FIJI BANK EMPLOYEES UNION & OTHERS

A **v**

1. ARBITRATION TRIBUNAL
2. NATIONAL BANK OF FIJI

[COURT OF APPEAL 1994 (Tikaram P, Quilliam, Hillyer JJ.A), 27 May]

B Civil Jurisdiction

Employment-Arbitration Tribunal-burden of proof before-function of-whether subject to judicial review. - Trade Disputes Act (Cap 92) Section 6(1).

On appeal against the High Court's refusal to grant judicial review of a decision of the Arbitation Tribunal the Court in dismissing the appeal discussed the
C function of the Tribunal and the burden of proof on the parties before it.

No cases were cited.

Appeal against refusal of the High Court to grant judicial review.

H.M. Patel for the Appellant
D *G.P. Lala* for the 2nd Respondent

Judgment of the Court :

This is an appeal against orders of Byrne J in the High Court dismissing an application for judicial review and requiring the appellants to pay the respondents' costs. The application had been made under Order 53 of the High
E Court Rules in respect of a decision by an Arbitration Tribunal ("the Tribunal"), constituted by the Permanent Arbitrator. By agreement and at the request of counsel the matter has been decided on the submissions filed on each side.

The second appellant ("the employee") was suspended In January 1986 from his employment by the second respondent ("the Bank") after being charged by
F the police in the Magistrate 's Court at Nausori with six offences of forgery. All six offences were alleged to have involved the forging on bank withdrawal forms of the signatures of persons having bank book accounts with the Bank. The charge was never heard; in November 1990 the employee was discharged by the Court pursuant to section 201(2)(b)(ii) of the Criminal Procedure Code (Cap.23). A few days later he applied to the Bank to be reinstated in his
G employment. When after several weeks the Bank had not given its decision in respect of that application, the first appellant ("the Union") took the matter up with it. As a result a dispute arose between the Union and the Bank; on 30th August 1991 the Acting Permanent Secretary for Employment and Industrial Relations referred the dispute to the Tribunal for settlement pursuant to section 6(1) of the Trade Disputes Act (Cap 92) ("the Act").

The referral by the Acting Permanent Secretary required the Tribunal:

> "To decide whether or not the Bank should reinstate Mr Maikali Naikawakawavesi who was suspended by the employer for alleged forgery for which he was charged and subsequently discharged by the Magistrate's Court Nausori on an application by the prosecution."

The Tribunal heard the parties to the dispute, as required by section 6(3) of the Act. They were represented by counsel. Oral evidence was received from the employee and an officer of the Court, who were called by the Union's counsel, and from two other persons, Manero Bulivou and Jackson Gock, who were called by the Bank 's counsel. Several documents were tendered in evidence. Submissions were made by counsel both orally at the hearing and in writing.

The Tribunal then made its award, as it was required to do by section 5(3) of the Act; by virtue of that subsection the award was binding on the parties to the dispute. It was in the following terms:-

> "TheTribunal finds that the suspension of Maikali Naikawakawavesi on 29 January 1986 be deemed to be a dismissal in view of the finding of fault on his part and that there be no order for reinstatement."

The Tribunal set out in some detail and in writing the reasons for the award.

The Union and the employee then, pursuant to Order 53 rule 3, jointly applied for judicial review. His Lordship dealt first, as a preliminary issue, with a submission by the Bank and the Tribunal that the Court had no jurisdiction to grant judicial review of an award made by the Tribunal. After hearing counsel for the parties His Lordship held that judicial review was available to contest an award of an arbitration tribunal made under section 6 of the Act; he stated fully in writing his reasons for doing so and ruled accordingly. He then invited counsel to lodge written submissions in respect of the merits of the application and they did so. Having considered those submissions, he dismissed the application for judicial review and gave full written reasons for doing so.

The grounds of the appeal to this Court were stated in the Notice of Appeal as follows:-

> "1. THE Learned Trial Judge erred in law and fact deciding that the Learned Permanent Arbitrator was correct eventhough:
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> (a) The Learned Permanent Arbitrator agreed that there was a breach in the rules of natural justice and
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> (b) Insufficient corroborative evidence existed in the whole proceedings held before the Permanent Arbitrator and the fact that Manero Bulivou was an alleged accomplice.

2. Further grounds of Appeal may be filed on availability of the Certified Copy Record."

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No further grounds of appeal have been filed. It is to be noted that Byrne J's ruling on the question of jurisdiction is not the subject of an appeal in these proceedings.

The Tribunal held, as asserted in ground 1(a), that the Bank had failed to accord the employee natural justice before suspending him from his employment. At the time of the suspension a collective agreement was in force between the Bank and the Union in respect of the Bank 's salaried staff and accountants. Inter alia it provided for disciplinary procedures. The Tribunal found that the Bank had not followed those procedures before suspending the employee, as it had not interviewed him in connection with the alleged misconduct or informed him of the proposed disciplinary action before it was taken. It found also that it was not "open to the Bank to argue that there was no requirement to observe natural justice". After considering a number of decisions of Courts in England and New Zealand, it expressed its opinion that "the omission to allow the [employee] to be heard was inconsistent with the provisions of the [collective agreement] and the requirements of natural justice". However, the Tribunal then examined the evidence which had been presented to it, accepted the evidence of Manero Bulivou and rejected that of the employee. It decided that there was "sufficient basis for the [employee's] suspension"

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In our view ground 1(a) is founded upon a misconception of the function of the Tribunal. Its function was not one of judicial review (which is not concerned with the merits of the decision under review but only with its legality). Rather it was required to investigate the merits of the suspension. Section 31 of the Act empowers it to elicit "all such information as in the circumstances may be considered necessary" . The denial of natural justice at the time of the suspension was, as the Tribunal correctly recognised, a relevant matter to be taken into account in determining the merits of the suspension; but it was not determinative of them. To a considerable extent it could be discounted because the Tribunal had itself, in ascertaining the merits, to accord natural justice to the employee. He was represented before it by counsel and quite clearly had a full opportunity to present his case before the Tribunal made its award. We find that Byrne J. did not err in law by upholding the decision of the Tribunal in spite of the fact that the Tribunal had found that the Bank had breached the rules of natural justice.

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Turning then to Ground 1(b). If Manero Bulivou's evidence to the Tribunal was true, he was an accomplice of the employee, if not in making the forgery then certainly in uttering the forged withdrawal forms. There was no evidence corroborative of Manero's evidence. One might have expected the forged documents to have Seen tendered in evidence and evidence to have been given by the persons whose signatures had allegedly been forged . Possibly with the

lapse of time, during which the two coups occurred, that evidence, if it ever existed, had ceased to be available. But the fact was that, for whatever reason, corroborative evidence was not adduced. The Tribunal however said - A

> "The Tribunal is satisfied on the evidence of at least Mr Bulivou that the Bank Officer improperly authorised the withdrawal of monies from several accounts including one belonging to one Cirivakarua. There is no reason for Mr Bulivou, who was described by learned Counsel for the Union as "a simple villager" to fabricate such a story, Mr Bulivou and the Bank Officer were from the same village, Natogadravo, and indeed were related. It was never suggested that he had any ulterior motive either. For those reasons, despite having some qualms about the lack of documentary evidence, the Tribunal accepts Manero Bulivou's evidence as the truth. B C
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> On the balance of probabilities, having accepted Manero Bulivou's evidence this Tribunal finds that there was sufficient basis for the Bank Officer 's suspension. There is no need to prove the Bank Officer's wrong doing beyond a reasonable doubt and the Bank's submissions are upheld on this point. It is trite law that a party need only prove a proposition on a balance of probabilities in a non-criminal proceeding. Therefore the authorities cited by the Union in its final submissions are not helpful to its case." D

It seems clear from the reference to the lack of documentary evidence that the Tribunal had the question of corroboration in mind. Where an allegation of a criminal act is made in civil proceedings the burden of proof is not beyond all reasonable doubt. It is necessary however to have the seriousness of the allegation in mind when deciding whether it has been proved. The Tribunal was equally conscious of this principle. It saw and heard Mr Bulivcu and it believed him. It was quite entitled to do so. E

His Lordship on the motion for review also had these principles in mind and held that the Tribunal was not in error. He said - F

> "To put it shortly the proceedings before the Permanent Arbitrator were not criminal but merely civil and it seems to me with respect that the appellant's argument fails to appreciate this." G

We hold that there was no error on the part of the Tribunal or of the learned Judge and the appeal will be dismissed with costs.

(Appeal dismissed.)