

SUPREME COURT

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R. v. ARBITRATION TRIBUNAL

A

EX PARTE TRANSPORT WORKERS UNION

[SUPREME COURT—(Kermode J.)—3 July 1984.]

Civil Jurisdiction

B

(Trade Unions—Practice and Procedure—application by way of Judicial Review for an Order of Certiorari to quash decision of Arbitration Tribunal—denial of Natural Justice—alleged refusal to applicant of opportunity to call witnesses—onus of proof to establish such denial—failure to discharge onus.)

V. Maharaj for the Applicant

D. C. Maharaj for the Respondent

C

Application by the Transport Workers Union (the Union) which sought by way of Judicial Review under Order 53 Rules of the Supreme Court for an Order of Certiorari to quash a decision of the Arbitration Tribunal (Tribunal) set out in an award dated 30 December 1983.

D

The application arose out of a dispute between the Union and Vatuwaqa Transport Company Limited (the Company) on 17 August 1983 which was referred to the Arbitration Tribunal for settlement by the Permanent Secretary for Employment and Industrial Relations.

The terms of the reference were:

“To decide on the claim by the Union that Mr Jagdishwar Prakash’s dismissal was unfair and he should be reinstated.”

E

The Tribunal ruled that the Company had acted fairly when dismissing Jagdishwar Prakash (Prakash) on 28 July 1983.

In the statement filed pursuant to Rule 3(2) of Order 53 the Union sought relief on grounds stated in Para 28 of which only one was argued viz:

F

“That the Arbitration Tribunal was in breach of the Rules of Natural Justice in failing to avail to the Plaintiff an opportunity to call Jagdishwar Prakash to give evidence in his defence and to call witnesses on his behalf.”

The Court noted that the parties involved in the dispute were the Union and the Company whereas Prakash was a member of the Union but not party to the dispute although very much interested in the outcome. Not having being charged with any offence into which the Tribunal was inquiring it was not necessary for him to defend himself or call witnesses on his behalf.

G

The statement filed by the Union indicated the complaint that the Tribunal had not granted an adjournment to enable it to call Prakash and other witnesses.

H

So far as necessary to note, the Tribunal was the Permanent Arbitrator Professor F. J. L. Young appointed to that position under S.21 of the Trade Disputes Act. Pur-

- A** suant to S.20(2) of that Act the functions of a Tribunal so appointed may be discharged by the Permanent Arbitrator.

Under S.30 of the Act the Tribunal had the power of a Commissioner under the Commission of Inquiry Act, may regulate the procedure in any proceedings under it as he thinks fit and was not bound by the rules of evidence.

- B** The Court noted that certiorari may issue to quash a decision ultra vires or vitiated by error on the face of the record. The application the subject of this litigation was concerned only with an allegation that the Tribunal had acted ultra vires because it was in breach of Natural Justice in denying an adjournment and a hearing to Prakash.

- C** On 27 September 1983 the first hearing of the Tribunal was held, at which the Union, represented by Mr Hasmukh Patel and the Company by Mr Benefield, Mr Patel appeared with Mr Palan the Secretary of the Union. Mr Patel sought an adjournment which was granted. Upon resumption both Mr Benefield and Mr Patel were given the opportunity of addressing the Tribunal at some length. They availed themselves of that opportunity. The Director of the Company gave evidence whereafter Mr Patel was asked if he wished to cross examine. However, he asked for second adjournment because of court commitment elsewhere. He suggested 13 October 1983 which date was then fixed. On 13 October 1983 Mr Palan advised the Tribunal that Mr Patel was sick. He sought an adjournment. The Tribunal granted this adjournment and stated that the first vacant date would be fixed and "to reckon on the 3rd or 4th week of November 1983" for the hearing.

- D** On 15 November 1983 the Secretary to the Tribunal advised Mr Benefield that the hearing would be resumed on 25 November 1983.

On 24 November 1983 the Secretary to the Tribunal advised Mr Patel by telephone that the hearing would be resumed the following day. Thereupon Mr Patel informed the Secretary of a prior court commitment and that he could not make other arrangements regarding that commitment.

- E** Thus it appeared that the Secretary gave the Company's solicitor about ten days notice and the Union less than one day.

Mr Patel did not inform the Secretary of the Union or Mr Palan of the projected resumed hearing date.

- F** The Tribunal although it would have proceeded on the 25 November 1983 in the absence of any Union representative did not do so; instead the Secretary located the Union Secretary, requested his presence before the Tribunal whereupon he was advised that the Tribunal proposed to commence the adjourned hearing. The Union Secretary protested to the Tribunal Secretary (but not to the Tribunal) about short notice and his inability to contact Prakash. Apparently he made no such protest to the Tribunal.

- G** The hearing continued and the Union Secretary cross examined the witnesses.

There was a conflict between the parties as to whether Mr Palan had been given an opportunity to call Prakash or witnesses and whether he the Union Secretary was asked whether he wished to call any witness in rebuttal on behalf of Prakash. The version of Mr Benefield is that the Union Secretary, on being asked by the Tribunal whether he would call witnesses replied that he had Prakash in mind but as it would be difficult to locate him immediately he would not call any witnesses. The Union Secretary did not then make any application for adjournment.

Both Mr Benefield and Mr Palan summed up at the conclusion of the hearing.

Held: The onus to establish that the Union had been denied a fair hearing was on the applicant. The three adjournments had been granted by the Tribunal in the circumstances where it could on two occasions have justifiably refused any further adjournment. Mr Palan alleged the Union was not given a fair hearing; but Mr Benefield related facts which disclosed that the Tribunal had acted fairly and consistently in its conduct of the Arbitration.

The applicant Union failed to satisfy the Court that it had not been given a fair hearing. The evidence showed that it was given a hearing conducted in a proper manner. Counsel for the Union could have been replaced by another solicitor at the hearings. The Union Secretary apparently had not passed on to Mr Patel that the adjourned hearing date would be in the 3rd or 4th week in November.

If the applicant Union had any genuine complaint about the hearing there was no room, on the evidence whereby it could blame the Tribunal.

The Union did not establish any breach of Natural Justice committed by the Tribunal.

Application dismissed.

KERMODE, Mr Justice

Judgment

The Transport Workers Union (hereinafter called the Union) seeks by way of Judicial Review under Order 53 Rules of the Supreme Court an order of certiorari to quash the decision of the Arbitration Tribunal in an award dated the 30th December 1983.

A dispute between the Union and the Vatuwaqa Transport Company Limited (hereinafter referred to as the Company) the respondent, was referred to the Arbitration Tribunal for Settlement by the Permanent Secretary for Employment and Industrial Relations on the 17th day of August 1983.

The terms of reference were as follows:

"To decide on the claim by the Union that Jagdishwar Prakash's dismissal was unfair and he should be reinstated."

In its said award the Arbitration Tribunal ruled that the Company acted fairly when dismissing Jagdishwar Prakash on 28th July 1983.

A In the Statement filed pursuant to Rule 3(2) of Order 53, the Union sought relief on the three grounds stated in paragraph 28. In opening the case for the Union Mr V. Maharaj stated that the only complaint they had was that no opportunity was given by the Arbitration Tribunal to call or give evidence in rebuttal of the Company's case. He claimed there was a denial of natural justice.

B This makes it not necessary to consider two of the three grounds and to consider only the third which is as follows:

"That the Arbitration Tribunal was in breach of the Rules of Natural Justice in failing to avail to the Plaintiff an opportunity to call Jagdishwar Prakash to give evidence in his defence and to call witnesses on his behalf."

This ground of complaint indicates some confusion or misunderstanding of the nature of the proceedings before the Tribunal.

C The parties involved in the dispute were the union and the Company. Jagdishwar Prakash was a member of the Union but he was not a party to the dispute although very much interested in the outcome. He was not charged with any offence into which the Tribunal was enquiring and it was not for him to defend himself or call witnesses on his behalf.

D The Statement filed by the Union indicates that its complaint is that the Tribunal did not grant an adjournment to enable it to call Jagdishwar Prakash and other witnesses.

The Tribunal in the instant case was the Permanent Arbitrator Professor F. J. L. Young. Professor Young was appointed Permanent Arbitrator under section 21 of the Trades Disputes Act. Under section 20(2) of the Act the functions of a Tribunal appointed under that section may be discharged by the Permanent Arbitrator.

E Under section 30 of the Act a Tribunal has the Power of a Commissioner under the Commission of Inquiry Act and may regulate the procedure in any proceedings under the Act as he sees fit. He is not bound by the rules of evidence in civil and criminal proceedings.

F Certiorari issues to quash a decision which is ultra vires or vitiated by error on the face of the record. The present case is only concerned with allegation that the Tribunal has acted ultra vires because he acted in breach of natural justice in denying an adjournment and a hearing to Jagdishwar Prakash.

G The Record includes a number of papers which do not properly form part of the Record mainly copies of letters. I have ignored all but the Reference to the Tribunal, the transcript of evidence which I have looked at only to see what happened at the hearing and the award. I have of course perused and considered the Statement and Affidavits filed in support and in reply.

H The transcript is of tape recordings of the hearings and it is apparent that difficulty has been experienced in making up the Record. There are gaps and evidence that does not make sense. It has been possible however from the affidavits and what is recorded in the transcripts to follow the procedure adopted by the Tribunal and what transpired at the hearings.

The first hearing of the Tribunal was on the 27th September 1983. The Union was represented by Mr Hasmukh Patel and the Company by Mr Benefield. Mr Patel appeared on that morning with Mr Palan the Secretary of the Union.

Mr Patel sought an adjournment for a short period because he was engaged in the Domestic Court. On his return both Mr Benefield and Mr Patel were given the opportunity of addressing the Tribunal at some length and availed themselves of that opportunity. A

A Director of the Company, a Mr Jagdishwar Singh (not to be confused with the employee of the Company Jagdishwar Prakash) gave evidence at some length. When Mr Patel was asked if he wanted to cross-examine this witness he asked for a second adjournment because he was engaged in the Supreme Court that afternoon. The 27th September, 1983, was a Tuesday and Chamber applications are heard on Tuesday afternoons at the Supreme Court. B

There was difficulty in finding a suitable date but on Mr Patel suggesting the 13th October, 1983, that date was fixed for the adjourned hearing. On the 13th October, 1983, Mr Palan advised the Tribunal that Mr Patel was sick and he had been asked to seek an adjournment on his behalf. C

The Tribunal acceded to the request and told Mr Palan that the first vacant date would be fixed but "to reckon on the 3rd or 4th week of November" 1983 for the hearing.

According to the Statement, the Secretary to the Tribunal telephoned Mr H. Patel on the 24th November, 1983, and advised him the hearing would be resumed the following day. The Statement goes on to relate that Mr Patel informed the Secretary he had a prior Supreme Court engagement and he could not at such short notice make other arrangements as regards the Supreme Court fixtures. He did not apparently endeavour to get other counsel to represent the Union. Mr Benefield in his affidavit stated that he was advised by the Secretary to the Tribunal on or about the 15th November, 1983, that the hearing would resume on the 25th November, 1983. If the date in the Statement is correct, it appears strange that the Secretary should give the Company's solicitor about 10 days notice and the Union less than one day. D E

Mr Patel did not inform the Secretary of the Union of the resumed hearing on the 25th November, 1983. He should have done so.

The Tribunal could have proceeded in the absence of any representative of the Union on the 25th November, but it did not do so. The Secretary to the Tribunal located the Union Secretary at a seminar in Suva and requested his presence before the Tribunal. On his appearing before the Tribunal he was advised that the Tribunal was commencing the adjourned hearing. F

The Statement alleges the Union Secretary protested to the Tribunal Secretary about short notice and his inability to contact Jagdishwar Singh. He apparently did not protest to the Tribunal and this is borne out by Mr Benefield's affidavit. G

The hearing continued and the Union's Secretary cross-examined witnesses.

The Union Secretary by his affidavit verified the facts stated in the Statement. On the relevant issue there is a very serious conflict between Mr Palan and Mr Benefield.

The Statement alleges Mr Palan was not given an opportunity to call Jagdishwar Prakash or Prakash's witnesses and that he, the Union Secretary, was not asked whether he wished to call any witness in rebuttal on behalf of Jagdishwar Prakash. H

Mr Benefield stated in his affidavit:

"14 (b) The applicant's secretary was asked by the Tribunal whether he would call any witnesses and the Secretary replied to the effect that he had Jagdishwar Prakash in mind but as it would be difficult to locate Jagdishwar Prakash immediately he would not call any witnesses.

(c) At this stage the Union Secretary made no application for an adjournment to call a witness or for any other purpose "

The transcript is silent on this issue and does not assist but it does disclose that both Mr Benefield and Mr Palan summed up at the conclusion of the hearing.

The onus is on the applicant to establish that the Union was denied a fair hearing.

C I have set out what transpired at the three hearings. The procedure followed by the Tribunal was that which would have been followed in a civil action.

Three adjournments were granted by the Tribunal in circumstances where the Tribunal could on two occasions have justifiably refused any further adjournment. The Record discloses his patience at a time when he had disclosed to the parties his heavy work load and difficulty in finding time for an adjourned hearing of the present case which he said should be dealt with speedily. Mr Palan alleges the Union was not given a fair hearing but Mr Benefield relates facts which disclose that the Tribunal acted fairly and consistently with its conduct of the arbitration at three hearings.

D Faced with two such affidavits as those of Mr Benefield and Mr Palan there would have been difficulty in coming to a decision but for the fact that it is for the applicant to satisfy the Court that the Union was not given a fair hearing. That it has been unable to do.

E The Union was given a hearing which was conducted in a proper manner. The Union was represented by counsel who could have made himself available the whole day for the hearing on Tuesday the 27th September, 1983. There would have been no problem in having another solicitor appear for Mr Patel at the Chamber hearings that afternoon and obtaining an adjournment of Mr Patel's cases. When Mr Patel fell ill on or about the 13th October, 1983, the Union Secretary was clearly informed that the adjourned hearing would be in the 3rd or 4th week of November. The Union Secretary apparently did not pass on that message to Mr Patel but of more importance when Mr Patel complained of short notice of the hearing for 25th November 1983 he did not inform the Union Secretary of the date and the Union Secretary went to attend a seminar on the day of the hearing.

F G If the Union has any genuine complaint about the hearing it cannot on the evidence before me blame the Tribunal.

The Union has not established that there was any breach of natural justice committed by the Tribunal.

The application is accordingly dismissed with costs to the respondent.

H *Application dismissed.*