A

## R. v. ARBITRATION TRIBUNAL

## Ex parte CIVIL AVIATION AUTHORITY OF FIJI

(Supreme Court—Kermode J.–22 February 1985)

B Civil Jurisdiction

*(**Administrative law Practice** and Procedure—application for certiorari and declaration—R.S.C. 0.53(2)—declaration not "just and convenient".)*

*A. M. Seru* for the Applicant
C *Aruna Prasad* for the Respondent

Application by Civil Aviation Authority of Fiji (CAA) for an order of certiorari to quash an award made by the Permanent Arbitrator on 2 April 1984 arising out a dispute between CAA and the Fiji Public Service Association referred to it on 6 October 1983 pursuant to the provisions of the Trade Disputes Act. A declaration was also sought.

D

CAA sought relief in respect of the Award only in regard to:

*(b)* Salary increase in line with the 1983 Remuneration Guidelines of the Tripartite Forum.

E The Award on this aspect stated

"The Arbitration Tribunal directs that the issues referred to it in this case shall be settled as follows:

(1) (not applicable)
(2) the 1983 Voluntary Guidelines of the Tripartite Forum shall apply with effect from 1.1.84 (vide clause 2.1.1. of the Agreement on Voluntary
F Guidelines)."

Clause 2.1.1. of the Tripartite Agreement reads:

"Such increases to be effective for 12 months from the date of expiration of their last agreement."

G The learned Judge stated that the (Arbitrator) had made in its award a factual error in stating that CAA had increased salaries by 10% from 1 January 1983: whereas the correct date was 1 July 1982. The Court for reasons stated considered this was immaterial.

The argument by the applicant referred only to alleged errors in the record which arise out of the date of the last increase in salary. The Court referred to Halsbury's "Laws of
H England" 4th Edition para 84 p.107 to the effect that certiorari will not issue to quash a decision for error or fact unless going to jurisdiction, which was not the case here.

The applicant's main argument was in support of a declaration. The Court quoted Order 53(2) which envisaged making a declaration on an application for Judicial Review where it would be "just and convenient". A

*Held:* "It is my view that where application is made to a Court of Review to quash the award of a Tribunal and there is no basis for the issue of an order of certiorari it is not open to the applicant to seek relief, which he might be able to obtain by way of appeal, by way of judicial Review seeking a declaration. I would not consider, in this instance, that it would be just and convenient for a declaration to be granted." B

*Application dismissed.*

*Case Referred To:* C

*Anisminic Ltd v. foreign Compensation Commission* (1968) 2 Q.B. 862.

KERMODE. J.

Judgment

D

This is yet another Judicial Review which has taken too long to hear and consider.

The applicant (CAA) seeks an order of certiorari to quash an award made by the Permanent Arbitrator on the 2nd April, 1984 in connection with a dispute between CAA and the respondent, the Fiji Public Service Association (FPSA), which was referred to it pursuant to the provisions of the Trade Disputes Act on the 6th October, 1983. E

It is some indication of the increasing number of disputes that are being referred to the Permanent Arbitrator that it was 6 months before he handed down his award. The Permanent Arbitrator refers in his Award to some of the causes of the delay. One cause was the two disputes that arose over the Nicol & Hurst Report, which he had to hear before he could deal with the CAA/FPSA dispute. F

The Trade Disputes Act, Section 23 envisages an Arbitrator can normally be expected to hand down his award within 28 days and he is directed to do so within that time. There is provision for extension of that time. However, the legislature clearly did not envisage that an award would take 6 months.

It would appear the Permanent Arbitrator is being asked to deal with more disputes than he can cope with. G

Then there is the delay which arose in this case as a result of the cumbersome and time consuming judicial review Procedure. one which should be streamlined, if possible. to enable the Courts to deal more expeditiously with applications.

The dispute referred to the Arbitrator was in respect of two matters:

*(a)* increase in rental charges for quarters;
*(b)* salary increase in line with the 1983 Remuneration Guidelines of the Tripartite Forum. H

A The Tribunal was critical of the vaguely phrased terms of reference. As the parties were compelled by law to go to Arbitration it behoved the Minister to be more specific in his terms of reference. Where parties agree to go to Arbitration they can agree on what is in dispute and should do so before the Arbitration hearing but that is not the case in a compulsory arbitration. The Minister must ensure that the Tribunal is made fully aware of what matters are in dispute, so that he is in a position to deal with all such matters.

B

CAA seeks relief only in respect of the award under *(b)* that is as regards salary increases.

The Tribunals' award on this aspect is not clearly stated although its intention is clear. It states:

"The Arbitration Tribunal directs that the issues referred to it in this shall be set-
C tled as follows:

(1) (not applicable)
(2) the 1983 Voluntary Guidelines of the Tripartite Forum shall apply with effect from 1.1.84 (*vide* clause 2.1.1. of the Agreement on Voluntary Guidelines)."

Clause 2.1.1. of the Tripartite Agreement reads:

D "Such increases to be effective for 12 months from the date of expiration of their last agreement."

Agreements of general application are not normally allowed to expire and are either extended or re-newed by Agreement reached before they would otherwise expire.

The Tribunal apparently made a factual error in stating in its award that CAA
E had increased salaries by 10% from 1.1.83. The correct date was 1.7.82 but this error, in my view is immaterial. It adversely affected only the Union members who have not complained.

Mr Seru in his lengthy and well researched submissions has concentrated mainly on the application for a declaration. He has advanced no argument in support of his application for an order of certiorari other than to refer to alleged errors
F in the record which are mentioned in a supplementary affidavit made by Mr Jan Mohammed. The only errors mentioned refer to or arise out of the error I have already mentioned—the date of last increase of salary.

These are errors of fact but the award as to salary increases can not be questioned unless those errors go to jurisdiction. Such is not the case in this instance as the Tribunal had jurisdiction to award increases from 1.1.84.

G Halsbury Vol. 1 4th Edition para 84 at P.107 states:

"Certiorari will not issue to quash a decision for error of fact unless the error goes to jurisdiction."

It is now apparent, but not from the Record that the parties signed a collective agreement on 2nd September, 1983 backdated to 1st October, 1982 valid for 2 years. The award would appear to indicate that increases were to be for the period 1.1.84 to
H 30.9.84, the latter date being the date the agreement was due to expire if not renewed.

The error has not prejudiced CAA which was directed to pay increases from a date 6 months later than it might otherwise have been.

Mr Seru has not persuaded me that any part of the award should be quashed and I decline to do so. A

The main theme of Mr Seru's argument is directed to seeking a declaration.

An application for a declaration may be made by way of an application for judicial review but Order 53(1) (2) has application. That subsection is as follows:

"(2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that having regard to— B

*(a)* the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari,
*(b)* the nature of the persons and bodies against whom relief may be granted by way of such an order, and C
*(c)* all the circumstances of the case,

it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

It is my view that where application is made to a Court of Review to quash the award of a Tribunal and there is no basis for the issue of an order of certiorari it is not open to the applicant to seek relief, which he might be able to obtain by way of appeal, by way of Judicial Review seeking a declaration. I would not consider, in this instance, that it would be just and convenient for a declaration to be granted. D

A declaration would be more appropriate where a government body is involved or cases where certiorari might not lie. E

Diplock L. J. in *Anisminic Ltd v. Foreign Compensation Commission* (1968) 2 Q.B. 862 at Page 911 said:

"It may well be that the inferior tribunal has in addition to its quasi-judicial function of making determinations the administrative function of enforcing them or ordering or authorising their enforcement, and where this is so the administrative tribunal may be an appropriate defendant in its administrative capacity to an action for a declaration. But where its only function is to make a determination, and the right to enforce or to order the enforcement of the liability to which the determination is a condition precedent is conferred upon other persons, I doubt whether any action for a declaration lies against the inferior tribunal itself. If the liability to which the determination is a condition precedent were enforced, there would be no right of action against the inferior tribunal on the part of the person against whom the liability was enforced: and I find difficulty seeing how the High Court has jurisdiction to make a declaration against a defendant in respect of conduct by him which could never give rise to a cause of action against him by the plaintiff or by him against the defendant. The only remedy against the inferior tribunal itself in such a case would, I think, be by certiorari." F G

While I do not consider a declaration to be the appropriate remedy I would refer to Mr Seru's arguments he raised about the Cost of Living Adjustment (COLA.) H

Mr Seru's arguments appear to indicate some confusion over the issue of COLA. He argues that a dispute over payment of COLA is not a trade dispute as defined

A under the Trade Disputes Act. He develops that argument and contends COLA is a voluntary issue and not an issue for arbitration.

The Agreement reached by the Tripartite Forum of Fiji on the 3rd June, 1983, was as it states an "agreement for Voluntary Guidelines for 1983". The Unions have generally accepted the guidelines as the minimum their members are entitled to and almost invariably set their sights higher. An employer would find it difficult to deny
B a Union's minimum claims where its own Consultative Association has signed the Agreements fixing the guidelines.

COLA is very much connected with employment. It is the justification for Unions to seek annual increases in remuneration for their members. Failure by the Employer to increase wages and salaries by at least the amounts recommended by the Tripartite Forum will usually result in a trade dispute unless the Union agrees to
C accept the employers last offer.

The Agreement is not as one sided as would at first appear. It recognises the inevitable claims by workers in an inflationary world to retain their standard of living. Whether this standard is maintainable in Fiji gives rise to opposing opinions. Some Employers contend demands have overstepped reasonable ability to pay. On the employer's side it recognises that Unions can not expect to receive increases grossly in excess of the guideline. Employers can
D anticipate that if there is a dispute an arbitrator would be unlikely to award an increase above the guidelines.

The "Voluntary" nature of the guidelines is a reference to the Voluntary nature of the Agreement of the parties on the Forum. In practice when negotiations between an employer and a union start the "voluntary" guidelines figures automatically become the minimum workers consider they are entitled to. Employers who plead inability to pay even that
E minimum can expect a dispute and little sympathetic consideration by an Arbitrator. The freedom to negotiate is not apparent. When negotiations for pay increases being the "freedom" is restricted by the guidelines.

If an employer can not afford to pay the minimum and is unable to mount a cost saving exercise he either goes bankrupt or goes out of business. If a union drives an employer into that situation it has acted irresponsibly and not in the interests of its
F members. Most unions in Fiji have an appreciation of just how far an employer can be pushed.

A dispute involving reliance on a reference to COLA is very much a trade dispute in wage negotiations and very much an issue for an Arbitrator to consider. I am not prepared to grant any of the declaration sought by CAA.

G The application is dismissed with costs to FPSA.

*Application dismissed.*