chameli Park area."

The grounds of appeal are as follows:-

1. *THAT the learned trial Judge erred in concluding that the Respondent M J Khan had a legitimate expectation that he could operate in the Chameli Park area without competition.*
2. *THAT the learned trial Judge erred in further holding that the Respondent M J Khan was entitled to at least short reasons why the Transport Control Board (TCB) granted the Appellant's application as well.*
3. *THAT the learned trial judge erred in failing to consider that the Respondent M J Khan applied for and was granted four further daily trips in that area in August 1995.*
4. *That the learned trial judge failed to consider that the Appellant was already crossing the creek, the subject of Fred Jennings demarcation in 1977, along M V Pillai Road.*
5. *That the learned trial judge in calling the Appellant and 1st Respondent's Counsel for further submissions erred in not requiring counsel for the TCB to file a further affidavit annexing the Minutes of the Meeting of 26th October 1994.*

6. That the learned trial judge failed to appreciate that the Appellant is a major operator in the roads leading to the new subdivision when he considered Guideline 1 (b) referred to in P. 6 of his judgment.
7. That the learned trial judge failed to appreciate that though both the Appellant and Respondent M J Khan were granted service in the Chameli Park area the routes taken from the area are totally different.
8. Such further and other grounds as may be applicable on receipt of record of the High Court proceedings."

Only grounds 1 and 2 need to be considered. The remainder dealt with the merits of the applications before the TCB and are thus inappropriate for consideration by this Court.

We turn now to Ground 1. In order to deal with it we need to consider what is involved in the concept of legitimate expectation, as well as the requirements of the Act. Sections 65 and 68 confer on the TCB a discretion whether or not to grant, renew, transfer or amend a licence. The terms of those sections and of section 66 circumscribe the manner in which the discretion is to be exercised; but, subject to those constraints, it is a discretion which the TCB *must* exercise fairly and impartially, not arbitrarily, in the public interest and on the merits of each application made to it.

Generally, an administrative body required to exercise such a statutory discretion cannot fetter its future exercise, although the desirability of consistency in administrative decision-making may often justify the setting of broad policy guidelines by the body (Eastleigh Borough Council v. Betts [1983] 2 A.C. 613, 628. It can and indeed should then usually apply those guidelines in dealing with applications.

However, if in any particular case the application of the guidelines will defeat the purpose for which the discretion was given, they should not be applied and a decision should be made which does accord with that purpose (British Oxygen Co. Ltd. v. Minister for Technology [1971] AC 610, 625) . The statute may authorise the setting of guidelines which must be applied in every case; that is still rare, however, and the Act does not do so in this instance. The body having the discretion may also set procedural guidelines; if it does, they must be consistent with the purpose for which the discretion is given and their application must never be allowed to impede the attainment of that purpose. The exercise of the discretion must not be fettered.

However, in recent years the courts, initially in England and latterly in Australia and New Zealand, have

introduced, as one aspect of the fairness component of natural justice, the concept of legitimate expectation. That concept was described, very well in our view, by Pathik J. in Fereti Seru Dewa v The University of the South Pacific (High Court Judicial Review No. 0007 of 1994; decided on 4 July 1996.) However, we think that it may be helpful to all those engaged in the work of the Courts in Fiji, including barristers and solicitors, if we amplify that description to some extent.

The concept was first formulated briefly by Lord Denning M.R. in Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch.149 at 170. Essentially, it is that a person may, in certain circumstances, have a legitimate expectation as to **procedures** to be followed by an administrative decision-maker prior to a decision being made. The expectation relates to a privilege, advantage or benefit to which there is no legal right. It arises where -

- (a) an express representation has been made to the person concerned, or to a group of people of which he or she is a member, that a certain procedure will be followed before a decision is made (Attorney General of Hong Kong v. Ng Yuen Shiu [1983] 2 A.C. 629 P.C.; Attorney-General of New South Wales v. Quin (1990) 170 C.L.R.1); or

- (b) there is a longstanding practice of following a certain procedure before a decision is made (Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374 H.L.)

The privilege, advantage or benefit may be substantive in nature or only procedural. However, as Mason, C.J. stressed in Quin (supra) at p.21, when applying the concept of legitimate expectation, a Court must "avoid confusion between the content of the expectation and the right to procedural fairness."

A court has no power, in judicial review proceedings, to determine the merits of the decision under review. For that reason, we consider that the few English cases, (such as R v. Secretary of State for the Home Department [1984] 1 W.L.R. 1337), in which a legitimate expectation was held to exist that substantive *policy* would not be changed, are not helpful.

In the Council of Civil Service Unions case (supra) Lord Diplock referred to the concept of legitimate expectation as based on the natural justice requirement of procedural propriety. A legitimate expectation, where it exists, is that

procedural propriety will be observed for the protection of the privilege, advantage or benefit to which the expectation relates. In the words of McHugh J. (dissenting but not on this point) in Minister of State for Immigration and Ethnic Affairs v. Teoh (1995) 183 CLR 273, 312 the concept of legitimate expectation "enlivens the rules of procedural fairness". We are not to be taken, however, to exclude the possibility suggested by Dawson J. in Quin (supra) at 60, that the selective application of an existing policy in an individual case may, depending on the facts, amount to a failure to accord the fairness required by natural justice.

We are satisfied that Khan had no legitimate expectation that the TCB would give him the exclusive right to operate a bus service from Chameli Park to Lautoka bus terminal. Even though the agreement in 1977 between him and Pacific to divide their respective territories of operation was brokered by the Transport Officer, the TCB could not be bound by it; nor, in our view, could Khan expect the agreement to continue in operation indefinitely with development taking place in the relevant part of Lautoka with concomitant changes in public demand. The TCB's primary duty is to serve the public interest as it exists from time to time; it must exercise accordingly its discretion whether to grant licences for bus services.

Even if we had found that Khan had a legitimate expectation, it would not have been an expectation of the exclusive right to operate a service from Chameli Park but rather procedural fairness in the manner in which the TCB dealt with Pacific's application. We are satisfied that the Board did not fail to accord Khan procedural fairness.

A copy of the relevant part of the TCB's minutes of its meeting held on 30 April 1985 show that Khan was represented by counsel when Pacific's application for amendment of its public service licence to take in Chameli Park was heard by the TCB. It shows further that Khan's counsel addressed the TCB expressly on the question of the agreement that Pacific's and Khan's buses should not operate in the same area.

The TCB may have failed to apply No. 1 (c) of its guidelines by not trying to extend an existing trip to cater for the Chameli Park needs instead of giving a licence for a new trip, although it is not entirely clear from the record whether there was any such failure. In any event, that guideline stated substantive policy and was not concerned simply with a procedural matter; the TCB had a discretion, which it could not fetter, to give licences for new trips instead of extending existing trips, if it considered that to be in the public interest.

The first ground of appeal is sustained to the extent that Byrne J's order depended upon his finding that Khan had a legitimate expectation that he would be allowed to operate a bus service in the Chameli Park area without competition.

We have, however, to consider ground 2 and the consequences of the TCB's failure to give reasons for its decision. The TCB may have had good reasons but, if it did, it failed to state what they were. The affidavit of its secretary did not annex the minutes of the relevant meeting.

After quoting extensively from Wade, Administrative Law (6th ed.) 547 and other authority, Byrne J. held that the TCB was obliged to give reasons for its decision, albeit in simple form. A statement to the effect that one party's submission had been accepted by the TCB would have been regarded as adequate by the Judge. He also noted that it could often be unnecessary for the TCB to give reasons where the basis for the decision was clear from the facts of the case.

Byrne J. considered that this case did not come into the category where the reasons for the decision were self-evident because of -

- (a) The 1977 and 1985 arrangements and
- (b) the Chairman's suggestion to Pacific at the hearing that Pacific should withdraw its application and allow Khan to operate in the Chameli Park area solely.

The Judge might well have added the TCB guidelines quoted earlier as a third consideration.

The Act does not impose any express obligation on the TCB to give reasons for its decisions, nor does any other statute; however, when a decision is inconsistent with policy which has previously been applied, the absence of any statement of reasons for departing from that policy can raise a doubt whether the tribunal gave proper consideration to relevant matters before reaching its decision.

In England and Australia, statutory reforms have mandated a requirement for administrative tribunals to give reasons for their decisions or else have given a right to parties to request reasons. In Fiji, as in New Zealand, there is no general requirement for a tribunal to give reasons in the absence of a statutory requirement.

In Akbar Buses Ltd. v. Transport Control Board and Others (unreported, 27th July 1984, Civil Appeal No. 9 of 1984) this Court recommended to the TCB that it should always give brief reasons for its decisions. The basis for this recommendation can be found in the various authorities which had been collected in another unreported decision of the Court given at the same sessions (Rajendra Nath v. Madhur Lata (13th July 1984, Civil Appeal No.11 of 1984)). In Nath's case there had been a right of appeal from the decision for which no reasons had been provided, a fact which made the provision of reasons even more desirable.

In the Akbar Buses case, the appellant had applied for a licence to operate a particular bus service; the TCB had refused to give the appellant a licence for that service but had given a licence to another operator, even though that operator had withdrawn its application to operate the service. Further, the TCB had done so without giving the appellant a chance to object to the TCB considering the other operator's withdrawn application. In Akbar Buses, the TCB's decision was described by the Court as 'extraordinary'. The absence of reasons was called 'inexplicable'.

A number of cases in the High Court, cited by counsel at the hearing involving TCB decisions, demonstrated to us that the TCB has not been following the recommendation of this Court in Akbar Buses, nor indeed has it followed item 3 of its own guidelines. Counsel for the TCB was unable to explain this state of affairs, but informed us that the TCB had abandoned its guidelines, some time after the hearing of the Pacific and Khan applications.

In New Zealand, Henry J. after summarising the authorities, affirmed the English view that an administrative tribunal does not have to give reasons in the absence of statutory requirement. See NZI Financial Corporation Ltd. v. NZ Kiwifruit Authority [1986] 1 NZLR 159, 167-171.

In Baker v. Public Service Appeal Board [1982] 2 NZLR 437, 445, Bisson J. said of a Board with judicial functions, but from which there was no right of appeal, "*...and although there is no statutory duty nor common law duty for it to give reasons, reasons are desirable and in some instances its failure to give reasons may cause this Court to intervene on the grounds that without giving its reasons the Appeal Board cannot be seen to have been acting within its jurisdiction.*" In Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997, the

House of Lords held, Lord Morris of Borth-y-gest dissenting, that an order of mandamus should be made directing the Minister, who had not given reasons for refusing to appoint a committee of investigation, to consider the complaint according to law. I cite the following passage from the judgment of Lord Upjohn at pp 1061-2:

"My Lords, I would only add this; that without throwing any doubt upon what are well known as the club expulsion cases, where the absence of reasons has not proved fatal to the decision of expulsion by a club committee, a decision of the Minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty's subjects; if he does not give any reasons for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly."

"In my view, the Appeal Board although exercising a different function may find itself in the same position as the Minister if it does not give reasons for its decisions in some cases."

Bisson J. in Baker's case was able to infer that the Board had upheld the dismissal of the applicant for the same reasons which had been clearly expressed by the Commission from the decision of which the appeal had been brought.

Andrews v. Public Service Board (High Court unreported, Christchurch M 653/90, 3 February 1995), Fraser, J.) was a case similar to Baker; the Judge noted that the Board had issued a supplementary decision giving brief reasons for its earlier decision to dismiss the applicant from the public service; he found that the brief reasons given by the Board were not so deficient that the Board could not be seen as acting within its jurisdiction; it would not be unfair to the applicant to allow the decision to stand. Despite their shortcomings, i.e. brevity and lack of analysis, the reasons were considered adequate.

In England, there is a perceptible trend towards an insistence on greater openness in the making of administrative decisions - per Lord Mustill in R. v. Secretary of State for the Home Department, ex parte Doody [1994] 1 A.C. 531, 564.

In R. v. Universities Trading Council, ex parte The Institute of Dental Surgery, [1994] 1 W.L.R. 242, Sedley J at 257 expressed the problem succinctly thus:-

"... each case will come to rest between two poles, or possibly at one of them; the decision which cries out for the reasons, and the decision for which reasons are entirely inapposite. Somewhere between the two poles comes the dividing line separating those cases in which the balance of factors calls for reasons from those where it does not. At present there is no sure indication where the division lies."

See also the discussion of the authorities on this topic in the judgment of Pathik J. in the High Court in Dewa v. The University of the South Pacific (supra).

The position in the instant case could have been ameliorated had the Rules allowed for the Court to require the TCB (or any other Tribunal the subject of judicial review) to file a report for the benefit of the Court. The Judicature Amendment Act 1972 in New Zealand and the various High Court Rules there afford useful precedent in this area. We bring the desirability of such a provision to the attention of those responsible for formulating Rules of Court.

We note too that the Beattie Commission in 1994 recommended the adoption of judicial review legislation on the Australian model (see, p.75 et seq of the Commission's report). Because judicial review litigation is becoming more common and assumes great importance in a complex modern society, the Court endorses the procedural reform recommendations in this area found in the Beattie report.

The ultimate question for the Court's determination is whether the TCB's failure to give reasons indicates to the Court in Lord Upjohn's words that it 'had no good reason for reaching

that conclusion' (i.e. the decision to grant the licence to Pacific).

We think that in the particular circumstances of this case, reasons should have been given. The failure to do so indicates that the TCB did not necessarily determine whether there were good reasons for its conclusion. This is not a situation, such as in the Baker and Andrews cases, where it is possible to infer the reasons. We say this because of -

- (a) the 1977 and 1985 arrangements, which were clearly relevant and had been canvassed;
- (b) the TCB's invitation to Pacific at the hearing to withdraw its application; and
- (c) the TCB's own guidelines, quoted earlier.

In this case, there is evidence of facts which might have offered good reasons for the decision made. Pacific's service was to follow a route entirely different from Khan's. It was to pass a number of schools and to go to the hospital en route to the bus station. Those amenities were not provided to the public in the Chameli Park area by Khan's service. Further,

there was evidence that within a year of the granting of the licences to Khan and Pacific, Khan had applied for and been granted several additional licences for its route on a daily basis.

However, there is nothing in the record before the High Court to indicate that any of the above matters were in fact taken into account by the TCB or that they provided the reasons for a decision which changed the existing situation and let Pacific into an area from which it had previously agreed to be excluded.

Although the TCB's decision may well have served the public interest, in our view the failure to give reasons explaining how the TCB believed that it did so raises serious doubts whether the decision was the result of a proper exercise of the statutory discretion.

It follows that the appeal must be dismissed and the judgment of Byrne J. upheld, not on the 'legitimate expectation' ground, but on the 'failure to give reasons' ground.

We were informed by counsel at the hearing that the TCB is now differently constituted. Had it been possible to have

assembled all the members of the TCB who had participated in the decision under review and to have clothed them with jurisdiction, then we should have ordered a reconsideration under Ord. 53 r. 9(4). Such a reconsideration would have been on the record of evidence and submissions already heard. The decision after such reconsideration would have to have been accompanied by a statement of reasons.

However, since the TCB is now differently constituted, there is no alternative but to order a rehearing de novo of both Khan's and Pacific's applications. However, the evidence therein already submitted should be used again, subject to supplementation and cross-examination, if any. Any detriment to the travelling public in the meantime can be addressed by the issue of temporary licences.

We are sorry to have had to have reached this conclusion because the deficient conduct is that of the TCB not of either party. We strongly recommend to the TCB what was recommended to it in 1984 by this Court - namely, that in all cases, it give brief reasons for its decision. Failure to do so involves parties in more cost and litigation. As is noted in some of the authorities, a failure to give reasons can make a 'disappointed' litigant a 'disturbed' litigant.

Since each party has succeeded on one of the two grounds of appeal, we make no order as to costs as between Khan and Pacific.

*I.R. Thompson*  
.....  
Justice I.R. Thompson  
Judge of Appeal

*R. D. Barker*  
.....  
Justice Sir Ian Barker  
Judge of Appeal

*J. D. Dillon*  
.....  
Justice J. D. Dillon  
Judge of Appeal