Vijay Construction (Pty) Ltd v
Ministry of Economic Planning and Employment

(2010) SLR 77

Somasundaram RAJASUNDARAM for the plaintiff
David ESPARON for the defendant

Judgment delivered on 28 May 2010 by

RENAUD J: The petitioner is a civil engineering and building contractor operating in Seychelles who entered this petition on 28 July 2006 praying this Court to:

(1) order that the decision of the Minister dated 30 June 2006 in Griev/09/04 ultra vires the petitioner's rights,

(2) order the reversal of that decision, and

(3) remit the matter back to the Competent Officer to hear the case afresh so as to invoke the provisions of law in proper manner.

This matter came up for hearing before me on 4 February 2010. It originated with a decision made and an order given by the respondent against the petitioner on 30 June 2006 in the case Griev/09/04 following an appeal against the decision of the Competent Officer made on 9 February 2006.

In his petition the petitioner claimed that the decision and order so made by the respondent is ultra viresbecause it violated the provisions of law of evidence, the law of prescription and the time limit for award of employment benefits, and the Constitution of Seychelles.

The petitioner also alleged that the respondent overlooked the principles of natural justice and ignored the rights of the petitioner in that the respondent omitted to note that the proceedings of the Competent Officer (CO) were not properly conducted and the resulting order of the CO was erroneously made.

The petitioner further alleged that the respondent failed to appreciate the case of the petitioner as the CO having improperly conducted the case, resulted in the wrong order being made, causing serious hardship to the petitioner.

The petitioner sets out the grounds in support of his petition in an affidavit deponed to by its representative Mr Kaushal Patel.

On 27 September 2006 the Court granted leave for the matter to proceed and for the respondent to transfer all records and relevant papers to this Court.

On 8 February 2007 the respondent filed his objection to the petition and raised a plea *in limine litis* as well as objection on the merits. This was supported by an affidavit sworn by the respondent Minister Jacquelin Dugasse.

The respondent raised the plea *in limine litis* to the effect that -

> The petition is not made promptly and in any event within 3 months from the date of the order or decision sought to be canvassed in the petition and therefore it ought to be struck off.

I find no merit in this plea as the decision being challenged in this review was made by the Minister on 30 June 2006 and this matter was entered on 28 July 2006 which is within time.

On the merits, the respondent averred that the order of the Minister dated 30 June 2006 is intra viresthe law reasonable and proper in all forms and substance, and was made in accordance with the law and the respondent properly appreciated the fact that the proceedings before the CO were done in a procedurally correct manner.

The respondent further denied that the petitioner's affidavit, purporting to show and explain how the decision of the respondent was ultra vires,and averred that as an accompanying affidavit it is a legal requirement in these proceedings.

A writ of certiorari has the effect of quashing a decision which may have been taken by the exercise of an excess or abuse of power. The criteria for deciding which acts or decisions are subject to certiorari was expressed by Lord Atkin in the case of *R v Electricity Commissioners, ex P London ElectricityJoint Committee* Co [1924] 1 KB 171,as —

> ... wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division.

Certiorari isalso available to quash or nullify actions or decisions that are ultra viresor in breach of natural justice or where traditionally there has been an error of law on the face of the record. As Lord Slynn suggested in the case of *Page v Hull University Visitor* [1993] 1 All ER 97 at 114b*,* the scope of certiorarimay be interpreted widely -

> if it is accepted, as I believe it should be accepted, that certiorari goes not only for such an excess or abuse of power but also for a breach of the rules of natural justice.

The interpretation of the duty to act judicially has been widened considerably since that case was decided. In the case of *Ridge v Baldwin* [1964] AC 40*,* the courts have interpreted the phrase to include those bodies that have the power to decide and determine matters which affect the citizens. This means that certiorarigenerally may be available to review all administrative acts.

The formulation of acting judicially commonly used today is that favoured by Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 309, that "it is enough to show that the body or person has legal authority to determine questions affecting the common law or statutory rights of other persons".

This Court, when exercising its supervisory jurisdiction does not act as a court of appeal. What is "supervised" is the decision-making process that was involved. The decision of the adjudicating authority could be quashed on the main grounds of illegality, irrationality or unreasonableness, procedural impropriety, failure to follow the rules of natural justice, or where there is an error of law on the face of the record.

May I also reiterate that judicial review is not concerned with the merits of a decision but with the manner in which the decision was made. Nevertheless, in determining the fairness and reasonableness of a decision one has invariably to look into the merits, as formulated in the case of *Associated Provincial Picture Houses v Wednesbury* [1948] 1 KB 223.Thus where judicial review is sought on the ground of being unjust, unfair and unreasonable, the Court is required to make value judgments about the quality of the decision under review.

At the outset I have to hold that only issues that the petitioner had canvassed either before the Competent Officer or the Employment Advisory Board or the respondent can now be considered by this Court in its supervisory jurisdiction. I cannot reach any decision different from that reached by the Minister unless one or all of the grounds of challenge were present before him then.

The case file reference Griev/09/04 was forwarded to this Court by the then Ministry of Employment and Economic Planning and my judicial review is based on its content. I have accordingly summarised the material facts of the case for ease of reference. These are set out hereunder.

On 16 February 2004 three employees of Messrs Vijay Construction lodged a complaint at the MEPE stating in their grievance form the following claims —

> overtime - work odd hours - don't get paid. Sleep on the islands don't get nothing. No displacement bonus. Sunday – Public Holiday same payment. Dredging at La Digue for 9 days no payment. Usually they pay - done it before.

Mr Timothe Confiance alleged that he started working for the said employer on 3 July 2000 at a salary of R 2,800 per month as a deck hand. His normal working hours were from 7am to 4pm Mondays to Fridays and 7 am to 12 noon on Saturdays. He also attached a handwritten statement dated 6 February 2009 in which he elaborated on his grievance.

Mr Eugene Morel alleged that he started working for the same employer on 6 May 1996 at a salary of R4,500 which was then increased to R5,000 per month as a skipper. His working hours were the same as those of Mr Confiance. He also appended the same handwritten statement to his complaint.

Mr Randy Morel alleged that he started employment with the same employer on 9 October 2002 at a salary of R 2,800 per month as a deck hand for the same working hours as the other two colleagues and he likewise appended the same handwritten statement.

On 9 March 2004 one Ms Eunice Seraphine, an inspector of MEPE, carried out an

investigation of the workers' complaints. She interviewed Mr Kaushal K Patel and obtained the employer's version of the facts.

A meeting was then set to take place on 1 June 2004 where all three employees were invited to attend together with the Managing Director of Vijay Construction (Pty) Ltd. The purpose of the meeting was stated as - to bring about settlement by mediation pursuant to section 61(1A) of the Employment (Amendment) Act 1999. That meeting was then re-scheduled for 28 June 2004 at 1.30 pm with due notice to all parties, which notice was dated 8 June 2004.

By letter dated 30 June 2004, pursuant to Schedule 1 Part II of the Employment Act 1995, the Managing Director of Messrs Vijay Construction (Pty) Ltd was invited to appear before the Competent Officer (CO) without fail on Friday 9 July 2004 at 10am. He was also advised to bring along any relevant documents and witnesses if necessary.

One Mr Roy Bristol being the representative of the workers involved wrote to MEPE on 10 August 2004 indicating that he had met with the Managing Director of Messrs Vijay Construction (Vijay) on 20 July 2004 and had held preliminary discussions and at the request of Vijay he had agreed to submit a formal claim with all financial details to the employer. He also indicated that the matter may be resolved without the need for MEPE to intervene. MEPE by letter dated 19 August 2004 gave the parties up to the end of August 2004 to reach an amicable settlement failing which the case would be heard by the Competent Officer. That period was thereafter extended to the end of October 2004.

The matter was eventually fixed for hearing by the CO on 21 March 2005 at 2 pm presumably because the parties could not reach the settlement as envisaged. All parties were duly informed by letter 4 March 2004 of the hearing. That meeting was adjourned to 14 April 2005 at 1.30 pm with due written notice dated 4 April 2004 to all parties. The meeting was again adjourned to 12 July 2005 with written notice to all parties dated 15 June 2005. By written notice dated 29 July 2005 addressed to all parties, the meeting was fixed for 17 August 2005. The CO who heard the parties was Mr R M Plows.

Following the meeting of 17 August 2005 the CO, Mr Plows wrote to the Managing Director of Messrs Vijay Construction on 5 October 2005 stating that, based on the fact that the applicants' claim was a legitimate one, he had requested the applicants to present a breakdown of their claims. The CO forwarded copies of the breakdown of the applicants' claims for public holidays, overtime and night allowance, to the Managing Director of Messrs Vijay Construction and the CO requested the latter to comment on those claims in writing within 7 days.

On 12 October 2005 the Managing Director of Messrs Vijay Construction, making reference to the CO's letter of 5 October 2005 wrote to the Principal Secretary of MEPE stating that there was a fundamental flaw in the handling of the case and they set out their reasons for alleging so. They also alleged that the CO was prejudiced and biased, and therefore requested that another CO continue with the matter.

On 27 October 2005, the Principal Secretary of MEPE wrote to the Managing

Director of Messrs Vijay Construction inter alia informing him that a new hearing date would be set to bring both parties together to discuss the claims.

On 18 December 2005 the representative for the Managing Director of Messrs Vijay Construction, Mrs Maryse Larue, following a meeting with CO Mr Bennett Alphonse on 6 December 2005, requested an extension of time to 23 December 2005 to meet with the CO in order to submit all documentation to show that there were no outstanding payments due to the three claimants.

The matter was eventually heard before another CO namely Mr B Alphonse. The record of proceedings shows that the three applicants were present and so were two representatives of Messrs Vijay Construction namely Mr Kaushel Patel and Mr Chandran Kannan.

The CO determined that on the basis of the evidence the 3 three applicants were entitled to be paid the underpayments of overtime, public holidays and night allowance. That determination was conveyed to the Managing Director of Messrs Vijay Construction by letter dated 9 February 2006 stating how much each of the applicants was entitled to, which should be paid by Messrs Vijay Construction. Details of how the claims were calculated were also forwarded. A summary of the final claims was as follows:

Mr Eugene Morel - for period		
13 May 1996 to 30 August 2005	-	R140,867.83
Mr Randy Morel - for period		
9 October 2002 to 30 August 2005	-	R 32,284.60
Mr Timothee Confiance – for period		
31 July 2000 to 30 August 2005	-	R 58,518.67

The Managing Director of Messrs Vijay Construction being aggrieved by the determination of the CO, by letter dated 21February 2006 lodged an appeal to the Minister, MEPE for re-consideration. The ground upon which the appeal was brought was –

> All documents which have been submitted to the Competent Officer – contract of employment, job card, pay slip, etc clearly show that the workers have been paid all their dues. We therefore disagree with Competent Officer's decision.

The appeal was set for hearing before the Employment Advisory Board (EAB) on 21 April 2006 at 11 am and all parties were duly notified in writing. Messrs Vijay Construction was represented by its representative Mrs Maryse Larue, and the three workers were present and represented by counsel Mr Frank Ally.

Mrs Larue confined her arguments to the following points:

(i) That the grievance procedure initiated by the respondents was out of time and contrary to the provisions of the Employment Act, in that the subject matter of the grievance arose over ten years back and the respondents never made any claim before 2004 and they have been

unable to prove or give genuine reasons as to why they could not do so.

(ii) That the respondents only signed a contract in 2002 and that all previous contracts were verbal.

(iii) That all claims made pertaining to the period before 2002 is erroneous for no claims were made at the time payment of salaries were done. The only claims may be considered are only the ones between the years 2002 and 2004.

(iv) That given the above arguments the decision of the said Competent Officer ought to be reversed accordingly.

Counsel on behalf of the three workers submitted:

(i) That it is incorrect to state that the respondents had lodged their grievances out of time for the grievances were lodged on the 3 February, 2004 when they were still in employment and thus the proper procedures were followed;

(ii)That the argument as to time limit does not apply in this case for the causes of the grievance were "continuous" and the time limit ought to have started upon the knowledge of illegal procedures being known to the respondents;

(iii) That if claims against any employee can be made upon termination of employment there is no reason as to why it cannot be done during a continuous contract of employment;

(iv) That the said Competent Officer was right to rule in the way she did based on the evidence on record.

On 7June 2006 the Employment Advisory Board gave its considered advice to the respondent, stating as follows:

> Based on the submissions of representatives of the appellant and respondents as well as the evidence on record, the Board has unanimously decided as follows:
>
> (a) That the provisions of paragraph 2(1) of Part II of the Employment Act, 1995, provide that 'whenever an employer or worker is empowered by or under this Act to initiate the grievance procedure, the employer or worker may, within 14 days of becoming aware of the event, act or matter giving rise to the grievance, register a grievance with the Competent Officer furnishing the officer with all information the officer may require'. Sub-section (3) of the same paragraph provides that 'an employer or worker who fails to register a grievance within the time specified under sub-paragraph (1) loses the right to do so, but the Competent Officer, if satisfied that registration within the

time was impracticable shall allow registration out of time'.

Taking into consideration the circumstances of this case, there is sufficient evidence on record to prove "genuine cause" as to why the claims of the respondents for the periods before the year 2002 were not done "within the period of 14 days from the time it became known" and as such these claims were rightly accepted by the said Competent Officer. The argument of the representative of the respondents that "the breach was continuous" is acceptable in view of the highlighted provisions of theAct and the circumstances of this specific case.

(b) The decision of the said Competent Officer is hereby upheld and appeal dismissed.

The respondent by a 'minute' on file dated 27June 2006 stated – "Having consulted the EAB, I confirm the decisions of the Competent Officer."

Ground 1

When COs hear cases they are not strictly bound by the rules of evidence and normal court procedures. What they are required to do in the process of their enquiry into any grievance is to fully brief the other party of the evidence they have collected and afford the other party the opportunity to comment thereon or adduce counter-evidence. The findings of COs must always be based on facts that have been made by a party with the full knowledge of the adverse party and duly tested as to correctness and veracity. That is the least that is expected of a CO when determining a grievance.

In my review of the proceedings in this matter, and in light of my foregoing observations, I am satisfied that the CO and indeed the respondent has not violated the provisions of law of evidence as claimed by the petitioner. The CO all along kept the petitioner within the process and did not act without its involvement.

The petitioner has also raised the issue of the law of prescription and time limit for award of employment benefits. On that score, I note that the petitioner has awarded the respondents relief that date back to 6 May 1996 in respect of Mr Eugene Morel, to 9 October 2002 in respect of Mr Randy Morel, and to 3 July 2000 in respect of Mr Timothee Confiance.

Paragraph 2(1) of Part II of the Employment Act 1995, provides that -

whenever an employer or worker is empowered by or under this Act to initiate the grievance procedure, the employer or worker may, within 14 days of becoming aware of the event, act or matter giving rise to the grievance, register a grievance with the Competent Officer furnishing the officer with all information the officer may require.

This provision is not ambiguous; it is very clear. A person has 14 days from the time that he/she became aware or has knowledge that an event, act or matter had arisen

which entitles him/her to lodge a grievance. There may, however, be instances where for good reasons shown it was impracticable for that person to file the grievance within the timeframe. In such circumstances, that person has to show cause why his/her grievance ought to be accepted although it was entered out of time. In such instance it is incumbent on the CO to judiciously consider the matter in the light of subsection (3) of the same paragraph.

Subsection (3) states -

> an employer or worker who fails to register a grievance within the time specified under sub-paragraph (1) loses the right to do so, but the Competent Officer, if satisfied that registration within the time was impracticable shall allow registration out of time.

The CO is therefore invested with the legal authority to allow the filing of a grievance out of time only if the CO having been judiciously satisfied that it was impracticable for the aggrieved to come within the time limit. This is a matter of a finding of fact by the CO into which I will not venture in this judicial review.

In the instant case it is not evident when the three workers came to have knowledge that they were being "shortchanged" in respect of their overtime payments etc. That is a fact that the CO has to establish in the process of the hearing. I do not find this fact on record. For the purpose of this case I take it that the three workers only became aware of their entitlement to such "extras" on or around the date that they filed their grievances.

This brings us to the contentious issue as to within what timeframe the claims should be accepted. There is no provision in the employment law regarding timelimits for claims of this nature. As propounded by counsel for the three workers, the claimsare of a continuous nature. Because of this lacuna in the employment law, it should not follow that the period is deemed to be unlimited as otherwise a worker may on his retirement claim "extras" from his employer for all the years that he had been so employed, which could possibly be for over 40 years. That is absurd and the law cannot reasonably be expected to allow this. The general law of limitation in respect of civil claims of this nature is 5 years in terms of article 2271 of the Constitution of Seychelles. I believe that that limit should be read into the Employment Act. In the case of *Seetha Ramanujulu v Sobhanachlam & Co* (1958) AIR AP 438 – it was posited that –

> the true test to find out as to when cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result. If there is an infringement of a right at a particular time the whole cause of action arises then and there. It is not then open to a party to sit tight and not to bring a suit for declaration of his right which has been already infringed, within the prescribed time. Once that right to sue is extinguished by lapse of time, he cannot thence wait for another cause of action and then institute a suit for establishing a right already extinguished. Such a suit could only mean a suit for revival of a right long ago extinguished by lapse of time. The right is dead for all purposes beyond any such revival.

In that same case it was also held that “if the contract which gives the cause of action to sue is superseded by an agreement, ... the original cause of action ceases to exist".

It is a fundamental principle of limitation that when a right to sue accrues, the cause of action begins there and then.

The clear test to determine when the cause of action accrues is to find out the time when the plaintiff could have first instituted his suit with success.

It appears that the respondent has followed the advice of the EAB which accepted the contention of counsel for the three workers that the claims were of a continuous nature. That may be so, but what needs to be determined is for how long back it is reasonable to allow for such continuity without causing prejudice to the other party. The workers knew of the infringement since they started employment and sat on their right, only to raise it when their employment was being terminated. In such circumstances, it is my considered judgment that their claims cannot in law (article 2271 Civil Code of Seychelles) extend to more than 5 years and so I find.

In conclusion, I find that the decision and order so made by the respondent is ultra viresto the extent that it has violated the law of prescription and the timelimit for award of accrued employment benefits.

Ground 2

The three workers formally filed their grievances with the MEPE on 16 February 2004. On 9 March 2004 Ms Eunice Seraphine, an Inspector of MEPE, carried out an investigation of the workers’ complaints. She interviewed Mr Kaushal K Patel and obtained the employer's version. The Managing Director of Vijay Construction (Pty) Ltd and all three employees were invited to attend a joint meeting on 1 June 2004. That meeting was then re-scheduled for 28 June 2004 at 1.30 pm with due written notice given equally to all parties.

By letter dated 30 June 2004, pursuant to Schedule 1 Part II of the Employment Act 1995, the Managing Director of Messrs Vijay Construction (Pty) Ltd was invited to appear before the Competent Officer (CO) without fail on Friday 9 July 2004 at 10am. He was also advised to bring along any relevant documents and witnesses if necessary.

One Mr Roy Bristol being the representative of the workers involved wrote to MEPE on 10 August 2004 indicating that he had met with the Managing Director of Messrs Vijay Construction (Vijay) on 20 July 2004 and had held preliminary discussions and at the request of Vijay he had agreed to submit a formal claim with all financial details to the employer. He also indicated that the matter may be resolved without the need for MEPE to intervene. MEPE by letter dated 19 August 2004 gave the parties up to the end of August 2004 to reach an amicable settlement failing which the case would be heard by the Competent Officer. That period was thereafter extended to the end of October 2004.

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presumably because the parties could not reach the settlement as envisaged. All parties were duly informed by letter 4 March 2004 of the hearing. That meeting was adjourned to 14 April 2005 at 1.30 pm with due written notice dated 4 April 2004 to all parties. The meeting was again adjourned to 12 July 2005 with written notice to all parties dated 15 June 2005. By written notice dated 29 July 2005 addressed to all parties, the meeting was fixed for 17 August 2005. The CO who heard the parties was Mr R M Plows.

Following the meeting of 17 August 2005 the CO, Mr Plows wrote to the Managing Director of Messrs Vijay Construction on 5 October 2005 stating that, based on the fact that the applicants' claim was a legitimate one, he had requested the applicants to present a breakdown of their claims. The CO forwarded copies of the breakdown of the applicants' claims for public holidays, overtime and night allowance, to the Managing Director of Messrs Vijay Construction and the CO requested the latter to comment on those claims in writing within 7 days.

On 12 October 2005 the Managing Director of Messrs Vijay Construction, making reference to the CO's letter of 5 October 2005 wrote to the Principal Secretary of MEPE stating that there was a fundamental flaw in the handling of the case and they set out their reasons for alleging so. They also alleged that the CO was prejudiced and biased, and therefore requested that another CO continue with the matter.

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The matter was eventually heard before another CO namely Mr B Alphonse. The record of proceedings shows that the three applicants were present and so were two representatives of Messrs Vijay Construction namely Mr Kaushel Patel and Mr Chandran Kannan.

Supported by the above findings as per the records I find that the petitioner was given all possible opportunity to prove fact of payment of all dues to the three workers. The petitioner also had the opportunity to question the three workers when they met at the joint meeting. The petitioner was afforded all opportunity to present its case before the CO made his considered findings and determination. The findings being findings of fact, this Court when judicially reviewing the case does not go into that.

In light of the foregoing, I therefore cannot hold with the petitioner that the respondent failed to uphold the rule of natural justice or that the latter failed to act fairly towards the petitioner in the handling of the matter from the start up to its ultimate conclusion. This ground of review is accordingly found to be of no merit and is accordingly dismissed.

I also find that the respondent did not in any way overlook the principles of natural justice and that he did not ignore the rights of the petitioner. I further find that the proceedings of the CO were properly conducted.

Having reached my conclusions on the two essential grounds of the judicial review, I believe that the other issues raised by the petitioner have been sufficiently addressed.

I wish, however, to place on record that I do not find anything in the whole record of proceedings which indicates on what basis the CO decided that it was impracticable for the three workers to file their grievances earlier. It is evident that the three workers registered their grievances on 16 February 2004. No reason was given by the three workers for the inordinate delay to register their grievances albeit their claims were of a continuous nature. My direction to COs is that in future when such a situation arises, a pre-trial enquiry ought to be held to judiciously establish whether there are good reasons shown for allowing grievances for accrued claims to be filed so long after the cause of action arose. Each case, however, should be determined on its own merits with good cause shown.

In view of my findings above, I hereby issue a writ of certiorari quashing the decision and order of the respondent to the extent that the claims of the three workers ought to have been entertained for a period not exceeding 5 years preceding the filing of the grievance. I hereby direct the respondent accordingly to amend its decision and order made on 30 June 2006.

Record: Civil Side No 290 of 2006