A. GARDNER v GENERAL MANAGER OF TIO & ORS

Supreme Court of the Northern Territory

Gray J

17 & 27 June 1991 at Darwin

ADMINISTRATIVE LAW - Rules of natural justice - right of appeal to a court - whether defect in natural justice cured by rehearing de novo.

COURTS & TRIBUNALS - Supreme Court - jurisdiction - prerogative writs - declaratory relief - whether Court should give relief where legislation provides hearing de novo.

MOTOR VEHICLES - Motor Accidents (Compensation) Act 1979 - rights of appeal - refusal by Court to provide additional relief where adequate review by legislation - circumstances amounting to adequate review - hearing de novo - Court.

PREROGATIVE WRITS - certiorari - disputed matter - subject of other proceedings - circumstances in which relief precluded.

STATUTORY INTERPRETATION - Motor Accident (Compensation) Act 1979, ss12, 27, 29 & 42.

STATUTORY INTERPRETATION - Supreme Court Rules - Rule 47.04 & Rule 47.05.

Cases referred to:

Commissioner of Police v Gordon (1981) 1 NSWLR 675
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421
Inglis v Cameron & Ors (1991) 99 ALR 149
Jones v Motor Accidents (Compensation) Appeal Tribunal (1988) 59 NTR 12
Marine Hull and Liability Insurance Co. Ltd v Hurford & Anor.
(1985) 10 FCR 234
R v Brisbane City Council; ex parte Read [1986] 2 Q'd R 22
The Queen v Marks & Ors (1981) 147 CLR 471

Tooth and Company Ltd v Parramatta City Council (1955) 97 CLR 492
Twist v Randwick Municipal Council (1976) 136 CLR 106

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Counsel for the Respondent: C.R. McDonald
Solicitor for the Respondent: Cridlands

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 133 of 1990

BETWEEN:

ASSAN GARDNER
Plaintiff

AND:

GENERAL MANAGER OF THE
TERRITORY INSURANCE OFFICE
First Defendant

AND:

BOARD OF THE TERRITORY
INSURANCE OFFICE
Second Defendant

AND:

TERRITORY INSURANCE OFFICE
Third Defendant

CORAM: GRAY J

REASONS FOR JUDGMENT

(Delivered 27 June 1991)

On 28 August 1982, the plaintiff was injured in a motor vehicle accident on the Arnhem Highway. On 26 February 1985 the first defendant determined that the plaintiff was entitled to benefits pursuant to s.13 of the Motor Accidents (Compensation) Act 1979 ("the Act").

S.13 of the Act provides that a Northern Territory resident who suffers injury in a motor vehicle accident in the Northern Territory shall be paid compensation if his capacity to earn income has been reduced as a result of the injury. The right to s.13 benefits is determined by the second defendant. S.36 authorises the second defendant to delegate its powers to the first defendant and this was done in this case.

The plaintiff received benefits in accordance with s.13 until 27 December 1985. On 29 May 1986, the first defendant determined that the plaintiff was not entitled to benefits under s.13 as from 27 December 1985. The basis of the determination was expressed to be that the plaintiff was reasonably capable of earning more than the amount referred to in s.13(2) as the measure of an entitlement to benefits.

S.27(2) of the Act provides that a person aggrieved by a decision of the first defendant may within 28 days request that the first defendant refer the matter to the second defendant. If a reference is made, s.27(3) requires the second defendant to determine the matter by confirming the first defendant's decision or substituting its own decision.

In this case the plaintiff's solicitors requested a reference to the second defendant by letter dated 16 June

1986. On 5 August 1986, the second defendant confirmed the decision of the first defendant.

S.29 of the Act provides that any person aggrieved by a determination of the second defendant, or by its failure to make a determination, may within 28 days refer the matter to the Motor Accidents (Compensation) Appeal Tribunal which is established by s.28.

S.28 provides that the Tribunal shall be constituted by a judge of the Supreme Court. S.29(3) provides:-

> "Where a matter is referred to the Tribunal, it shall conduct such hearings into the matter as it thinks fit and may make such determination as the Board could have made thereon as the Tribunal considers proper in the circumstances having regard to the intention of the Act, and such determination is binding on the Board."

S.24(4) provides that the hearing by the Tribunal shall be a hearing de novo. S.30 provides that a decision of the Tribunal is final and is not reviewable in any Court of law by prerogative writ or otherwise.

On 5 September 1986, the plaintiff filed with the Tribunal a notice of reference pursuant to s.29. On 7 October 1986 the third defendant filed an answer to the notice of reference. The answer alleges that the plaintiff is able to work in any one of a number of stated occupations and annexed a number of medical reports. In early 1988

each party provided a list of documents. On 3 March 1988, the third defendant delivered interrogatories for the examination of the plaintiff.

Between March and May 1988, the plaintiff failed to attend four medical examinations which had been arranged by the third defendant As a result, a hearing date for the appeal was vacated on 9 June 1988. Further interlocutory steps were taken throughout 1988 and 1989. On 31 January 1990, the plaintiff's solicitors asked for further discovery of documents in relation to the appeal.

Whilst the appeal proceeding stood in this posture, the plaintiff on 9 March 1990 issued the originating motion with which the Court is presently concerned. The endorsement on the motion attacks the determination of the first defendant dated 29 May 1986 and that of the second defendant dated 5 August 1986. The grounds of the attack can be broadly described as an allegation of departure from the requirements of natural justice and acting without jurisdiction. The plaintiff claims declarations and orders in the nature of certiorari.

On 7 September 1990, the defendants issued a summons seeking an order pursuant to Rule 47.04 that the following question be tried before the trial of the proceeding:

> "Assuming the plaintiff establishes the allegations he has made in his originating motion as particularised, does the presence and exercise by the Plaintiff of his rights pursuant to Section 29 of the Motor Accidents (Compensation) Act in Motor Accidents Compensation Tribunal Proceedings No. M9 of 1986 (8250226) mean that in the proper exercise of its discretion the Court ought to dismiss the plaintiff's claim?"

This summons did not come on for hearing until 17 June 1991 when Mr Riley QC, with Mr Wyvill of Counsel, appeared for the defendants and Mr McDonald of Counsel appeared for the plaintiff.

Although the summons asks for an order that the preliminary point of law be tried, the hearing took the form of a consideration of the preliminary point itself. The point was fully argued over the course of a whole day and the relevant authorities discussed.

Accordingly, it seemed appropriate that I decide the question and make whatever orders flow from the result. Thus, I allowed Mr Riley leave to add a paragraph to the summons seeking summary judgment for the defendants pursuant to Rule 23.01.

Further reflection has persuaded me that the amendment to the summons was unnecessary because Rule 47.05 deals with the case of the determination of the question ordered to be tried under Rule 47.04. Rule 47.05 empowers

the Court to "dismiss the proceeding" if the determination of the question is adverse to the plaintiff.

I turn now to the question posed by the summons. The primary contention of Mr Riley was that the Act implicitly excludes the jurisdiction of the Court to grant declaratory or prerogative relief where the Tribunal has jurisdiction to consider every aspect of the plaintiff's claim to continued compensation. His alternative submission was that if the Court's discretionary jurisdiction is not excluded it should not be exercised in the present circumstances.

In reply, Mr McDonald disputed Mr Riley's primary proposition and submitted that the very wide discretion to grant relief should be exercised to quash the invalid exercise of administration power which is alleged here.

Before I discuss these rival arguments I will return to a consideration of the relevant provisions of the Act.

The Act expresses the clear intention that the applicant's claim to compensation should be dealt with administratively by the first defendant and, if necessary, by the second defendant. The Act does not provide for any right in the applicant to give evidence or be heard. S.12(1) provides that the amount of a benefit "shall be

determined by the Board and regulations under this Act may prescribe the manner in which any such determination is to be made." S.42 provides for the making of regulations, but no regulations were made concerning the making of a determination under S.12(1). S.12(2) empowers the Board to require an applicant to submit to an examination by a doctor nominated by the Board but there appears to be no right in the applicant to submit medical reports or other evidence. S.27(6) provides that neither the first defendant nor the second defendant is required to give reasons for his or its decision. In this case, reasons were sought and refused.

If the Act had provided for no more than an application to the first defendant and a further reference to the second defendant the Court would not hesitate to exercise its supervisory jurisdiction if the circumstances called for it.

If a statutory authority has power to affect the rights of a person it is fundamental that it must hear the person and otherwise act lawfully before exercising the power.

The question in this case is whether the legislature has implicitly excluded this fundamental rule by providing for an adequate remedy against any misuse of the executive power.

It is therefore necessary to examine closely the nature of the appeal to the Tribunal which is provided for in S.29.

The first thing to notice is that the appeal is to be heard by a Supreme Court judge. It is true that the judge is not sitting as a Court and the Tribunal remains, at least technically, an administrative body. But when one is considering the parliamentary intention, the selection of a Supreme Court judge as the Tribunal is, to my mind, highly significant.

The next thing to consider is the nature of the appeal. It is of the widest possible kind. The Tribunal embarks upon a complete new hearing of the application for compensation. It shall conduct "such hearings into the matter as it thinks fit and may make such determination as the Board could have made." The procedure is designed to allow any error, vice, irregularity or unfairness in the determination of the Board or its delegate to be corrected or otherwise cured.

The nature of the appeal provided for is quite different from an appeal to the Minister or to a body who might be said to have some affiliation to his Department. In short, the Tribunal could not have been better designed to provide a completely adequate remedy against any possible

form of administrative oppression in relation to the plaintiff's application.

What I have said goes a long way to deciding the present question. In Twist v Randwick Municipal Council (1976) 136 CLR 106, the High Court considered the effect of a provision in the Local Government Act of New South Wales giving a right of appeal to the District Court against an order for the demolition of the appellant's dwelling house. The appellant sought a declaration that the order was invalid because he had been given no opportunity to be heard.

Each member of the Court held that the appeal must fail. The majority, for whom Barwick CJ delivered the principal judgment, held that the nature of the right of appeal provided in the Act showed that the appellant had no right to be heard by the Council before it made the demolition order. After stating the fundamental rule requiring that the person affected by the order must be heard, Barwick CJ continued (at p.110):

> "But, if the legislation has made provision for that opportunity to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its

legislation, decided what opportunity should be afforded, the court, being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme."

and later (at p.111-12):

"In the present case, the appeal to the District Court calls, in my opinion, for an examination of the facts and for the exercise of a primary discretion whether or not an order for demolition should be made. I have already pointed out that the power to make an order rests on objective facts. Thus the District Court must be satisfied by evidence duly given before it that the state of the building satisfies the prescription of the section. The Court cannot take anything from the fact that the council has made an order. Thereafter it must decide upon its own view of the actual facts whether an order should be made under the section, placing itself in the position of the council with its responsibilities to the local government area and its inhabitants."

At p.117, Mason J said:

"Having regard to the subject matter of the section, the nature of the order which the council is empowered to make, the degree of urgency which may attend the execution of the order and more particularly the comprehensive nature of the appeal to a District Court judge, I am of opinion that s.317B(5) should be read as providing the exclusive remedy available to an owner who wishes to challenge the validity or correctness of an order made under s.317B(1)."

At p.119 Jacobs J said:

"I do not think that it would at all accord with the legislative intention that an owner should be able to ignore rights of appeal of the kind given by sub.s (5) and instead rely on an absolute

> invalidity in the order which a council had made. A different view might be open if the appeal were to anything less than a court of the wide jurisdiction and consequent legal standing possessed by the District Court; but in my opinion it was not the legislative intention that an order under the section, subject to appeal to the District Court, should, without any resort to the right of appeal, be able to be treated for all purposes as void and of no effect upon the ground that the principle of natural justice had not been observed."

Those citations and the decision itself are, in my view, of direct application to the present case.

Twist v Randwick Municipal Council has been applied in a number of cases which bear a similarity to the present case. See The Queen v Marks & Ors (1981) 147 CLR 471; Marine Hull and Liability Insurance Co Ltd. v Hurford and Anor. (1985) 10 FCR 234; Commissioner of Police v Gordon (1981) 1 NSWLR 675.

Mr McDonald referred me to the judgments of the Full Court of Queensland in R v Brisbane City Council, ex parte Read [1986] 2 Q'd R 22. The case concerned an order made by the Council to re-zone land. The order was attacked on various grounds and prerogative orders were sought. The relevant Town Planning Act provided for an appeal to the Local Government Court which had jurisdiction to "hear and determine ... an appeal against a decision of the Council to allow an application." Each member of the Court held that the right of appeal did not oust the jurisdiction of the Supreme Court. Doubts were expressed

whether the jurisdiction of the Local Government Court was adequate to give the relief which the Supreme Court could give.

McPherson J pointed out (at p.27) that if the Council did something other than make a valid decision, the Local Government Court would have no jurisdiction to entertain an appeal. His Honour also stated (at p.28) that the Local Government Court would ordinarily pay some regard to the views of the responsible planning authority as expressed in the Council's decision under appeal. Neither of those considerations have any application in this case.

Neither Twist nor the other decisions to which I have referred were cited to the Full Court of Queensland. In the result, the Court decided that the Act there in question did not, in sufficiently clear language, oust the jurisdiction of the Supreme Court to give relief against what was described by de Jersey J (at p.53) as "a clear piece of illegality of substantial proportions." In my view, the Brisbane City Council case is clearly distinguishable from the present case and does not derogate from the authority of Twist and the cases in which Twist has been applied.

After the Court reserved judgment in this case, Mr McDonald sent a note to my chambers referring to a recent judgment of Neave J in Inglis v Cameron & Others (1991) 99

ALR 149. I have read the judgment but, in my view, it has no present application. The case concerned a Commonwealth public servant who had been dismissed for inefficiency. He sought a judicial review of two administrative decisions connected with his dismissal. The question before Neave J was whether the right of appeal open to the applicant was such as to preclude judicial review. His Honour drew attention to various limitations on the powers of the appeal committee (none of which are present here) and concluded (at p.165) that the procedure was not a "full and comprehensive appeal."

Mr McDonald placed some reliance on the judgments of the Court of Appeal in Jones v Motor Accidents (Compensation) Appeal Tribunal (1988) 59 NTR 12. In that case the Court held that s.30 does not oust the jurisdiction of the Court in a case where the Tribunal declines to exercise jurisdiction. There was no discussion of the issues which arise in this case and I do not regard Jones as having any present application.

Mr McDonald relied upon a number of cases which are authority for the proposition that "the right of a subject to apply to the Court for a determination of his rights will not be held to be excluded except by clear words." Forster v Jododex Aust. Pty. Ltd (1972) 127 CLR 421 per Gibbs J at pp.435-6.

This proposition can be readily accepted, but in each case the question is whether a parliamentary intention to exclude the Court's jurisdiction has been made manifest. In this case, for the reasons I have endeavoured to express, I am of opinion that it has.

The conclusion I have reached is sufficient to dispose of the preliminary question raised. However, I should add, that if I had thought that the Court had jurisdiction, I should certainly not have been prepared to exercise it.

This case has a close similarity to the circumstances with which Commissioner of Police v Gordon (supra) was concerned. In that case a policeman pleaded guilty to being in possession of a pistol without being licensed. He was dismissed from the force by the Commissioner. The policeman lodged an appeal to the Crown Employees Appeal Board. The appeal was listed for hearing but was stood over to allow the policeman to seek an order in the nature of certiorari in the Supreme Court. This proceeding was successful before the primary judge, who quashed the order for dismissal. The commissioner appealed to the NSW Court of Appeal.

The appeal was allowed, the judgment of the Court being delivered by Moffitt P. After considering the

authorities, including Twist, the learned President said (at p.690):

> "In my view, apart from other considerations, the existence and continuance of the proceedings before the board in these circumstances provided compelling ground for the court to decline to intervene in exercise of its prerogative powers. The court has always and properly shown reluctance to exercise this discretionary jurisdiction where there are available, and on foot proceedings before a tribunal, particularly if presided over by a judge which is invested with power exercisable judicially to determine the subject matter of the dispute on the merits.
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> I should further add the present case appears to be another example, of which *Dennis v Law Society of New South Wales* (Court of Appeal, 17th December, 1979, unreported) was one, where complaints, based on the principles of natural justice, that an opportunity to be heard, only in some limited way on the merits are pursued at length and with delay, while an opportunity to have a substantive investigation of the merits is spurned or postponed. In this way technicality based on not being heard in some limited way on the merits is preferred to being heard on the merits. In the present case, almost at the moment when the merits of an allegedly unjust dismissal was to be investigated by an independent tribunal, the opportunity to do so was set aside in favour, not of a vindication of the respondent on the merits, but in favour of a technical approach to the act of dismissal which would leave the merits either unresolved or postponed.
>
> In this field, as in others, where the law is evolving in aid of a more just approach to some situations, resort to the new tool is inclined to become fashionable, leading to the danger on occasions that resort to it is not in aid of its true purpose, so that the instrument intended to produce greater justice on some occasions may produce less justice. Justice is not a one sided affair."

Those observations are equally applicable to this case. If the plaintiff was successful in the present

proceedings the best he could hope for is the quashing of the order that his benefits should cease. The Court could not substitute an order that the benefits continue, although the Tribunal could do so.

In this connection I refer to the remarks of Dixon CJ in Tooth and Company Ltd v Parramatta City Council (1955) 97 CLR 492 at p.498.

> "But, where the legislature has provided for the very description of case a remedy designed as appropriate and adequate, a court should be careful that mandamus is not used to avoid recourse to the remedy or as a substitute for it. The general rule is that the Court exercises its discretion against granting a writ of mandamus where a remedy is provided by way of appeal or the like which is equally convenient, beneficial and effective. If the writ of mandamus does not provide the party with a more convenient and better remedy, the Court, in such a case, leaves the party with that which has been provided."

In the result, I am satisfied that the question raised in the summons should be answered in the defendants' favour. The plaintiff's proceeding No. 133 of 1990 is dismissed, with costs, including the defendants' costs of the summons.
