FATUPAITO (LESA ERIKA) v PUBLIC SERVICE BOARD OF APPEAL

Supreme Court Apia
St John CJ
15 October 1980

CONSTITUTION - Applicability of Art.9(1) to the Public Service Board of Appeal, constituted subsequent to the Constitution.

PRODUCTION OF DOCUMENTS - Summons to produce - S46(2) and (10) Public Service Act 1977 - order made for production.

RULES OF NATURAL JUSTICE - Not to be inferred if intention to the contrary expressed in legislation -. S32 and 34 Public Service Act 1977 involving Public Service Commission only, rules of natural justice do not apply - if Public Service Commission decides to hold an enquiry, then rules of natural justice do apply.

HELD: The Plaintiff sought, pursuant to Art.4(1) of the Constitution, and was granted declaration that the Public Service Board of Appeal is bound to conduct its proceedings in all respects in accordance with Art.9(1) of the Constitution.

CASES CITED:

- Heatley v Tasmanian Racing & Gaming Commission (1977) 14 A.L.R. 519
- Ridge v Baldwin [1964] A.C. 40
- Brown v Allweather Grouting Co. Ltd. [1953] 1 All E.R. 402
- Exparte Timber Workers Union [1937] 37 S.R. (N.S.W.) 52

A S Epati for Applicant
F M Sapolu for Respondents

The Plaintiff was suspended and later dismissed from his position as Managing Secretary of the Department of Health, by the Public Service Commission. (the Commission). He appealed to the Public Service Board of Appeals (the Board) and his request for access to the documents which was before the Commission and upon which the dismissal was based was refused.

Before the Board counsel for the Commission argued that a summons to produce such documents could not be issued because of a provision in the Public Service Act, namely Section 46(2). I have already dealt with that aspect and decided as follows:

> "The applicant seeks certain declarations as to his rights in relation to a decision of the Public Service Commission to dismiss him from a position he formerly held and in relation to his pending appeal to the Public Service Board of Appeal against such dismissal. On these matters I have reserved my decision. However, [there is] one matter which was fully argued before me and which, because of the pending appeal merits immediate attention. By letter, the solicitor for the applicant herein, (the appellant to the Public Service Board of Appeal) sought copies of certain documents which were before the Public Service Commission on the hearing of charges leading to his dismissal. The Commission refused this request. Before this Court the legislative intention exhibited in section 46 sub-section 2 of the Public Service Act 1977 was the subject of submissions.
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> That sub-section is in the following terms:
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> > "The Board shall have jurisdiction to hear and determine every such appeal, and for this purpose to summon witnesses, and to examine the witnesses on oath or otherwise. On any such appeal the Board may receive such evidence as it thinks fit, and receive any statement, document, information, or matter which in the opinion of the Board may assist it to deal with the matters before it, whether or not the same would be admissible in a Court of Law."
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> A power to summon witnesses is a power to summon them to give oral evidence or to produce documents or do both. The use of the words "receive any statement" etc. in the second sentence are, intended to broaden the type of material which may be used as evidence beyond evidence strictly admissible in a court of law. "Receive" is facilitative and not restrictive. In my view, it clearly does not mean that documentary evidence in the hearing of the appeal is confined to such documents as are voluntarily produced and tendered to the Board.
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> For reasons which I will give fully at a later date, I am of the view that the documents of which the appellant sought copies are clearly relevant and a summons to enforce their production before the Board should be issued if any party to the appeal requests it. Further, on production, leave to inspect and copy such documents should be given to the

appellant. I would add that in expressing these views I have been conscious of the provisions in section 46(10) of the Act, which will be examined in more detail in dealing with the question with which I still have to deal."

In amplification of my reasons, I do not feel it necessary to deal with all the arguments addressed to me. The words of the sub-section are clear. The word "receive" is used to widen the scope of evidence to that which is beyond the ambit of legally admissible evidence in a court of law.

The Plaintiff also sought a declaration that the Commission in forming its decision to dismiss was bound by the rules of natural Justice. This submission was later abandoned but it was sufficiently argued for me to comment.

When a statute makes no comment on whether a decision-making body has to abide by the principles of natural justice the court may infer the requirement so to abide from the nature of the statutory power whether such power be categorised as administrative or judicial; Heatley v Tasmanian Racing and Gaming Commission (1977) 14 A.L.R. 519; Ridge v Baldwin [1964] A.C. 40. But the court may not infer such an obligation if the legislature has expressed an intention to the contrary.

The offences with which an officer may be charged are set out in section 32 and 34 of the Public Service Act. They are all concerned with efficiency or honesty in employment; major offences, as alleged against the Plaintiff, are dealt with by a specific procedure laid down whereby the charge against him is set out in writing and delivered to him. The officer charged is required to admit or deny in writing the truth of the charges and give such explanation as shall enable the permanent Head to properly consider the alleged offence; section 34 and 34 (2). Thereafter the permanent head reports to the Commission and the Commission "shall thereupon proceed to consider and determine the matter". So far, the legislature has provided that the officer charged receives notice of the charges and has an opportunity to admit or deny and give an explanation. Such provisions are, in my view, a sufficient indication of an intention to exclude the rules of natural justice up to that stage by providing a method (writing) by which the officer may be made aware of the charges and answer them. In other words the officer gets a hearing, albeit a limited one. The reports referred to are no doubt reports of superior officers setting out opinions regarding the capacity and diligence or otherwise of the officer charged. These measures should be looked at bearing in mind that apart from Statute, government servants may be dismissed at pleasure. Further the provision that on completion of the procedure laid down the Commission "should thereupon consider", impliedly eliminate further steps such as an oral hearing.

The legislation then goes on to provide for an enquiry if the Commission so decides. Should such a decision be made, then, in my view, the rules of natural justice come into play. The

provision for representation of the officer at the enquiry indicate that parliament is concerned to have issues of fact resolved in a manner where the rules of natural justice apply.

In summary, the Commission is not bound by the rules of natural justice up until the time investigation or enquiry is ordered; thereafter it is.

I proceed now to consider the function of the Board and in particular the submission that, Article 9(1) of the Constitution is applicable. That article is in these terms:

> "9. (1) In the determination of his civil rights and obligations or of any charge against him for any offence, every person is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established under the law. Judgment shall be pronounced in public, but the public and representatives of news service may be excluded from all or part of the trial in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

It is appropriate to make some general comment on the question of interpretation of the constitution of Western Samoa. The constitution of this country is based upon what is termed, in political science, the separation of powers under the headings legislative, executive and judicial. Many constitutions have embodied that separation or attempted to do so, since Montesquieu extolled the virtues of that separation which he found in the English Constitution. It has been since pointed out by such academic constitutional law writers as Professor Jennings that even in the English system, there is in some instances an overlapping across the three divisions, in such offices as that of the Lord Chancellor whose activities include both the judicial and legislative field. No such overlapping is evident in the constitution of this country.

However, as has been pointed out with great clarity by learned commentators of the constitution of the United States of America and the interpretation of that constitution the differentiation in substance between the judicial and legislative process becomes blurred in practice when the judiciary has to apply constitutional guarantees of civil rights to particular sets of facts. The decisions of the Supreme Court of the United States

of America, under the Chief Justiceship of Earl Warren C.J. on the desegregation of schools springs readily to mind as an example where such comments were forcefully made. It behoves judges to be aware of the separation of their function from the legislative, but the dividing line will often be hard to draw with precision.

Statutory interpretation and constitutional interpretation can be approached broadly or restrictively. The balance between those two approaches is the elusive goal. Judicial interpretation of the constitution of Western Samoa has to date been minimal; my predecessors in office have not had raised before them issues which demand some formulation of general principles of approach to the task.

British legal history reveals a distrust of, if not a reluctance to set down in statutory form any of the rights of man, as formulated by Thomas Paine and others, and which so influenced the framers of the constitution of the United States of America and the amendments thereto. That distrust should not be reflected, in my view, in the judgments of this Court. That the framers of the constitution of Western Samoa had regard to the American experience, both as to content of that constitution and its judicial interpretation is an irresistible conclusion to be drawn from the very presence of the provisions, expressed in general terms, regarding fundamental rights. That amendment of the Western Samoa constitution was made a simple Legislative process untrammelled by referenda or other restrictive provisions provokes the conclusion that the framers had in mind that the operation of the constitution, in some circumstances, may be adverse to good government. The responsibility of the judiciary is somewhat leavened by such simple amendment procedures when compared to constitutions with cumbersome machinery and checks on amendment.

There are a number of principles of constitutional interpretation which have been formulated. Firstly, the provisions of the document under review can not be looked at in isolation from the whole. Secondly, it is intended as a permanent expression of those principles which are to regulate relationships in society for an unlimited time and therefore must be treated as an instrument adaptable to changing social conditions of which courts must make themselves aware. Many other principles have been evolved; it is not necessary to quote or evaluate them for the purposes of this judgment.

Apart from the already quoted Article 9, the relevant provisions of constitution for present purposes are:

> "The Supreme Law. 2. (1) This Constitution shall be the supreme law of Western Samoa.

(2) Any existing law and any law passed after the date of coming into force of this constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

"Remedies for enforcement of rights. 4. (1) Any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provisions of this Part.

(2) The Supreme Court shall have power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of the rights conferred under the provision of this Part."

Article 9(2) is as follows:

"(2) Nothing in Clause (1) shall invalidate any law by reason only that it confers upon a tribunal, Minister or other authority power to determine questions arising in the administration of any law that affect or may affect the civil rights of any person."

The remainder of article 9 deals with criminal charges. Indeed, the relationship between Article 9(1) and Article 9(2) is better understood by reference to Professor Salmon's analysis of civil rights, dividing them into primary and secondary rights. For example the right not to be assaulted is a primary right, the right to recover damages is a secondary right arising out of infringement of the primary right. The word "determination" in Article 9(1) indicates that it is the remedy, the secondary right which is intended to be protected. Action by a Minister or tribunal exempted from the operation of Article 9(1) by Article 9(2) may nevertheless give rise to a civil right which has to be determined in accordance with Article 9(1).

Civil rights are not defined, but clearly in the British legal tradition, they include rights as arising between subject and subject including corporations; see Salmon on Jurisprudence 10th Edition at p.120 et.seq. The enactment of legislation before independence allowing civil suits against the government and vice versa and no intention to the contrary expressed, in my view, is sufficient to conclude that civil rights comprehends the citizen's civil rights vis-a-vis the government or any statutory body. Civil rights that are created by statute are civil rights for the purposes of Article 9. Over the centuries common law civil rights have been extended, modified and altered by statute. To hold that civil rights created by statute subsequent to the constitution were not included would be too restrictive an approach.

The Board is by the relevant act given power to determine the

The Public Service Commission also has powers with respect to contracts of employment but the ultimate power is vested in the Board. The Commission's power when exercised adversely against an officer is subject to appeal. The Commission is the employer. Although it is bound by the statute to follow certain procedures before dismissal or suspension of an officer takes place, it is, in essence, the governments agent to hire or fire. It is executive or administrative in function. It is this function that sub-article (2) of Article 9 exempts from the general statement relating to civil rights in sub-article (1) of Article 9. The Commission is empowered to dismiss. Dismissal may affect contractual rights. An officer may be wrongfully dismissed by a tribunal or Minister empowered to dismiss. To test whether such dismissal is wrongful and can be remedied is a right to be pursued elsewhere.

The Board is given jurisdiction to review the actions of the Commission. Before it, the merits of the Commission's actions can be tested. Before it, the Commission's right to dismiss and the officer's rights to remain in employment are determined. It provides a remedy if the officer's right to remain in employment has been infringed. It is a body constituted for the purpose of determining a particular "civil right" within the meaning of article 9(1). That the remedy for infringement is contained in the same act as enables the employment of the officer is irrelevant.

The Board is a tribunal within the meaning of Article 9(1) and must perform its duties observing the standards laid down in that Article.

A submission was made that the power to impose penalties under the Act results in the later provisions of Article 9 relating to criminal offences being applicable to the Board. Provision for the imposition of and the recovery of a penalty does not automatically indicate a criminal offence. There has been in English law since the 18th century statutes containing provisions for such recovery which have been characterised as "qui tem" or "popular" actions. Such motions, successfully prosecuted do not result in conviction for a criminal offence, but merely in the recovery of a penalty; see for example Brown v Allweather Grouting Co Ltd [1953] 1 All E.R. 402 per Lord Goddard at 405 and Exparte Timber Workers Union [1937] 37 S.R. (N.S.W.) 52 at 65 per Jordan C.J. I am therefore of the view that those sub-articles of Article 9 dealing with criminal prosecutions are not applicable.

I therefore declare, pursuant to Article 4 that the Public Service Board of Appeals, constituted pursuant to the Public Service Act is bound to conduct its proceedings in all respects, in accordance with Article 9(1) of the Constitution.