CIVIL AVIATION AUTHORITY OF FIJI

v

LABOUR OFFICER

[HIGH COURT, 1994 (Fatiaki J), 3 August]

Revisional Jurisdiction

Judicial Review-whether available in respect of a judgment of the Magistrates Court after leave to appeal had been refused-whether available in respect of an award made under the Workman's Compensation Act (Cap. 94).

Practice (Civil)-submissions in chambers to be made orally unless otherwise directed.

The Applicant sought leave to move for review of an award in the Magistrates Court and the refusal of leave to appeal out of time against the award. Refusing leave the High Court HELD: (i) the application was delayed and if granted would prejudice the Respondent (ii) in view of the statutory appeal provision judicial review was not available.

Cases cited:

R v Inland Revenue Commissioner ex parte Preston [1985] A.C. 835
Re Racal Communications Ltd [1981] A.C. 374

Application for leave to move for judicial review.

G.P. Shankar for Applicant
Ms. M. Sakiti for Respondent

Fatiaki J:

On the 27th of July this court refused an application by the plaintiff authority seeking leave to apply for Judicial Review in respect of "Order or decision" made on or about 15th day of May 1993 by the Labasa Magistrates Court.

The particular "order or decision" sought to be judicially reviewed and which was annexed to the affidavit in support of the application is a judgment of the Magistrate's Court in Labasa dated 15.5.93.

The 6 page closely-typed judgment concerned an application under the Workman's Compensation Act in respect of the death of a former employee of the plaintiff authority which occurred on the 26th of April 1985.

In his judgment delivered in open court on the 26th of May 1993 in the absence

of counsel for the plaintiff authority the learned trial Magistrate granted the application and awarded a sum of $12,000 compensation for the benefit of the deceased workman's dependants including his widow, children and a grandson.

Almost 3 months later on the 4th of August 1993 the plaintiff authority sought in the Labasa Magistrates Court (presumably under the Magistrates Courts Rules)

> "... leave to give notice of appeal and file grounds of appeal out of time."

The authority's application for leave to appeal out of time was vigorously opposed by learned counsel for the respondent in an 18 page written submission which raised amongst other matters the jurisdiction of the learned Magistrate to hear the application.

On the 8th of December 1994 however the learned trial magistrate delivered a 2 page closely-typed "Order" dismissing the plaintiff authority's application for leave to appeal out of time. On this occasion counsel for the plaintiff authority was represented in court.

Two months then passed before the present application for leave to issue judicial review was filed in the High Court on the 16th of February 1994 (the judgment was by then almost 10 months old). Since then the plaintiff authority's application has been called in chambers on no less than 7 occasions from 4th March to 27th July and on none of these occasions has counsel for the plaintiff authority personally appeared. Indeed on only 3 occasions has counsel been instructed to appear for the plaintiff authority and that was limited to taking a date or seeking an adjournment.

Furthermore on the 21st of March 1994 learned counsel for the plaintiff authority without it being requested or agreed to either by counsel for the respondent or the court and without serving a copy on counsel for the respondent, lodged a written submission in support of the application for leave. The submission was returned by the court under cover of a letter dated the 22nd of March.

On the 30th of March in the absence of counsel for the plaintiff authority the application was fixed by the Deputy Registrar for oral argument in chambers. On the 6th of June in the absence of counsel for the plaintiff authority and at his request the matter was adjourned once again to the Chief Registrar's list and a fresh date of argument assigned for 27.7.94.

On 28th June 1994 (3 months after an earlier submission had been returned) another unrequested unconsented to written submission was lodged by counsel for the plaintiff authority and despite the service of 2 notices of Adjourned Hearing on his city agents, on 27.7.94 counsel for the plaintiff authority again

failed to personally appear. On this occasion the counsel appearing on instructions stated that he had not read the applicant's written submissions and was unable to assist the court further than to support the written submission already tendered.

Although there does not appear to be any relevant High Court Rule or practice direction (other than Order 32) directly dealing with the matter it must be clearly understood that chamber applications once assigned to a judge for argument or hearing are meant to be heard *ORALLY* unless otherwise agreed by counsel and consented to by the judge.

Counsel cannot and will not be permitted either unilaterally or without the consent of the judge to dictate or pre-empt the nature or form in which chamber argument or hearing will take.

In this particular case not only had counsel's wish to file written submissions (see : para. 5 of the Notice) not been granted, but counsel's written submissions were actually returned as they were not requested or agreed to by Counsel, and the application was specifically listed at the court's direction for oral argument in chambers.

Needless to say in the light of the above, the failure of counsel for the plaintiff authority to appear personally or fully instruct counsel appearing on the assigned day and the lodgment without service on an opponent of a second unrequested written submission can only be viewed with grave concern.

In the result the court was denied the opportunity of clearing its lingering doubts as to proper procedure to be followed in this case and the precise order(s) sought to be judicially reviewed in the plaintiff authority's application which differed according to whether one read the summons, the notice, the affidavit, the written submissions or the grounds upon which leave was being sought.

In this latter regard no grounds have been advanced to show where or why the Labasa Magistrate Court was wrong in refusing leave to appeal out of time (See notice) or how the court had erred in exercising its discretion in that regard. Nor has the applicant's written submission addressed the general principle that judicial review is not to be made available where there is an alternative appeal procedure provided by statute to the aggrieved party albeit that the appeal period has long expired.

In this latter regard Section 22 of the Workmens Compensation Act (Cap.94) relevantly provides:

> "22 - (1) ... an appeal shall lie to the High Court from any order of the court" and

> "(4) No appeal shall lie after the expiration of thirty days from the date of the order of the court :
>
> Provided that the High Court may, if it thinks fit, extend the time for appealing under the provisions of this section notwithstanding that the time for appealing has elapsed."

Clearly the legislature has thereby conferred a statutory right of appeal against any "order" (which term in my view includes a judgment, decision or determination) of the Magistrates Court. There is also a time limit within which the right shall be exercised and provision for extending the time limited for appealing.

In the light of such a comprehensive statutory appeal provision, which learned counsel for the plaintiff authority has chosen to ignore, ought this court to grant the plaintiff authority leave to issue proceedings by way of judicial review merely because it can be shown that the applicant is an interested even aggrieved party ? With all due respect I cannot agree.

In R. v. Inland Revenue Commissioner ex parte Preston [1985] A.C. 835 Lord Scarman said at p.852 :

> "My fourth propostion is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge, it is not an appeal. Where Parliament has provided by statute appeal procedure ... it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."

In the present case not only has the legislature provided a statutory appeal procedure which the applicant authority has not as yet fully exhausted but further in my view, to grant the application at this stage some 14 months after the Magistrate's Court's decision would offend the general principle enunciated above by Lord Scarman and render the provisions of Section 22(4) (op. cit.) of the Workmen's Compensation Act (Cap. 94) illusory.

Furthermore although the likelihood of success or failure of the substantive application for judicial review has not been argued before the Court, I observe that the applicant's complaint is primarily directed at the admission and use by the learned trial magistrate of evidence presented in court by counsel for the respondent.

In those circumstances it is well to bear in mind the headnote in In re Racal Communications Ltd. [1981] A.C. 374 where it was :

> "Held ... that when a power to decide a particular question was conferred by statute on a court of law, as distinct from a tribunal of limited jurisdiction, there was no presumption that Parliament did not intend to confer on it power to determine questions of law going to its jurisdiction as well as questions of fact and judicial review was not available to correct any error of law made by it."

A fortiori where Parliament has specifically provided an appeal procedure for the correction of such errors and (in the context of the magistrate's refusal to grant leave to appeal out of time) where the decision is a discretionary one.

Then there is the question of delay. In this regard as already pointed out the judgment of the learned trial magistrate was delivered in open court on the 26th of May 1993 and the plaintiff authority's application for leave to issue judicial review for an order of certiorari against the decision was made almost 9 months later on the 16th of February 1994 which is 6 months after the relevant period provided for such an application by Order 53 r.4 had expired.

In my view even assuming that the application for leave to issue judicial review is an appropriate procedure, there can be no doubting that there has been undue delay in making the application. It may be as counsel appears to suggest that the delay was caused by the applicant awaiting the outcome of its application for leave to appeal out of time but even on that score the application can hardly be said to have been made with any promptitude nor is there any consistency in the applicant's approach to the matter.

Finally on the question of prejudice learned counsel for the applicant authority states somewhat cynically :

> "Really the Respondent's only concern is the money. That is the only aspect of prejudice to which a finger can be pointed at. Well, to that answer is simple. The applicant is prepared to deposit that sum in court and court can put it on interest bearing account in Bank in the name of Chief Registrar pending the outcome of the hearing."

No mention is made of the dependants of the deceased workman on whose behalf the application for compensation was made and for whose benefit the award was made.

Yet this case involves a widow and her 5 children who lost their sole breadwinner in 1985 and who have finally obtained an award in 1993 under social legislation designed in part to alleviate the hardship of such persons. They have already been denied the fruits of their successful application through no fault of their making for over a year, and are now to be longer denied on the

basis of an application which may not finally determine the matter. A greater hardship it would be difficult to imagine.

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Furthermore it can hardly be conducive to the effective and efficient administration of the Workman's Compensation Act if, despite the presence of a statutory appeal procedure, an unsuccessful party in an application under the Act could with ease ignore or evade the time limits there imposed by instituting an application for leave to issue judicial review.

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In my view to grant the plaintiff authority's application would be to introduce into the good administration of the Act an hitherto unforseen element of uncertainty and duplicity which would be highly detrimental to its good administration.

For the foregoing reasons the plaintiff authority's application was refused.

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(Application for leave refused.)

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