

## Peter Wateoli v. Public Service Commission

High Court

Ward C.J.

15 November 1988

*Unfair Dismissal Act 1982—whether applicable to public servants—whether Trade Disputes Panel has jurisdiction to review decisions of Public Service Commission.*

The appellant was employed by the Solomon Islands Government. On 26 April 1988 he was dismissed with immediate effect by a decision of the Public Service Commission. On 30 May 1988 he lodged a complaint with the Trade Disputes Panel under section 6 of the Unfair Dismissal Act 1982. The Panel dismissed the complaint on the ground that it had no jurisdiction by reason of the Constitution. The appellant appealed against the decision of the Trade Disputes Panel.

### HELD:

- (1) Section 116(1) of the Constitution vests the power to dismiss public officers in the Public Service Commission and, by section 137(4), that is not subject to any review or control by the Trade Disputes Panel unless it is a court of law and thus saved by section 138. Taking into account the relevant tests, the Trade Disputes Panel is clearly not a court. *Shell Co. of Australia v. Federal Commissioner of Taxation* [1931] A.C. 275, per Lord Sankey L.C. at 297; and *Trapp v. Mackie* [1979] 1 All E.R. 489 at 499 followed.
- (2) Insofar as it relates to public servants, the effect of section 11(2) of the Unfair Dismissal Act 1982 is inconsistent with section 116(1) and section 137(4) of the Constitution and to that extent is void.

Appeal dismissed.

### Cases referred to in judgment:

*Shell Co. of Australia v. Federal Commissioner of Taxation* [1931] A.C. 275; [1930] All E.R. 671; 1006 J.P.C. 55; 144 L.T. 421

*Trapp v. Mackie* [1979] 1 All E.R. 489; [1979] 1 W.L.R. 177

### Counsel:

*J. Hauirae* for the appellant

*R. Teutao* for the respondent

## WARD C.J.

### Judgment:

The appellant, Peter Wateoli, was employed by the Solomon Islands Government and he was dismissed by a decision of the Public Service Commission made on 26 April 1988 with immediate effect. On 30 May 1988 he lodged a complaint with the

Trade Disputes Panel under section 6 of the Unfair Dismissal Act 1982.  
Section 2 of that Act states:

every employee has the right not to be unfairly dismissed by his employer.

40 Because of the unusual features of employment by the Crown, special provision is made to bring Government employees within the Act. Thus, section 11(2) provides that section 23(1) of the Employment Act 1981 applies for the purposes of the Unfair Dismissal Act and thus has effect "in relation to employment by a department of the Government or any employment by or on behalf of the Crown and to persons in such employment as it has effect in relation to other employment and to employees". At the hearing on 23 June 1988 the Panel dismissed the complaint on the grounds that it had no jurisdiction.

The appellant appeals against that decision on three grounds:

- 50 1. The Trade Dispute Panel erred in law in holding that it had no jurisdiction to hear the appellant's case as the said case was purely a trade dispute matter and as such falls within the Trade Disputes Panel's jurisdiction.
2. The Trade Disputes Panel's ruling is discriminatory in effect, in that it discriminates against employees of the Crown who might be dismissed by the respondent.
3. The Panel erred in law in deciding that section 138 Constitution has the effect of depriving the Panel of jurisdiction in this case.

The basis of the Panel's decision relates to the third ground, and I deal with that first.  
Section 116(1) of the Constitution provides:

- 60 (1) Subject to the provisions of this Constitution, power to make appointments to public offices (including power to confirm appointments) and to remove and to exercise disciplinary control over persons holding or acting in such offices is vested in the Public Service Commission.

That power is strengthened by section 137(4):

- (4) In the exercise of their functions under this Constitution, no such Commission shall be subject to the direction or control of any other person or authority, except where otherwise provided by this Constitution.

The only provision of the Constitution that affects it is section 138:

- 70 138. No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law or should not perform those functions.

It is clear that section 116(1) vests the power to dismiss public officers firmly in the Public Service Commission and, by section 137(4), that is not subject to any review or control by the Trade Disputes Panel unless it is a court of law and is thus saved by section 138. The Panel concluded that it is not a court of law and therefore is not empowered by section 138 to exercise jurisdiction.

In its findings, the Panel dealt with it this way:

80 To the extent provided for in section 138, a decision of the commission may be called into question in a court of law. However, the panel does not regard itself as a court of law. It has a legally qualified chairman and, subject to appeal to the High Court, it makes legally binding decisions. However, it has no power to enforce its own decisions. This must be done by the High Court or a Magistrate's Court on its behalf, or more accurately, on behalf of a party. Most importantly, in making its decisions, the panel is not restricted to a consideration of any legal cause of action, e.g. breach of contract. It is because, for example, a court would be so restricted, that the panel was created.

90 The parties to the appeal were in agreement that the Panel was not a court and I agree.

The written law provides no clear definition of a court. Neither the Constitution nor the Interpretation and General Provisions Act 1978 give any assistance.

The question of whether a particular tribunal has sufficient attributes of a court depends on the various features it possesses but the presence of a particular feature or group of features will not necessarily provide the answer.

Thus in *Shell Co. of Australia v. Federal Commissioner of Taxation* [1931] A.C. 275 at 297, Lord Sankey L.C. set out some of the features, which, even if present, are not necessarily conclusive.

- 100 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision.
2. Nor because it hears witnesses on oath.
3. Nor because two or more contending parties appear before it between whom it has to decide.
4. Nor because it gives decisions which affect the rights of subjects.
5. Nor because there is an appeal to a Court.
6. Nor because it is a body to which a matter is referred by another body.

Equally, any one or more of those features is not prevented from helping to demonstrate that a tribunal is a court.

110 "Judicial power" which is used in the Australian Constitution. Lord Sankey adopted a definition from an earlier Australian case which included the proposition that "the exercise of (Judicial) power does not begin until some tribunal which has power to give a binding authoritative decision (whether subject to appeal or not) is called upon to take action." There is no such expression in our Constitution, but I feel the power to give a binding authoritative decision is an important consideration in deciding whether a tribunal is to be considered a court, although, in common with the other features, its presence or absence is not necessarily conclusive of the matter as was stated by Lord Frazer in the more recent House of Lords' case of *Trapp v. Mackie* [1979] 1 All E.R. 489 at 499.

120 It is true the Trade Disputes Panel has similarities to a court. It is presided over by a chairman with a legal qualification, it has power to summon witnesses, and it receives their evidence on oath. Such witnesses are subject to penalties for perjury if their evidence is false and each witness is subject to cross-examination by the opposing party.

On the other hand, the differences are more striking. Whilst the Panel is subject to the rules of natural justice, it is empowered, within that, to determine its own procedure. The inquiry is not conducted as a *lis inter partes* and so the Panel may give, to the Minister and others who are not parties but whom it considers have an interest in the dispute, an opportunity to give and call evidence. It is not bound to limit its consideration to legal causes of action and, in reaching its conclusion, it is entitled to take into account matters outside the actual dispute under consideration.

I have said the power to make binding decisions is an important consideration and here there are further differences. In a trade dispute, the Panel must, once it has made an award, refer the draft to the Minister who has power, insofar as it relates to the pay of any employees, to vary its terms. In unfair dismissal cases, where they feel an employee should be re-engaged, they can only make such a recommendation. In all cases, the Panel has no power of enforcement and must rely on the courts. Whilst there is a right of appeal against the Panel's decision, it may also, at the request of the parties, review its own decision and, if necessary, hold a fresh inquiry.

All these factors clearly show it is not a court, and so the jurisdiction specifically reserved to a court of law by section 138 does not apply to the Panel.

Counsel for the appellant suggests that the effect of sections 116 and 137 is avoided because of the express inclusion of government employees by section 11(2) of the Unfair Dismissal Act and section 23(1) of the Employment Act. He bases this on the novel suggestion that, as they were passed subsequently to the Constitution, they do not breach it.

By section 2, the Constitution is declared the supreme law of the Solomon Islands and, if any other law is inconsistent with it, that law is void to the extent of the inconsistency.

Whilst it may well be that Parliament did not intend to exclude government employees from the protection of the Unfair Dismissal Act, the effect of section 11(2) is inconsistent with sections 116(1) and 137(4) of the Constitution and to that extent is void. The appeal on the third ground fails.

The first ground of appeal urges that the case is purely a trade dispute within the definition in the schedule to the Trade Disputes Act and thus fails within the exclusive jurisdiction of the Panel.

Whether or not a complaint of unfair dismissal to the Panel can always be considered as a trade dispute was not argued before this Court, but the facts in this case, in any event, are that it was one of dismissal of an employee by the Public Service Commission. As such it is clearly covered by section 116(1).

Finally in his second ground, the appellant suggests that, if the effect of sections 116(1) and 137(4) is to prevent the majority of public servants availing themselves of the remedies under the Unfair Dismissal Act, it is discriminatory and, therefore, in breach of section 15 of the Constitution. "Discriminatory" is defined by section 15(4) as affording "different treatment to different persons attributable wholly or mainly to their respective description by race, place of origin, political opinions, colour, creed or sex". It is quite apparent this does not fall within that section and the appeal must fail.

This is a matter of some importance to public servants. Whilst it prevents them making a complaint of unfair dismissal to Panel, it does not mean, as was suggested by counsel for the appellant, that they are left with no remedy if the Public Service Commission dismisses them wrongly. Quite apart from the extraordinary right provided by the Public Service Commission Regulations to appeal to the

Commission from its own decision, section 138 of the Constitution clearly gives jurisdiction to the courts to consider, within the limits of the section, whether the Commission has acted properly.

Appeal dismissed.

No order for costs.

Reported by M.L.