

A

RE. FIJI PUBLIC SERVICE ASSOCIATION

[SUPREME COURT, Rooney J. 16 April 1985]

Civil Jurisdiction.

B

Public Service—Interpretation by Permanent Arbitrator under Trade Disputes Act of an award made by him—Trade disputes which arose settled on terms providing reference to Arbitration—Whether particular issue was outside terms of reference of the review leading to Arbitration—whether award of Permanent Arbitrator can be the subject of certiorari—private domestic tribunals outside scope of certiorari since authority derived in contract—tribunal appointed under Trade Disputes Act not amenable to Judicial Review.

C

V. Maharaj for the applicant
Mr S. P. Sharma for the Attorney-General

D

Motion made ex parte under Order 53(3) of the Rules of the Supreme Court for leave to apply for Judicial Review by way of certiorari and declaration in respect of interpretation of an award made by the Permanent Arbitrator and concerning his interpretation of that award.

The purpose of the requirement that leave must be obtained was to eliminate at an early stage applications which are considered frivolous, vexatious or hopeless.

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If it appeared that the decision of the Permanent Arbitrator in this instance was not subject to Judicial Review the applicant should be refused leave to proceed.

F

The facts include that following a review of certain conditions in the Public Service completed in June 1982, a dispute arising out of it emerged between the applicant and the Public Service Commission (Commission). The applicant was a Trade Union representing the interest of Civil Servants.

G

A trade dispute within the meaning of the Trade Disputes Act (Cap. 97) was declared. On 23 June 1983 the dispute was settled on terms which provided that the Association and Commission had agreed to refer the matter in dispute to Arbitration and to abide by the decision of the Arbitration Tribunal; that the terms of reference of the dispute should be as follows:

"To examine and decide on the dispute between the parties on the Report of the General Review Team on classification, gradings, salaries and allowances of all posts in the occupational classes represented by the Association and to make an appropriate award."

H

Subsequently the Commission and applicant entered into a supplementary agreement as to the precise issues in dispute which were to be determined by the Arbitration Tribunal pursuant to the Agreement of 23 June .

The applicant contended that a particular issue ("non-appealable posts issue") was outside the terms of reference of the review completed in June 1982 which had lead to the Arbitration and not included amongst issues which were before the Arbitration Tribunal. A

The Public Service Act (Cap. 74) established the Public Service Appeals Board. S.14 conferred upon officers appointed by the Commission a right of appeal to the Board arising out of promotions, punishments and transfers of officers in the service. S.14(2) empowered the Minister responsible for the Public Service to exclude that right of appeal against the promotion of any officer or the appointment of any person to any office or position specified in orders made by the Minister. The aim of the applicant was to restrict by agreement or otherwise the exercise by the Minister of that power to limit the right of appeal. In an interpretation dated 13 March the Permanent Arbitrator in effect dealing with the non-appealable posts issue removed any restraint which previously existed on the Minister's right to make Orders under S.14(2) above. B C

Held: On the present motion made ex parte the Court could not make any orders other than to grant or refuse leave to make the application. Before the Court gave leave to proceed by way of Judicial Review it had to be established that the body or person against whom the relief was claimed was subject to the procedure. Should it appear that the decision of the Permanent Arbitrator in this instance was not subject to Judicial Review the application must be refused. In *R. v. Arbitration Tribunal Ex parte Air Pacific Employees' Association and Another* (No. 17 of 1984) there was support for the contention that certiorari would not lie to an award of the Permanent Arbitrator on a dispute referred to him with the consent of the parties. Kearsley J. in that case cited *Regina v. National Joint Council for the Craft of Dental Technicians Ex parte Neate* 1953 1 Q.B. 104 where Lord Goddard C. J. said: D E

"There is no instance of which I know where certiorari has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom by statute the parties *must* resort."

See also *In Reg. v. Criminal Injuries Compensation Board Ex parte Lain* (1967) 2 Q.B. 864 per Lord Parker. F

A clear distinction must be drawn between acts and decisions of Public authorities exercising powers irrespective of the wishes of those effected and authorities public or private who can make decisions only by the free consent of the parties who appoint them. It did not matter that the Tribunal resorted to in this instance was a creature of Statute. A statutory tribunal not normally an arbitration tribunal can be empowered to act in the capacity of arbitrator by consent. G

Leave should not be granted.

The Tribunal appointed under S.6(1) of the Trade Disputes Act is not amenable to Judicial Review. H

Leave to make application refused.

(Editor's Note: Overruled: *RE Satish Chandra* 32 FLR 16)

A Cases referred to:

R. v. Arbitration Tribunal Ex parte Air Pacific Employees' Association and Another (S.C. 17/84)

Reg. v. Criminal Injuries Compensation Board Ex parte Lain (1967) 2 Q.B. 864

B *Reg. v. National Joint Council for the Craft of Dental Technicians Ex parte Neate* (1953) 1 Q.B. 704

ROONEY, Mr Justice.

Judgment of the Court

C This is an ex parte motion under Order 53(3) of the Rules of the Supreme Court for leave to make application for judicial review by way of certiorari and declaration. The subject of the application is an interpretation, dated 13th March, 1985, made by Professor Young in his capacity as Permanent Arbitrator under the Trade Disputes Act, Cap. 97, of an award made by him on the 20th December, 1983. The background can be summarised as follows.

The Applicant is a trade union representing the interests of civil servants.

D Following a review of matters relating to conditions in the Public Service which was completed in June 1982 (the Nicol & Hurst Review), a dispute arose between the Applicant and the Public Service Commission arising out of it. A trade dispute within the meaning of the Trade Disputes Act, Cap. 97, was declared, but, on the 23rd June, 1983 the matter was settled on terms which provided as follows:

E "(a) That the Association and the Commission have agreed to refer the matter in dispute for adjudication by an Arbitration Tribunal consisting of an arbitrator and two assessors representing the parties respectively.
(b) That the Association and the Commission have agreed to abide by the decision of the Arbitration Tribunal, and
(c) That the terms of reference of the dispute shall be as follows:

F "To examine and decide on the dispute between the parties on the Report of the General Review Team on classification, gradings, salaries and allowances of all posts in the occupational classes represented by the Association and to make an appropriate award."

G Subsequently the Public Service Commission and the Applicant entered into a supplementary agreement as to the precise issues in dispute which were to be determined by the Arbitration Tribunal appointed pursuant to the agreement of the 23rd June. It is the contention of the Applicant that a particular issue, which I shall call the "non-appealable posts issue", was outside the terms of reference of the Nicol & Hurst Review which led to the arbitration and was not included among the issues which were before the Arbitration Tribunal.

H Section 13 of the Public Service Act, Cap. 74 establishes the Public Service Appeals Board and section 14 confers upon officers appointed by the Public Service Commission, a right of appeal to the Board arising out of the promotions, punishments and transfers of officers in the Public Service. Subsection (2) of section 14 empowers the Minister responsible for the Public Service to exclude that right of appeal against the promotion of any officer or the appointment of any person to any office or position specified in orders made by the Minister. The aim of the Applicant is to restrict by agreement or otherwise the exercise by the Minister of that power to limit the right of appeal.

In the interpretation dated 13th March, the Permanent Arbitrator dealt with the non-appealable posts issue. The effect of the interpretation is to remove any restraint which may presently exist on the Minister's right to make orders under section 14(2) of the Public Service Act. The Court was informed in the course of these proceedings by Mr Sharma of the Crown Law Office that it is the present intention of the Minister to make orders which would severely reduce that right of appeal in the case of many senior posts in the Public Service. It appears that the Applicant is of the view that the orders would prove detrimental to the best interests of its members.

Before this Court gives leave to proceed by way of judicial review it must be satisfied that the body or person against whom the relief is claimed is subject to the procedure. The purpose of the requirement that leave must be obtained is to eliminate at an early stage any applications which are frivolous, vexatious or hopeless. I do not suggest that this application is either frivolous or vexatious, but, if it appears clear that the decision of the Permanent Arbitrator in this instance is not subject to judicial review, I consider it my duty to refuse the applicant leave to proceed.

To my mind the agreement of the 23rd June, 1983 was a submission to arbitration and the Arbitration Tribunal's authority rested upon that submission. The parties freely chose the form of arbitration and it was open to them to have selected another arbitrator or arbitrators.

In a recent case, (Action No. 17 of 1984—*R. v. Arbitration Tribunal Ex parte Air Pacific Employees' Association and Anor.*), my Brother Kearsley made the following observations:

"Perhaps I should record before expressing the substance of this judgment that I have considered the question, not raised by counsel, of whether certiorari is available, at all, to quash such an award.

In *Regina v. National Joint Council for the Craft of Dental Technicians ex-parte Neate* (1953) 1 Q.B. 704, at page 707, Lord Goddard, C. J., said:

"I should say that never during the many centuries that have passed since reports of the divisions of English courts first began is there any trace of an arbitrator being controlled by this court either by writ of prohibition or certiorari.

and, at page 708. His Lordship added:

"There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator and a statutory arbitrator is a person to whom by statute the parties *must* resort."

(The emphasis placed on the word 'must' is mine).

According to my understanding, those words of Lord Goddard are authority for saying that certiorari would not lie to an award of the Permanent Arbitrator on a trade dispute referred to him with the consent of the parties under Section 6(1) of the Act which requires the written consent of the parties."

In *Reg. v. Criminal Injuries Compensation Board Ex parte Laim* (1967) 2 Q.B. 864 Lord Parker, C. J., said at 882:

"The position as I see it is that the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined. They have

A Varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a *lis inter partes*. Later again it extended to cases where there was no *lis* in the strict sense of the word but where immediate or subsequent rights of a citizen were affected. The only constant limits throughout were that it was performing a public duty.

B Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned."

The Trade Disputes Act, Cap. 97, section 6(1) reads as follows:

C "6.—(1) Where the Permanent Secretary or any person appointed by him or by the Minister is unable to effect a settlement the Permanent Secretary shall report the trade dispute to the Minister who may, subject as hereinafter provided, if he thinks fit, and if both parties consent, and agree in writing to accept the award of the Tribunal, authorise the Permanent Secretary to refer such trade dispute to a Tribunal for settlement.

Subsection (2) applies to a different class of cases in which an order may be made by the Minister to refer a dispute to a Tribunal whether or not the parties consent.

D Sections 20 and 21 of the Act provide for the appointment of Tribunals and the office of the Permanent Arbitrator. Section 27 makes a particular provision for the interpretation of any award made by a Tribunal. There are other sections which give particular validity to awards, but, there is nothing in the Act which places a Tribunal appointed under section 6(1) outside the purview of the Arbitration Act, Cap. 38.

E A clear distinction must be drawn between the acts and decisions of public authorities which exercise their powers irrespective of the wishes of the persons affected and the acts and decisions of authorities whether public or private who can only make decisions by the free consent of the parties who appoint them. It does not matter that the Tribunal resorted to in this instance is a creature of statute. An example of a statutory tribunal, which is not normally an arbitration tribunal, but, which is empowered to act in the capacity of arbitrator on reference by consent can be found

F in the United Kingdom Land Tribunal Act, 1949, section 1(5).

In England a judge may be appointed an arbitrator (Halsbury 4th Ed. Vol. 2 para. 506). The decision of a judge acting in that capacity would not be subject to an appeal to the Court of Appeal, but, his award could be impugned in the manner provided in the Arbitration Act of the United Kingdom.

G Mr Maharaj pointed out the Applicant herein is seeking not only an order for certiorari to quash the Arbitration Tribunal's interpretation, but, for certain declarations relating to its proceedings. He has referred me in particular to Order 53.9(5) and submitted that I should order the proceedings to continue as if they had begun by writ. The Court could exercise that power if leave to apply for judicial review had first been obtained and on a consideration of the matter it appears to be appropriate to take that course. I do not, however, accept that on the present *ex parte* motion that the Court can make any orders other than to grant or refuse leave to

H make the application for judicial review.

In the result, therefore, I am of the opinion that leave should not be granted on the ground that a Tribunal appointed under section 6(1) of the Trade Disputes Act is not amenable to judicial review and leave to proceed is therefore refused.

Application for leave refused.