The Editor
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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 191/83

708

BETWEEN RAJ NARESH

Applicant

A N D THE TRANSPORT LICENSING APPEAL AUTHORITY AT HAMILTON AND WELLINGTON

First Respondent

A N D THE ATTORNEY GENERAL On behalf of the Ministry of Transport

Second Respondent

A N D MARTIN JOHN FOSTER the Auckland Transport District Licensing Authority

Third Respondent

Hearing: 7 and 8 June 1984

Counsel: K F Gould for Applicant
C J McGuire for Respondents

Judgment: 8 June 1984

ORAL JUDGMENT OF HILLYER J

This is a motion for an order under the Judicature Amendment Act 1972 reviewing the purported exercise by the first respondent of a statutory power of decision to dismiss the applicant's appeal against the decision of the third respondent, the Auckland Transport District Licensing Authority.

The applicant was the holder of Continuous Taxicab Service Licences numbers 12615 and 7344. On 25 May 1981 the Auckland Transport District Licensing Authority ("the Licensing Authority") commenced a review of the licences held by the applicant. That review continued for nearly six months and the Licensing Authority heard complaints, by the Ministry of

Transport, in relation to technical breaches of the applicant's licences, but in particular by the Auckland City Council Traffic Department in relation to the conduct of the applicant in operating his licences.

It was alleged that the applicant was not a fit and proper person to hold such a licence.

The hearings, as I have said, concluded on 29 October 1981 and the Licensing Authority's decision was given on 8 February 1982. In that decision the Authority held -

> " From the evidence I have heard I can simply state that I have formed the conclusion that Mr Naresh is not a fit and proper person to be entrusted with the operation of any public taxicab. "

and further -

> " After considering all the factors which have emerged at these hearings I have, however, formed the conclusion that it is in the best interests of the taxi industry and the public if Mr Naresh leaves the industry. In view of what I have heard I could feel quite justified in revoking both his licences forthwith. However I am conscious of the enormous financial penalty that I would impose on Mr Naresh if I were to adopt this course of action and I therefore propose to afford Mr Naresh the opportunity as set out in the proviso of sub-section 4 of Section 141 of the Transport Act to sell or to otherwise dispose of the two licences within three months of the date of this decision, failing which both his licences will be revoked. "

Against that decision the applicant appealed to the Transport Licensing Appeal Authority, the first respondent. The notes of evidence of the hearing ran into something over one hundred pages. These had to be transcribed and it was not until 29 April 1982 that the notes were furnished to the Appeal Authority. The Authority has the right to determine the matter on written submissions pursuant to s 172 of the Transport Act 1963. On 17 May 1982 the applicant's solicitors were advised by the Appeal Authority's secretary that the appeal would be

considered in that way. She asked the solicitors to let her have the opening submissions by 9 June 1982.

On 15 September 1982, not having heard further from the applicant's solicitors, the secretary wrote to the solicitors as follows:

> " It is noted that submissions on appeal are some three months overdue.
>
> Consequently, no progress has been made in this matter.
>
> If Mr Naresh intends to proceed with his appeal please ensure submissions are filed without further delay. "

On 22 September 1982 the solicitors replied as follows:

> " We acknowledge receipt of your letter of the 15th inst.
>
> Upon receipt, we wrote yet again to our client regarding the appeal to which, unlike our previous correspondence, we received a reply. Mr. Naresh informs us that this is the first letter he has received from us in the matter although, he has been away for part of the time.
>
> Be that as it may, we have been seeking Mr. Naresh's assistance in obtaining possible further evidence which, we are seeking to introduce on appeal.
>
> Notwithstanding this, we are hopeful of having the submissions on appeal to you shortly. "

I should comment that pursuant to s 171 of the Transport Act, on the filing of the notice of appeal dated 17 February 1982, the Transport Licensing Authority's decision was in effect suspended and Mr Naresh was able to carry on his licences pending the determination of the appeal. One could have the thought that Mr Naresh was not anxious to pursue the appeal; he was happily continuing with his taxi licences while the matter was delayed. This thought may have occurred to the Transport Licensing Appeal Authority. On 29 October 1982 the solicitors for the applicant telephoned the Authority's secretary and the secretary made a note as follows:

" Mr Castles phoned on 29/10/82

re Raj Naresh - had difficulty in contacting his client - hopes to have submissions within 3 weeks - (also notes of evidence extensive and other commitments). Question of further evidence resolved.

Will write confirming the above. "

Mr Castles confirms, by an affidavit filed by him, that he made that telephone call. He says that the secretary then advised that a further extension of time would be agreeable as at that stage there was no appeal authority in existence. He says that the delay being experienced was due to his pressure of work but I also note that there was a comment regarding the difficulty he was experiencing in contacting his client. On 26 November 1982 the secretary noted further in relation to this matter:

" Did not write as at 26/11/82.

Submissions not filed to date 26/11/82.

3 weeks expired on 19/11/82. "

and on 26 November 1982 she wrote to the Appeal Authority as follows:

" Appeal file forwarded herewith for your direction as to disposal action to be taken. Mr Castles, counsel for Appellant has failed to file submissions. "

That was sent with the file to the Appeal Authority in Hamilton. A stamp on the minute notes that it was despatched on 29 November 1982. On that same day the applicant's solicitors wrote to the secretary of the Transport Licensing Appeal Authority in Wellington as follows:

" Further to the writer's telephone conversation with your Mrs. Willoughby on the 29th ult. we had hoped to have the opening submissions on appeal with you by Friday, the 26th November.

As we advised, because of a heavy Court commitment there was likely to be delay which there has been, consequently, we are hopeful of having the opening submissions

with you no later than Friday, the 10th December 1982.

We apologise for any inconvenience that may be caused but would ask you to note the extent of the evidence to be reconsidered and the seriousness of the appeal. "

That letter clearly was in the mail to the secretary at the time the secretary was writing to the Appeal Authority in Hamilton and was not before the Appeal Authority when he wrote from Hamilton to the Appeal secretary on 1 December 1982 as follows:

" 1. Your Memo. of 26 November to hand.

2. Appeal struck out for want of prosecution.

3. Advise all parties and put file away. "

That memorandum was received by the secretary on 2 December 1982 and that day she telephoned the applicant's solicitors advising them accordingly. The solicitors immediately wrote to the secretary setting out in a three page letter a request to the Appeal Authority to reconsider his decision and giving details of the course of events and exculpatory features. That letter was sent to the Appeal Authority and on 7 December the Appeal Authority made a memorandum as follows:

" 1. I have your Memo. of yesterday's date.

2. This is the worst example of long intermittent delay that has come to my notice.

3. About half the delay is due to the Auckland Office in dragging the hearing on from 25 May, 1981 to the Reserved Decision on 8 February, 1982. This gave the Appellant about 8 1/2 months use of his licenses.

4. The Decision suspended the licenses for three months, and they were then to be revoked - May, 1982.

5. On 17 May, 1982 submissions were asked for, to be supplied by 9 June, 1982. They have not yet been received. This

means that Appellant has had a further 9 1/2 months use of his licenses including 6 months since submissions were due.

6. The Appeal was struck out for want of prosecution when default in submissions was still subsisting, and the striking out must be confirmed. "

From the decision of the Appeal Authority this motion for review is brought. In support of the motion the solicitor for the applicant has exhibited to his affidavit a copy of the opening submissions which were filed with the Transport Licensing Appeal Authority on 7 December 1982. In those opening submissions it is alleged that there are substantial defects in the transcription of the evidence taken in the review before the Licensing Authority. It seems that substantial parts of the evidence which was recorded on a tape, were not able to be transcribed because of some defect in the recording machinery. The submissions therefore include the submission as follows:

" The omission of this evidence from the transcript precludes in the writer's view a proper consideration of the matters on appeal and having regard to the seriousness of the matters under review, it is respectfully submitted that the matter ought to be referred back to the Authority for rehearing. "

The affidavit filed by the applicant deposes that on 2 May 1983 he sold one of his taxicab licences and on 18 May 1983 he sold the other licence, the price in each case was $10,000. He therefore has no taxi licence at the moment and I enquired of his counsel what the point of the review would be. It seemed that the applicant could make a further application to the Licensing Authority. At that application he could bring forward any evidence that he chose and I enquired whether he would not be as well off making a fresh application for a licence as he would be if the whole matter was referred back to the Transport Licensing Authority by the Appeal Authority.

His counsel advised me that if this motion for review was granted the taxi companies had advised that the applicant could drive for them and that he would therefore immediately be able to obtain employment without waiting for a further hearing. The applicant's counsel said that the taxi companies would not give the applicant a job unless the appeal was still pending.

That statement was made to me yesterday morning but after the luncheon adjournment counsel for the applicant advised that Mr McGuire for the second respondent, the Attorney-General on behalf of the Ministry of Transport, had made enquiries during the adjournment, as a result of which counsel for the applicant had taken further instructions from his client. He advised me that the position was not as he had indicated, that in fact there was no undertaking that the applicant would be given a job, it was merely that one of the committee members of the taxi society had said that he would support the applicant in any attempt to obtain a job with the taxi society.

Mr McGuire made application for leave to call evidence on the point. In the circumstances, it being a matter that had arisen only at the hearing, I gave him leave and he called a Mr Torr who is the general manager of the Auckland Co-Operative Taxi Society. Mr Torr gave evidence that the applicant had written asking, either for approval of the Society to him buying a taxi licence, or alternatively for a driver's permit to drive a taxi until the transfer went through.

Those letters were considered by the committee of management of the Society on 1 June 1982 and the committee declined both applications. Certainly Mr Flegg who was the Society committee member referred to by the applicant indicated that he was sympathetic but the application for the licence to drive was undoubtedly turned down by the Society.

The disturbing aspect of this matter is that a letter to that effect was sent by the Society to the applicant and was

received by him on 4 June. He was in Court when his counsel gave me the advise that I have referred to and I have now been advised by his counsel that the applicant did not see fit to give his counsel the letter from the Society. It is not stated that the applicant did not understand the situation and I am left with the thought that the applicant has been deceitful in this matter. I put this to his counsel but his counsel said he was not able to take the matter any further.

I have however given further consideration to the particular point I raised as to whether the application would be just as well off making a fresh application to the Society. I have come to the conclusion that he may not be. It is, I think, one thing to be seeking to remain a driver and another thing to be seeking the right to become a driver. The distinction may be a fine one and there may not be any difference. Nevertheless, I do not think I would be justified in saying that I should refuse the motion for review because a successful appeal would not do the applicant any good.

I go on therefore to consider the grounds for the motion for review advanced on the applicant's behalf. It was suggested that the Appeal Authority, by referring to the delay between May 1981 and February 1982 while the hearing was continuing and the decision being considered and the delay while the decision was suspended until the submissions were asked for on 17 May 1982, was taking extraneous matters into consideration. Certainly if the Appeal Authority was blaming the applicant for the delay between May 1981 and May 1982 he should not have held that delay against the applicant. But it seems to me that that reference by the Appeal Authority was no more than a recognition of the principle that if delay in any regard is complained of, the whole of the delay must be looked at not merely delay while the applicant is in default. That principle is clearly set out in New Zealand Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58, 64. That case is referred to in Fitzgerald v Beattie [1976] 1 NZLR 265, 268.

Those cases were cases in which there were motions to strike out a claim for want of prosecution. The Court in Fitzgerald's case restated three general principles on page 268:

> " To succeed an applicant should establish (1) that there has been inordinate delay; (2) that this delay is inexcusable; and (3) that the defendants are likely to be seriously prejudiced by the delay. "

These principles were put forward by Mr Gould for the applicant as being the basis on which delay should be looked at. He submitted that these criteria had not been fulfilled. The delay, he said, had neither been inordinate or inexcusable and there could not be any prejudice to any person. Certainly having regard to some of the complaints of delay that come before the Court, the delay from June when the submissions should have been filed to December when they were, is not inordinate. I note that during that time the solicitors for the applicant kept in touch sporadically with the Appeal Authority and that the applicant having now sold his licences any further delay that may be occasioned by the necessity for the Appeal Authority to consider the appeal will not affect the public.

Mr McGuire on behalf of the Attorney-General who conducted the argument against the motion, submitted that it was clear that under the Transport Act appeals should be dealt with expeditiously and that there being no true respondent to the appeal since it derived from an enquiry, it rested with the Appeal Authority to prevent its own processes from being abused.

In the normal course however, where one party to a judicial proceeding complains that the other has not proceeded as rapidly as he should, a notice of motion is filed seeking to strike out the proceedings and that can be argued before an independent tribunal. In this case the Authority itself had to take the step to prevent its own processes being abused. In those circumstances, however, it does seem to me that it was important for the Authority to ensure that submissions were made to it on the question of whether the appeal should be struck out before making the determination that it should.

I note there was no notification that if the submissions were not filed expeditiously the appeal would be struck out and although the letters could be read as indicating a desire on the part of the Authority for the matter to be proceeded with, it does seem to me that it would have been desirable, before the matter was struck out, for the Authority to have given some warning of its intention to do so. This is the principal basis on which the applicant has relied in the motion for review. Had it merely been a matter of my determining whether the appeal should be struck out I am doubtful whether I should have been justified in disturbing the exercise of the Authority's discretion. However, where there has been a failure to advise the consequences of the delay in filing submissions, it seems to me that the decision is one in which I may properly interfere.

The question of fairness is one which is very much a matter for the individual judge to determine. As was said in Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No.2) [1981] 1 NZLR 618, 651, "a broad and balanced assessment of what has happened and been done in the general environment of the case under consideration" is called for.

It is a common experience at the bar that when delays occur the normal procedure is for one party to write to the other saying "if the delay continues I shall move to strike out your claim".

I was referred to the case of Pryer v Smith [1977] 1 All ER 218 by Mr McGuire. That was a case in which there had been substantial default in compliance with an order. A conditional order was then made that in default of compliance the action would be dismissed for want of prosecution. It was held that even though at the date of making the conditional order the judge had not been satisfied that there was a likelihood of serious prejudice to the defendant, he nevertheless had jurisdiction to make that conditional order. He therefore had further jurisdiction to make the order dismissing the action when the order was not complied with.

That however just demonstrates the point I have been endeavouring to make which is that in the ordinary course of litigation a party should at least be given some warning that he is likely to have his action struck out before that happens, except of course in cases in which the delay has been so inordinate as to make it obvious that that will happen.

I do not think that this is such a case and I therefore grant the review sought. It need hardly be said that the appeal must be pursued with all diligence. I am advised by counsel for the applicant that the submissions having now been filed it is only necessary for the Appeal Authority to consider the matter. In all the circumstances I do not consider this to be a proper case in which to award costs in favour of the applicant and there will be no order as to costs.

The review is granted. The decision to strike out the appeal is set aside and the Appeal Authority is directed to consider the appeal.

.....J.....

ADDENDUM

After this judgment was delivered in open court I noticed a very recent decision of the Court of Appeal, Birss v Callahan (CA 2/84 decision 1 June 1984) reported in 7 TCL 19/6. In that case an officer of the Justice Department was suspended without pay unless the State Services Commission

resolved otherwise, pending the hearing of disciplinary charges against him. The Court of Appeal allowed his appeal against the High Court's dismissal of his application for review. The Court said:

> " [He] had a legitimate expectation that a draconian decision so adverse to his position as a serving member of the Public Service would not be made without any warning that it was in contemplation and the reasons why it was in contemplation. "

With respect, those words, with necessary changes, express very accurately the principle I thought was applicable in this case.

.....J.....

Solicitors

Jamieson Wilkinson Castles, Auckland for Applicant
Crown Law Office, Auckland for Respondents