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NZLR.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.939/95

LOW PRIORITY

BETWEEN JAE CARPETS AND PEST CONTROL SERVICES LIMITED a duly incorporated company having its registered office in Auckland, Service Providers and PETER CHEYNE of Auckland, Company Director

Applicants

AND THE DISPUTES TRIBUNAL, TAKAPUNA a Disputes Tribunal established pursuant to the Disputes Tribunal Act 1988

First Respondent

AND SUZIE JONES and MICHAEL GARDNER of 7 Hewson Street, Ellerslie, Auckland, Workpersons

Second Respondents

Hearing: 18 March 1996

Counsel: P. Brown for Applicants
N. McAteer for First Respondent

Judgment: 18 March 1996

ORAL JUDGMENT OF BLANCHARD, J.

Solicitors: Morrison Morpeth, Auckland for Applicants

Crown Law Office, Wellington for First Respondent

The issue in these judicial review proceedings is whether a rehearing by the Disputes Tribunal at Takapuna under s.49 of the Disputes Tribunal Act 1988 must be on notice to the party which has to that point been successful and, if so, the procedure which must be adopted by a Disputes Tribunal in determining whether to grant a rehearing.

The second respondents, who are not represented by counsel in these proceedings, brought a claim against the applicants Jae Carpet and Pest Control Services Ltd and its director Mr Cheyne. But they did not appear at the hearing and the claim was dismissed. They then made application to the Tribunal saying that they had not received notice of the hearing and it was for that reason that they had not attended. They sought a rehearing under s.49. The Tribunal dealt with the matter on the papers and did not give the applicants an opportunity to be heard, but simply ordered that there be a rehearing and nominated a date on which this was to occur.

On the face of it there was a breach of the principles of natural justice, although, of course, the application of those principles depends very much upon the circumstances of the case. In ***Russell v Duke of Norfolk*** [1949] 1 All ER 109 at 118 Tucker, L.J. said:

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

Disputes Tribunals are established as a means of resolving disputes between citizens, including claims against business entities, where a relatively small sum of money ($3,000 or less) is involved. It is clearly envisaged that its procedures will be relatively informal. Section 18(6)

requires a Tribunal to determine the dispute according to the substantial merits and justice of the case and goes on to say that, in doing so, the Tribunal is to have regard to the law but is not to be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

On the subject of giving reasons for decisions, s.21 says merely that a Tribunal shall in all proceedings give its reasons for its *final* decision in the proceedings. The implication from this is that when a decision is made which is not a final decision it will not always be necessary for a Tribunal to give reasons.

Section 42 enables a Tribunal to proceed *ex parte* where a reasonable opportunity has been given to a party to present its case, but the party does not do so. Subsection (2) of that section says that an order made by the Tribunal in these circumstances is not to be challenged on the ground that the case of the party was not presented to the Tribunal, but the party may apply for a rehearing under s.49 on the ground that there was sufficient reason for its failure to present its case.

Then there is s.44 which says that, subject to the Act and to any rules made under the Act (I understand there are none which are relevant), a Tribunal is to adopt "such procedure as it thinks best suited to the ends of justice". And then, finally, there is s.49 itself, enabling an order to be made for a rehearing of a claim on such terms as the Tribunal thinks fit.

Section 49 does not in express terms say what procedure is to be used to determine whether there should be a rehearing. Subsection (3) requires that an application for a rehearing is to be served "upon the other parties to the proceedings". I take this to be a requirement that the Tribunal

itself must arrange service, or at least ensure that the applicant has served the other parties. It is probably safer as a matter of practice for the Tribunal to undertake the task itself.

Subsection (4) deals with the situation after a rehearing has been ordered and requires the Registrar to notify all parties of the making of the order and of the time and place appointed for the rehearing. At that stage the decision of the Tribunal at the first hearing ceases to have effect.

It seems to me that it cannot have been intended that a successful party be deprived of the benefit of the order in its favour, which is the effect of s.49(4)(b), without having an opportunity of making a submission about the right of the applicant for rehearing to have the benefit of a rehearing in the particular circumstances. It is quite possible that in some circumstances that party may be aware of some conduct of the applicant for rehearing which it would wish to bring to the attention of the Tribunal and which might be regarded by the Tribunal as disqualifying the applicant from receiving the benefit of an order for a rehearing or might justify the imposition of conditions (under s.49(1)).

On the other hand, a Disputes Tribunal should not be burdened with an obligation to hold an oral hearing of every application for a rehearing of the substantive claim, as is, I understand, the position where rehearings are sought in proceedings in a District Court. To lay down any such requirement for Disputes Tribunals would, I think, be in conflict with the direction in s.18(6) that the Tribunal is not bound to give effect to legal forms or technicalities and the freedom given to a Tribunal by s.44 to adopt a procedure it thinks best suited to the ends of justice. However, the Tribunal is still required to determine the dispute according to the substantial

merits and justice of the case. It may be that the conduct of the applicant for rehearing in relation to the conduct of the claim has been such that matters should lie where they have fallen.

The only reported case in which a similar issue has previously arisen is *Moeke v Drinkwater* (1992) 5 PRNZ 28 which was also an application for judicial review. But in that case the decision in respect of which review was sought was a refusal of a rehearing application made without affording the applicant an opportunity to be personally heard.

Tipping, J. was heavily influenced by the fact that a refusal of a rehearing amounts to a final decision. He considered, as I do, that the implication from s.21 is that reasons need not be given for interlocutory or procedural rulings, but he was of the view that, where the decision is a final decision, reasons should be given. I respectfully concur.

I have already indicated that I see no need or justification in the Disputes Tribunal jurisdiction for applications for rehearing to be the subject of an oral hearing and determination as a matter of course. But it seems to me that the principles of natural justice do require that where a Disputes Tribunal receives an application for a rehearing, the opposing party, the one which has been successful to that point, must be advised in writing that the application has been made, advised of the grounds upon which the applicant is relying and must also be given a reasonable opportunity of making written submissions to the Tribunal in opposition to the application. It would then be for the Tribunal to consider the application on the papers taking into account any such submissions. If an application is granted there would be no need for reasons to be given; the substance of the dispute could simply then proceed to a rehearing. On the other hand, if the application is refused

so that the decision is a final one then I take the view, as did Tipping, J., that reasons should always be given.

Tipping, J. thought also that an application should not ordinarily be declined without an oral hearing. I would not impose any such requirement where the applicant has set out in writing the basis of its application or been given the opportunity to do so. Although there may be circumstances in which, having received written submissions, the Tribunal decides that there should be an oral hearing of the application for rehearing in order to determine disputed issues of fact about the conduct of the parties relevant to the question of rehearing, I would see that as being the exception rather than the rule. The decision to have an oral hearing would be one for the discretion of the Tribunal in particular and unusual circumstances.

I have accordingly come to the view that the present application must succeed notwithstanding the careful submissions of Mr McAteer, who had been invited by this Court at a Directions Conference to present submissions on behalf of the Disputes Tribunal.

There will be a declaration as sought that the order granting the second respondents' rehearing application be quashed. The Disputes Tribunal is directed to proceed to reconsider the rehearing application in accordance with this judgment.

I turn to the question of costs. As the applicants have been successful they are entitled to an award of costs, but I have been advised that since the time when these proceedings were commenced, though not necessarily as a consequence of them, Disputes Tribunals have adopted the practice of conducting s.49 application hearings on the papers in a manner

similar to that which I have now held should occur. It seems to me that it would have been sensible for the applicants, on learning of this change of practice, to have requested the Disputes Tribunal to set aside its own order granting the rehearing and then to deal with the rehearing application afresh in accordance with the new practice. Admittedly that might have required the consent of the second respondents, but if the question had been discussed with them it is very likely that they would have accepted the situation rather than have their claim (for only $1,000) delayed by continuance of proceedings in this Court. In fact, unless I have misunderstood the position, it seems that the applicants brought judicial review proceedings more as a matter of principle than because there is any real basis for them to resist the application for rehearing. It has not been suggested in Court today that there was any reason why the second respondents did not attend the first substantive hearing other than the failure of the notice of hearing to reach them. It seems most unlikely that after hearing from Jae Carpets the Disputes Tribunal will decline a rehearing, though that is a matter for it.

In the circumstances, then, I am prepared to make only a modest award of costs. I award the applicants the sum of $750 and reasonable disbursements as fixed by the Registrar. This sum is to be paid by the first respondent.