SHORE BUSES LIMITED
TACIRUA TRANSPORT COMPANY LTD.
PACIFIC TRANSPORT LIMITED
ISLAND BUSES LIMITED

v.

MINISTER FOR LABOUR AND INDUSTRIAL RELATIONS

[COURT OF APPEAL, 1996 (Thompson, Hillyer, Dillon JJA) 15 November]

Civil Jurisdiction

Judicial review- delay in filing originating notice of motion following grant of leave- dismissal for want of prosecution- principles applicable. High Court Rules 1988 Order 53 rule 5 (4).

Following the grant of leave to move for judicial review there were substantial delays before the respondents successfully applied for dismissal of the proceedings for want of prosecution. On appeal the Court of Appeal HELD: (i) the ordinary principles applicable to an application to dismiss an action for want of prosecution also apply to proceedings commenced by originating motion or summons but (ii) in judicial review proceedings it is prejudice to the public interest in good administration rather than to the respondent which is relevant. The Court once again emphasised that judicial review proceedings are intended to be dealt with and disposed of as promptly as reasonably possible.

Cases cited:

Al-Mehdawi v. Secretary of State for Home Department [1991] LRC (Const) (H.L.)
Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229
Anuradha Charan v PSC and Others - Civ. App. 2/92 (FCA Reps 93/661)
Birkett v. James [1978] A.C. 297
Charan and Another v. Syed M. Shah & Ors – Civ. App. 29/94 (FCA Reps 95/84)
Halls v. O'Dell [1992] Q.B. 393.
O'Reilly v. Mackman [1983] 2 AC 237
R v Dairy Tribunal ex parte Caswell [1990] 2 AC 738
United Bank Ltd. v. Maniar [1988] 2 W.L.R. 28
White v. Brunton [1984] QB 520

Application for leave to appeal to the Court of Appeal from the High Court.

H. Nagin for the Appellants
S. Banuve for the Respondent

Judgment of the Court:

This is an appeal against an order made by Fatiaki J. dismissing for want of

prosecution the appellant's application for judicial review of a decision of the respondent to make an order pursuant to section 8(3) of the Wages Councils Act (Cap. 98) ("the Act").

The grounds of appeal are that

> "1. THE Learned Trial Judge erred in law and in fact in dismissing the Appellants' application for Judicial Review.
>
> 2. THE Learned Trial Judge erred in law and in fact in not properly considering that the Appellants were themselves not in anyway personally in default.
>
> 3. THE Learned Trial Judge erred in law and in fact in taking into account Rules of the High Court which were inapplicable in the circumstances.
>
> 4. THE Learned Trial Judge erred in law and in fact in holding that the inadvertent delay in the matter affected the good administration."

The relevant provisions of the Act are as follows:-

"8. (1) Subject to and in accordance with the provisions of this section, any wages council shall have power to submit to the Minister proposals (hereafter in this Act referred to as "wages regulation proposals") -

> (a) for fixing the remuneration to be paid, either generally or for any particular work, by their employers to all or any of the workers in relation to whom the council operates;
>
> (b) for requiring all or any such workers as aforesaid to be allowed holidays by their employers.

The power to submit proposals for fixing remuneration shall include power to submit proposals for fixing holiday remuneration.

(2) Before submitting any wages regulation proposals to the Minister, a wages council shall make such investigations as it thinks fit and shall publish, in the prescribed manner, notice of the proposals, stating the place where copies of the proposals may be obtained and the period within which written representations with respect to the proposals may be sent to the council; and the council shall consider any written representations made to it within that period and shall make such further inquiries as it considers necessary and may then submit the proposals to the Minister either without amendment or with such amendments as it thinks fit having regard to the representations;

Provided that if the council, before publishing its proposals, resolves that, in the event of no representation with respect to the proposals being made to it within the said period the proposals shall without further consideration be submitted to the Minister, the proposals shall, if no representation is so made, be submitted to the Minister accordingly.

(3) Where the Minister receives any wages regulation proposals, he shall make an order (hereafter in this Act referred to as a "wages regulation order") giving effect to the proposals as from such date as may be specified in the order:

Provided that the Minister may, if he thinks fit, refer the proposals back to the council and the council shall thereupon reconsider them having regard to any observations made by the Minister and may, if it thinks fit, re-submit the proposals to the Minister either without amendment or with such amendments as it thinks fit having regard to those observations; and where proposals are so re-submitted, the like proceedings shall be had thereon as in the case of original proposals.

The date to be so specified shall be a date subsequent to the date of the order, and where, as respects any worker who is paid wages at intervals not exceeding thirty-one days, the date so specified does not correspond with the beginning of the period for which the wages are paid, the order shall, as respects that worker, become effective as from the beginning of the next such period following the date specified in the order.

(4) As soon as the Minister has made a wages regulation order, he shall give notice of the making thereof to the wages council and that council shall give such notice of the order and the contents thereof as may be prescribed for the purpose of informing, so far as practicable, all persons who will be thereby affected.

(5) Any wages regulation proposals and any wages regulation order for giving effect thereto may make different provision for different cases, and may also contain provision for the amendment or revocation of previous wages regulation orders. ....."

The Road Transport Wages Council met on 16 September 1992 and decided to give notice to the public of its intention to submit wages regulation proposals to the respondent. Under the proposals the wages of road transport workers were to be increased substantially. In the notice it was stated where the proposals were publicly displayed and that written representations in respect of them might be sent to the Council. However, it failed to state the closing date for such representations. So on 27 November 1992 a fresh notice was published in the

Gazette in the same terms as before, except that it was stated that written representations might be sent to the Council on or before 21 December 1992.

A

On 30 December 1992 the Fiji Bus Operators Association sent to the Council its objections to the proposals insofar as they related to the employees of bus operators. The Association is an unregistered association of all the bus operators in Fiji. The appellants are four of those operators. The general manager of the first appellant is the secretary of the Association. Its objections were detailed and reasoned, running to twelve pages.

B

The Association also expressed to the respondent its concern that none of the industry representatives on the Council represented the bus operators. Paragraph 1 of the First Schedule to the Act provides for the Minister to appoint members to a Wages Council, three chosen as independent persons, a number representing employers in relation to whom the Council is to operate and an equal number to

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represent employees. Paragraph 3 requires the Minister to consult organisations apparently representing the employers and the employees respectively before ordering the representative appointments. On 28 January 1993 the Minister appointed a director of the third appellant to be a member of the Council.

On 18 March 1993 the Council, with the director of the third appellant present,

D

met to consider the Association's objections. It noted that bus operators' costs had risen and they could charge bus fares only as authorised under the Traffic Act (Cap. 176) and that they had not been increased. The majority of the Council nevertheless considered its previous proposals to be fair. It submitted them to the respondent for his decision but the Chairman undertook to draw the bus operators' problem to the attention of the Minister.

E

As authorised by the proviso to s.8(4) of the Act the respondent referred the proposals back to the Council. It met again on 13 July 1993. The minutes of the meeting record that the director of the third appellant reiterated the problem of the bus operators discussed at the previous meeting but that, as before, by a majority the Council decided to submit the proposals to the respondent again.

F

However, it also recommended that, if the income of the bus and taxi operators was incapable of sustaining the increased wages, the respondent should refer the problem to the appropriate transport authority with a view to seeking increased fares.

On 16 August 1993 the respondent made the Wages Regulation (Road Transport) Order 1993 as submitted to him by the Council. It was then published in the

G

Gazette by the Council as provided for by regulation 5 of the Regulations. It is the order of which judicial review was sought by way of certiorari and declarations. The grounds on which the application for judicial review was made were:-

> "(a) That the Minister acted in breach of the relevant rules of natural justice in that he failed to give the Applicants a

hearing or a proper hearing before making the Wages Regulation (Road Transport) Order 1993. He also failed to consider the bias shown by the Road Transport Wages Council.

(b) That the Minister in making the Wages Regulation (Road Transport) Order abused his discretion under the Wages Council Act and Regulations in that:-

(i) he took into consideration irrelevant matters; and

(ii) he did not take into consideration relevant matters;

(iii) he acted unreasonably;

(c) That the Minister exceeded his jurisdiction under the Wages Council Act and Regulations."

The application for leave to apply for judicial review was made on 1 November 1993. On 3 November 1993 Byrne J. ordered the stay of implementation of the respondent's order, insofar as it affected bus operators, until "the hearing and determination of the Judicial Review" or further order of the Court. Leave was granted on 22 November 1993 by Byrne J. and the matter adjourned to 9 December 1993. Byrne J.'s contemporaneous note of the proceedings on 9 December 1993 reads "Applicants to issue o/s. Adjourned for mention at 9:30 a.m. on 21/1/94." The application for judicial review was made on 15 December 1993 but by originating notice of motion not by originating summons. It was set down for hearing on 28 January 1994. On that date it was adjourned until 9 February 1994 for the Chief Registrar to fix a new hearing date. The proceedings were then further adjourned until 18 May 1994 "for mention". It is not clear why no hearing date was fixed on 9 February; as Fatiaki J. pointed out in his statement of the reasons for his decision, that was contrary to the clear intention of 0.53 r.5(4). The 0.53 procedure is intended to be expeditious and to provide "a relatively straight forward and prompt determination of the case" (Anuradha Charan v Public Service Commission and Others (Civil Appeal No. 2 of 1992, page 28: FCA Reps 93/661)).

On 18 May 1994 the Chief Registrar set 4 August 1994 as the date for the hearing of the application. Counsel for both parties were present when he did so but on 4 August 1994 there was no appearance by the appellants and the hearing was adjourned sine die. Nothing further occurred in the matter until 31 May 1995 when the respondent applied for the application to be dismissed for want of prosecution. The appellants' solicitors then filed an affidavit stating that the fault was theirs; they had failed to note the new hearing date in their diaries and had in consequence overlooked it.

His Lordship considered whether he had power to dismiss an application for judicial review for want for prosecution. He concluded that he had. He observed

that "there was not the slightest doubt that the appellants had been guilty of undue delay" and observed that it was implicit in the appellant's solicitors' affidavit that the delay would have continued if the respondent had not made his application for dismissal. He considered whether he might revoke Byrne J's stay order but allow the judicial review proceedings to remain on foot. However, having discussed several authorities regarding the nature of judicial review and having taken into account the social aspects of wages regulation orders, he concluded that he should exercise his discretion to dismiss the application for judicial review with costs.

The order for dismissal of the application for judicial review brought the judicial review proceedings to an end. However, if dismissal had been refused, those proceedings would have continued. This Court has held that the question whether an order is interlocutory or final is to be determined by adopting the "application approach" as described by the English Court of Appeal in White v. Brunton [1984] QB 520 (see Charan and Another v. Syed M. Shah and Others (Civil Appeal No. 29 of 1994, page 4; FCA Reps 95/84). Consequently leave to appeal was required in the present case. Neither party had recognised this before the hearing; we brought it to their attention. The appellant's counsel then applied for leave. We informed the parties that we would hear them on the merits of the appeal and then decide whether to grant leave to appeal.

We turn now to consider the grounds of appeal. It is convenient to deal with the first and third grounds together. The learned judge, in his written statement of the reasons for his decision to dismiss the application for judicial review, refers to Byrne J.'s order that an originating summons be issued and then says that "this was subsequently filed on 15th December 1993." 0.53 r.5 provides for application for judicial review to be made either by originating motion or by originating summons. 0.28 r. 11 applies to the dismissal of a cause or matter commenced by originating summons for failure to "prosecute the process with due despatch." His Lordship based on that rule his decision to dismiss the application for judicial review. He undoubtedly erred in treating the originating process as an originating summons when it was not. However, that does not vitiate his reasoning generally.

Order 8, which contains provisions relating to originating motions: makes no provision for dismissal for want of prosecution. However, it would be remarkable, in our view, if an application for judicial review commenced by originating summons could be dismissed for that reason but a similar application commenced by originating motion could not. Similarly it would be remarkable if the criteria for dismissal for want of prosecution should be different in judicial review proceedings depending on the originating process by which they were commenced. In stating what the criteria set by 0.28 r.11 were Fatiaki J. relied on the dicta of Millett J. in United Bank Ltd. v. Maniar [1988] 2 W.L.R. 28 that there is no requirement that the delay must be inordinate and inexcusable or that the defendant must have been prejudiced by the delay. In our view he should not have done so

Millett J's views have been disapproved by the Court of Appeal in Halls v. O'Dell [1992] Q.B. 393. The Court of Appeal held that nothing in Order 28 justified his conclusion. The ordinary principles applicable to power to dismiss an action for want of prosecution did apply where the proceedings had been commenced by originating summons. We would respectfully agree.

The ordinary principles to which the Court of Appeal referred are well established (Allen v. Sir Alfred McAlpine & Sons Ltd [1968] 2 Q.B. 229; Birkett v. James [1978] A.C. 297). There must have been inordinate and inexcusable delay in prosecuting the action and serious prejudice to the defendant. Whether delay has been inordinate and inexcusable in any particular action depends on all the circumstances of the action and the delay. Whether the defendant has been seriously prejudiced is likewise a question of fact to be determined by reference to the circumstances of the action and the defendant. Although the learned trial judge stated that he was applying the criteria set by Millett J. in the Union Bank case, he examined thoroughly the nature of the proceedings, the length and circumstances of the delay and its effect on the employees for whose benefit the wages regulation order had been made. We can find no error in his statement of those facts or any omission by him of any relevant facts from his consideration.

Judicial review proceedings are not truly *inter partes*. So, when the principles applicable to dismissal for want of prosecution of an action are applied, prejudice to the public interest in good administration rather than to the respondent needs to be shown. We agree with Fatiaki J.'s observation that the public interest in good administration requires that the legal validity of administrative decisions affecting members of the public should not be kept in suspense for very long. That is why judicial review proceedings have to be commenced within a very short time. Because of the nature and purpose of such proceedings, delay may be inordinate even though in a civil action a much longer delay might not. In view of the nature of the respondent's order of which judicial review was sought, we have no doubt that the delay in this case was inordinate and, as Fatiaki J. found in discussing the issues raised by the fourth ground of appeal, was significantly prejudicing the public interest. There is no doubt that it was inexcusable. Even though failure to make the appropriate diary entries in respect of the hearing date was unintentional, the failure to give any attention to the matter for a period of eleven months was inexcusable. The first and third grounds of the appeal, therefore, lack merit.

The second ground can be quickly disposed of. First, although the appellants' solicitors were seriously at fault, the appellants themselves apparently did nothing to ensure that their application was prosecuted expeditiously. In the affidavit in support of the application for leave to apply for judicial review assertions were made on their behalf that the respondent's order was of great concern to them and affected the viability of their businesses. They could, therefore, reasonably have been expected to inquire of their solicitors from time to time regarding the progress of the proceedings. Yet they appear to have taken no such interest in

them. Second, although there may possibly be circumstances in which a party ought not to be required to suffer the consequences of his solicitor's error or default, the general rule is to the contrary (Al-Mehdawi v. Secretary of State for Home Department [1991] LRC (Const) (H.L.)). If a party suffers loss as a consequence of his solicitor's negligence, he can seek a remedy against his solicitor. Although His Lordship, having referred to the fact that the appellants' counsel had raised the question to which the second ground relates, did not address it further in the statement of the reasons for his decision, we are satisfied that, if he had done so, it could not properly have affected the reasoning on which his decision was based. Accordingly, the second ground of the appeal lacks merit.

The fourth ground relates to the finding that the delay adversely affected good administration and implicity that it significantly prejudiced the public interest in good administration. The affidavit of the Acting Executive Officer in support of the dismissal application contained the assertion of his belief that "continuous in action" (sic) [presumably "continuous inaction" was intended] "by the Applicants is prejudicial to the official functions of the Respondent." In his affidavit in reply Mr Nagin stated that the appellants were ready to proceed with the judicial review and that the Attorney-General's Office was not prejudiced by the delay in the High Court. (The respondent is represented by a member of the staff of that office). In spite of the Acting Executive Officer's failure to specify the nature of the prejudice to the respondent's official functions and Mr. Nagin's failure to address that question or the broader question of the public interest in good administration, His Lordship did deal with the latter question at some length. He considered a passage from Lord Goff's judgment in R v Dairy Tribunal ex p. Caswell [1990] 2 AC 738 discussing what constitutes the public interest in good administration. Then he examined the Act, noting that it might be classed as "social legislation." He discussed its purpose and the effect of wages regulation orders made under it. He observed that the stay of the respondent's order only insofar as it affected employees of the bus operators meant that they were not receiving the same increases as other road transport workers. Those increases, the minutes of the Council showed, were granted to take account of the substantial increase in the cost of living which had occurred between the date of the previous wages regulation order and 1992. We can see no error of fact or law in the conclusion reached by His Lordship. Accordingly the fourth ground of appeal has no merit. As we have found that all of the grounds lack merit, it would be futile to grant leave to appeal.

Before concluding this statement of the reasons for our decision, we need to comment briefly on the unsatisfactory approach which was taken to the proceedings at the outset. They were not handled with the expedition which judicial review proceedings require. This appears to indicate that the nature and purpose of the 0.53 procedure may not be properly understood or that, if they are understood, they have been overlooked. In O'Reilly v. Mackman [1983] 2 AC 237 at 280 Lord Diplock said:

> "The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision- making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

In Anuradha Charan v. Public Service Commission and Others (supra) this Court observed:

> "In a world of burgeoning bureaucracy and use of administrative powers by an increasing number of official bodies, judicial review is an essential means of reddress. The special procedures are designed for a relatively straight forward and prompt determination of the case."

We agree with Fatiaki J. that it is desirable for the High Court to take firm control of the proceedings in cases of this nature, particularly at the early stages.

The application for leave to appeal is dismissed with costs.

(Appeal dismissed.)