Vanuatu

Kalo v. Public Service Commission

Supreme Court
Cooke C.J.
9 October 1987

Administrative law – judicial review – Public Service Disciplinary Board – appearance of justice – whether a real likelihood of bias.

Administrative law – judicial review – no opportunity to be heard – Constitution, Article 5(2) – whether appeal frivolous or vexatious.

The petitioner had been Director of the Public Service in the Vanuatu Government. The petitioner allegedly disclosed confidential government information, in violation of specific instructions and in violation of the Public Service Act, to a meeting of the Public Service Association. The petitioner was also charged with bringing the Public Service into disrepute. A Public Service Disciplinary Board was appointed to hear the charges, found the petitioner guilty of two charges and ordered the petitioner to be demoted, transferred, and to receive half salary during a time of suspension. The petitioner appealed to the parent body of the Public Service Disciplinary Board, the Public Service Commission. That Commission rejected his appeal without allowing petitioner or his counsel to be heard. The petitioner appealed on the grounds inter alia (1) that the Public Service Disciplinary Board and the appeal authority, the Public Service Commission, were not impartial bodies, and (2) that the denial of the right to be heard on appeal was unlawful and unconstitutional.

HELD: The appeal was granted and a rehearing of the appeal, against the decisions of the Board, should be held before a reconstituted Public Service Commission with petitioner and counsel to be present.

(1) The Public Service Disciplinary Board was set up appropriately by law and was independent and impartial: *l.* 180.

(2) The Public Service Commission which dealt with the appeal was not independent and there was a real likelihood of bias, albeit unconscious: *l.* 190.

(3) Both the Constitution (Article 5(21) and the Public Service Act 1981 require that appellants be entitled to attend appellate hearings, with counsel if they so choose: *l.* 270.

(4) Section 5(2) of the Constitution, "Protection of the law", extends, in paragraphs (a) to (e) to civil as well as criminal matters: *l.* 320.

Cases referred to in judgment:

Adams v. *Batley* (1887) 18 Q.B.D. 625

Anisminic Ltd. v. *Foreign Compensation Commission* [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208

Boulekone v. *Timikata* Supreme Court, Vanuatu, Civil Case 90/1986
R. v. *Medical Practitioners Professional Conduct Tribunal, ex parte Medical Board* (1985) 40 S.A.S.R. 84
R. v. *Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796
R. v. *Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256
Saunders v. *Wiel* [1892] 2 Q.B. 18
In re County Council of Derbyshire and the Mayor, Aldermen and Burgesses of the County of Derby [1896] 2 Q.B. 53

Hudson for the petitioner
Durkin for the respondent

COOKE C.J.

Judgment:

This is an appeal by Joseph Kalo, formerly Director of the Public Service in the Vanuatu Government.

Mr Hudson of Hudson Solicitors & Co. appeared for Mr Kalo and Mr Durkin, Solicitor General of the Vanuatu Government appeared for the Public Service Commission (hereinafter called P.S.C.).

Mr Hudson's grounds of appeal on behalf of Mr Kalo were:

(1) The P.S.C. did not allow Mr Kalo or his legal representative to be present at its hearing of his appeal, in breach of Section 11(6) of the Public Service Act 1981 and thereby exceeded its jurisdiction.
(2) That the Public Service Disciplinary Board (hereinafter called P.S.D.B.) and Public Service Commission were not impartial and independent bodies.
(3) That Mr Kalo's appeal against the decision of the P.S.D.B. should have been allowed, on the grounds referred to in his appeal.

Re Charge 1: The evidence did not establish the offence alleged.

Re Charge 3:

(1) Insufficient details were given in the charge of
    (a) the conduct alleged to constitute the offence
    (b) the disrepute alleged to have been caused and
    (c) how that disrepute was caused.
(2) No disrepute was proved to have been brought on the Public Service.

Mr Hudson then seeks the following Orders:

(1) That the appeal from the P.S.D.B. be upheld.
(2) The orders of the P.S.D.B. and the P.S.C. be quashed.
(3) That Mr Kalo be fully re-instated in his former position in the Public Service, with all entitlements.
(4) That the P.S.C. be ordered to pay his legal costs and expenses in relation to the proceedings before the Board, the Commission and the Court.
(5) Other consequential orders and such other orders as may be just.

The facts of the case against Mr Kalo were as follows:
He was on 28 October 1986 charged by the P.S.C. before the P.S.D.B. of having

committed three different offences on 17 September 1986.

(1) That on or about the 17th September 1986, at Port-Vila you wilfully defaulted in carrying out instructions given to you by the first secretary to the Prime Minister which instructions forbade you to disclose any information relating to redundancy of public servants at the meeting of the Public Service Association held at Owen Hall on the 17th September 1986, such acts being contrary to Section 8(b) of the Public Service Act No. 3 of 1981.

(2) That on or about the 17th September 1986, at Port-Vila, at a meeting of the Public Servants Association held on the 17th September 1986, in discharging your duties you disclosed information acquired by you in the course of your duties as Director of the Public Service Department, which information contained the financial reserves of the Government, such acts being contrary to Section 8(g) of the Public Service Act No 3 of 1981, and

(3) That on or about the 17th September 1986, at Port-Vila, your improper conduct at the meeting of the Public Servants Association held on the 17th September 1986 brought the Public Service into disrepute.

On 18 December 1986, a P.S.D.B. was appointed by the P.S.C. with Francis Gilu, chairman of the P.S.C. as chairman. (This is provided for under Rule 1 of the P.S.D.B. (Procedure Rules) Order No. 59 of 1981 which states that the "chairman" means a member of the Commission appointed as chairman of the Board under Section 9 of the Public Service Act 1981.) The Disciplinary Board having heard the evidence against Mr Kalo and having heard the submissions by Mr Kalo and his counsel, Mr Hudson, found the first and third charge proved and ordered that:

(1) Mr Kalo be demoted to Grade P. 17.3 and at the same time be transferred out of the Public Service Department. The Board recommended that Mr Kalo be transferred to the Registrar and Receiver General's Department, and

(2) That Mr Kalo, shall receive all those half salaries withheld during his period of suspension.

The Board found the second charge to be defective and not proved.

The submissions of Mr Hudson stated that the proceedings before the Court were commenced by a petition under the Constitution, Article 6 and Article 51 and Section 218 of the Criminal Procedure Code (which lays down the procedure for petitions under Articles 6, 51.1, 51.2 and 52 of the Constitution) and also that with leave of the Court he applied for Orders of Certiorari and Mandamus, which is permitted under the Civil Procedure Rules in force in Vanuatu.

He first submitted that as the Chairman of the P.S.D.B. was also the Chairman of the P.S.C., which brought the charges against the Petitioner before the P.S.D.B., and heard the appeal by the Petitioner from the decision of the P.S.D.B, the P.S.D.B. and P.S.C. were not independent and impartial bodies and so contrary to one of the rules of natural justice i.e. the right in respect of an offence to a hearing by an independent and impartial tribunal or court, which is contained in the Constitution, Article 5(1)(d) and (2)(a) and has been held to apply to all tribunals in Vanuatu, whether administrative or judicial by the Full Court in *Boulekone* v. *Timakata,* Civil Case No. 90 of 1986.

The Full Supreme Court of the Republic consisting of Mr Justice Cooke as President with Mr Justice Williams and Mr Justice Amet stated:

> The Petition is presented under Article 6(1) of the Constitution which reads as follows:
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> 6 (1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.
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> It further states:
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> > Fundamental rights are set out in Article 5(1) which includes under paragraph (d) "protection of the law". Article 5 (2) describes what is meant by "protection of the law". Without repeating it in detail one can say that it specifies the essential requirements of a fair hearing by anyone facing an allegation, that is to say, the principles of natural justice as known and understood in the free and democratic world will be applied by the tribunal considering the allegation. *All tribunals in Vanuatu are accordingly bound by the rules of natural justice whether they be administrative in function or purely judicial.*

Mr Durkin in reply to the first part of Mr Hudson's submission maintained that the P.S.D.B. was established under the Public Service Act and the Public Service Disciplinary Board (Procedure Rules) Order. That those rules were followed, indeed, there was no choice but to follow them. If they were not followed he submitted, the Petitioner would certainly have a right to complain.

In my opinion charges were laid by the P.S.C. who had Mr Kalkot Matas Kelekele as their legal adviser and the Commission knowing very little about framing charges, I think I can reasonably infer that the charges were drawn by the legal adviser. The P.S.D.B. consisted of persons not members of the P.S.C. other than Francis Gilu, chairman of the P.S.C. who was also chairman of the P.S.D.B. by virtue of Section 1 of the Public Service Disciplinary Board (Procedure Rules) Order No. 59 of 1982 which states that the chairman shall be a member of the P.S.C.

In so far as all the members of the P.S.D.B. except Francis Gilu were persons chosen specifically to hear this matter I cannot infer they are not independent and impartial members of the Board. The fact that Francis Gilu was the chairman does not in my opinion detract from the independence and impartiality of the P.S.D.B. Again if Mr Hudson, counsel for Mr Kalo, considered such a Board to lack independence and impartiality, I am surprised he did not take this point in limine when the matter could have been argued. In fact he and Mr Kalo thoroughly examined all the witnesses and made lengthy submissions to the Board before they were asked to make a finding. I hold that the P.S.D.B. was an independent and impartial Board and I reject Mr Hudson's submission on this point.

The next submission by Mr Hudson was that the P.S.C. who dealt with the appeal was not an independent and impartial body. This submission has some cogency as the P.S.C. must have been aware of the complaints against Mr Kalo and agreed to charges being laid against him. Again Francis Gilu sat on the P.S.D.B. when it found two charges proved. Was Francis Gilu biased when the P.S.C. made its decision to reject the appeal? This has to be carefully considered.

So far as bias is concerned, I think it can be acknowledged that there was no bias on the part of Francis Gilu, and certainly no want of good faith. However, there was albeit unconscious, a real likelihood of bias.

Lord Hewart, a Chief Justice of England, stated in *Rex* v. *Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256, 259:

> It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifest and undoubtedly be seen to be done."

The Court of Appeal in England has again and again set aside proceedings of inferior tribunals because an individual who had an interest in a case took part in the decision.

In my opinion, to ensure a fair hearing to Mr Kalo, an independent Commission who took no part in the action against Mr Kalo should have heard the appeal.

I am not accusing the members of the Commission but as stated before, there was albeit unconscious, a real likelihood of bias.

The next point taken by Mr Hudson was that the Commission rejected the appeal without giving him or Mr Kalo a chance of being heard as allowed under 11(6) of the Public Service Act No. 3 of 1981 which states:

> 11(6) At the hearing of an appeal the appellant shall be entitled to be present and may be represented or assisted by a lawyer or any officer.

The Commission nonchalantly stated:

> The Commission furthermore took into consideration the appeal submitted on behalf of Mr Kalo by his lawyer, David Hudson. After giving much consideration to the appeal, the Commission came to the conclusion by rejecting the appeal.

In my opinion Parliament in using the word "shall be entitled" in Section 11(6) seemed to intend that in all normal circumstances an officer charged is entitled to be present and may be represented by a lawyer at the hearing of his appeal.

I fully realize that Section 11(9) provides an exception to that section.

Section 11(9) states:

> Notwithstanding any thing to the contrary in this Act or in any other written law the Commission may either before the hearing or any time during the hearing of an appeal summarily dismiss or disallow the appeal without hearing it or without hearing it any further, as the case may be, on the ground that the appeal is *frivolous* or *vexatious* or should not otherwise have been brought or made.

It is quite clear to me and I so hold that unless that Commission find or indicate clearly that the appeal is *frivolous* or *vexatious* or *should not otherwise have been brought or made* they are compelled to abide by the mandatory intention of Parliament and hear the appeal with the officer charged and his counsel present, if they so wish. In this case a request was made by Mr Hudson that he be informed of the date and hearing of the appeal but he received no reply to that request.

From the words used such as "After giving much consideration to the appeal the Commission came to the conclusion by rejecting the appeal, at p. 52 of the affidavit

of Francis Gilu stating the decision of the Commission, I think it is fair to hold that the Commission did not think the appeal was frivolous, vexatious or should not otherwise have been brought or made. That being the case, they were bound to hear the appeal with Mr Hudson and Mr Kalo present.

It is said there is a strong presumption that the legislature does not intend access to the courts to be denied. At one time the prerogative orders were often excluded by name but even the express exclusion of certiorari was not effective against a manifest defect of jurisdiction or fraud committed by a party procuring an order of the Court. One frequently found a clause that a particular decision "shall be final", but it is settled law that this does not restrict the power of the Court to issue certiorari, either for jurisdictional defects or for error of law on the record. Such a clause means simply that there is no right of appeal from the decision. (See *R.* v. *Medical Appeal Tribunal ex parte Gilmore* [1957] 1 Q.B. 574.

In the *Anisminic Ltd.* v. *Foreign Compensation Commission* case [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208 the Foreign Compensation Act 1950, Section 4(4) provided that the determination by the Commission of any application made under the Act "shall not be called in question in any Court of law". The Commission was a judicial body responsible for distributing funds supplied by foreign governments as compensation to British subjects. It rejected a claim made by Anisminic for a reason which the company submitted was erroneous in law and exceeded the Commission's jurisdiction.

It was held, by a majority of the House of Lords, Section 4(4) did not debar a court from inquiring whether the Commission had made in law a correct decision on the question of eligibility to claim.

"Determination" means real determination, not a purported determination. By taking into account a factor which in the view of the majority was irrelevant to the scheme, the Commission's decision was a nullity.

Lord Wilberforce said, "What would be the purpose of defining by statute the limit of a tribunal's power, if by means of a clause inserted in the instrument of definition, those limits could safely be passed?" [at p.208 (A.C.); p. 204 (W.L.R.); p. 244 (All E.R.).

Hence in this case, in my opinion, Section 11(9) of the Act cannot wipe away the mandatory provision in Section 11(6) permitting the officer and his Counsel to be present at the hearing of the appeal unless the Commission categorically state that they rejected the appeal because it was frivolous, or vexatious or should not otherwise have been brought or made.

Another case in point was a recent case in Australia, *R.* v. *Medical Practitioners Professional Conduct Tribunal, ex parte Medical Board* (1985) 40 S.A.S.R. 84. The Medical Board of South Australia made a complaint to the Medical Practitioners Conduct Tribunal against a medical practitioner, alleging that the practitioner had been guilty of unprofessional conduct. At the hearing of the complaint by the Tribunal, counsel for the Medical Board opened the case and called several witnesses, who were examined and cross examined. At the conclusion of the evidence for the Medical Board, the Tribunal, without affording counsel for the Medical Board an opportunity to make submissions, dismissed the complaint on the ground there was insufficient evidence to support it. The Medical Board applied to the Supreme Court of South Australia for Orders of Certiorari quashing the determination of the Tribunal and of Mandamus requiring the Tribunal to hear and

determine the complaint according to law, on the grounds that the Tribunal had acted contrary to the principles of natural justice in that, (a) it had dismissed the complaint without affording counsel for the Medical Board an opportunity to make submissions with respect to the sufficiency of the evidence in support of the complaint; and (b) it had intervened to an excessive degree in the examination and cross examination of the witnesses.

It was held by the Full Court of the Supreme Court of Australia that:

The Tribunal in dismissing the complaint without affording counsel for the Board an opportunity to make submissions had failed to comply with the duty placed on it by Section 61(1) of the Medical Practitioners Act 1983 (S.A.) of affording the parties a reasonable opportunity to make submissions to the Tribunal and that upon this ground orders should be made quashing the dismissal of the complaint and directing the Tribunal to resume the inquiry and complete it according to law.

I hold that Mr Kalo was entitled to a fair hearing in accordance with the principles of natural justice under Section 11(6) of the Public Service Act 1981. Here I am not refering to a "fair hearing" as stated in the Constitution, as that relates to a person charged with an offence but to a "fair hearing" according to the principles of natural justice.

In the case *In re County Council of Derbyshire and The Mayor, Aldermen and Burgesses of The Borough of Derby* [1896] 2 Q.B. 53 referred to by Mr Durkin, Collins J. stated at p. 57:

> It seems to me that, prima facie, the words of Section 3 – (i.e. "Every person who causes or knowingly permits sewage matter to fall into any stream shall be deemed to have committed an offence under the Act") would create a misdemeanour, the word "offence" being used. But it has been held, in *Adams* v. *Batley* (1887) 18 Q.B.D. 625 and *Saunders* v. *Wiel* [1892] 2 Q.B. 18, 321, that the use of the word "offence" is not conclusive upon that point. We must see what are the consequences which will follow, and if we find that what is described as an offence is followed, not by punishment, but by a remedy equivalent to that for a civil wrong then the matter is not a criminal one.

Applying that rule to Article 5(2) and when considering (a) to (h) of the Article, it is my opinion that (a) to (e) can refer to either a criminal or civil matter but (f) to (h) seem to apply to criminal matters alone. It would therefore seem that Parliament intended that the sub-article should be given the widest interpretation possible.

The following are my findings:

(1) The decision of the P.S.C. is a nullity.

(2) That the appeal be heard by a reconstituted commission. This is possible by appointing a temporary commission to hear this appeal due to the inability of the substantive commission to act. (Interpretation Act No. 9 of 1981 – Section 21).

(3) That Mr Kalo and Mr Hudson be present at the hearing of the appeal to make submissions to the appeal commission.

(4) That the findings of the reconstituted commission be submitted to Government.

(5) That it is outside the Court's jurisdiction to give any direction as to reinstatment of Mr Kalo.

(6) It is ordered that the P.S.C. pay all Mr Kalo's legal costs and expenses.