

Uikelotu v Tonga Water Board

Supreme Court, Nuku'alofa

Martin CJ

Civil case No. 34/1990

10, 21 August 1990.

10 *Administrative law - natural justice - whether applicable to foreman plumber by statutory body.*

Natural justice - whether applicable to dismissal of foreman plumber by statutory body.

Employment - dismissal - public law principles applicable.

20 The plaintiff was a foreman plumber employed by the Water Board, a statutory body established by the Water Board Act. He was dismissed by the Board in March 1990 with three months' pay in lieu of notice which he rejected. He brought proceedings for public law remedies, and the court ordered that the question of whether his dismissal was regulated by public law be tried as a preliminary issue.

HELD:

30 The provisions of section 19 of the Water Board Act, requiring that decisions as to employment and dismissal be made by a majority of members of the Board at a duly constituted meeting of the Board, provided sufficient statutory restriction or "underpinning" to remove the employment and dismissal of the plaintiff from the ordinary contractual master and servant relationship and render it subject to public law.

Cases considered :

R v East Berkshire Health Authority, ex parte Walsh [1984] 3 All E.R. 425

'Uta'atu v The Commodities Board Appeal 4/1990 (reported at p)

Leone Palu v The Commodities Board Civil case No. 55/1988 (reported at p)

40 Counsel for the plaintiff : Mr W. C. Edwards and Mrs F. Vaihu

Counsel for the defendant : Mr 'A. Taumoepeau (Solicitor-General)

Judgment

Background

The Plaintiff Pita Uikelotu was employed by Tonga Water Board ("the Board") as a foreman plumber. On 22 March 1990 he was dismissed. He claims damages for wrongful dismissal. He says that his employment was governed by public law, and will seek a declaration that his dismissal was in breach of natural justice in that he was not afforded a fair hearing. The Board admits that he is entitled to 3 months' pay in lieu of notice and certain other payments, which it says were tendered to the Plaintiff on his dismissal but rejected by him. It denies that public law applies.

The only real issue between the parties is whether he is entitled to any remedy in public law. On 8th August 1990, on the application of both parties, it was ordered that this point of law be tried as a preliminary issue.

The Board is a body created by statute - the Water Board Act ("the Act"). It is very similar, but not identical to the Commodities Board whose circumstances were considered recently by the Privy Council Court of Appeal in *Uta'atu v The Commodities Board* (Appeal 4/90). In that case the Privy Council reviewed the principles on which public law may apply to employees of statutory bodies, and held that it applies to senior employees of that Board. It would be illogical and undesirable if employees of the Water Board were given any less protection, but that depends on the terms of the Act.

The Law

Uta'atu approved the following principles:

1. Public law does not apply in an ordinary master and servant relationship, which is governed only by the terms of the contract of employment.
2. Employment by a public body does not of itself introduce public law into the contract of employment. Unless there is some statutory provision which gives the employee special status or protection, the ordinary rules of contract apply.
3. Public law only applies to an employee where there is some statutory or other restriction on the grounds or procedure for dismissal. In *R v East Berkshire Health Authority, ex parte Walsh* [1984] 3 All E. R. 425 (at p. 430) Sir John Donaldson MR described such a limitation as "... special statutory restrictions on dismissal or other underpinning of his employment."
4. Public law may apply to some, but not all, of the employees of a statutory body. This depends on the terms of the statute.

To ascertain whether public law applies, we must look at the Act to see whether it provides any such restrictions or underpinning.

Conclusions

The Board is not, as the Solicitor General argued, entirely separate from government. Its members are appointed by Privy Council (section 4) and its chairman is appointed by Cabinet (section 5). It is controlled, or capable of being controlled, by government.

The power to employ is contained in section 19, which states:

"19. The Board may by resolution from time to time appoint fit persons to

be Secretary, Treasurer, Accountants, Engineers, Manager, and all such other officers and servants as it thinks necessary to assist in the execution of the provisions of this Act . . ."

A power to employ implies a corresponding power to dismiss, and by implication the same procedure applies to dismissal. It follows that when the Board dismisses an employee it is exercising a power given to it by statute in the manner dictated by statute.

100 In a pure master and servant relationship the power to dismiss is normally exercised by an individual. The master may exercise the power himself or delegate it to a senior employee. So with many statutory bodies. For example, under clause 1(b) of the Schedule to the Commodities Board Act the Director may employ or dismiss any employee except for "... the most senior officers ..." who are thereby given a special status above more junior employees. Webster J applied this distinction in *Leone Palu v Commodities Board* (Civil Case No. 55/88) - to which I was referred - when he held that a store attendant class II was not entitled to public law remedies.

110 Section 19 of the Act requires a resolution of the Board to appoint an employee at any level, not only the specified senior officers but also "... all such other officers and servants as it thinks necessary ..." By implication the same authority is required to dismiss any employee. The decision cannot be made by one man; it must be made by a majority of the members of the Board present and voting at a duly constituted meeting (section 7). This establishes an unusual restriction on dismissal over and above that in a normal master and servant relationship. It is a statutory restriction of the nature referred to by Sir John Donaldson in *Walsh*.

120 I hold that section 19 provides a special statutory protection to all employees of the Board, and that public law therefore applies to all such employees, including the Plaintiff.

I was referred by Counsel to sections 26 and 27 of the Act. Section 26 gives the Board the same "... power, authority, rights, duties and obligations ..." as the Electricity Board under the Electric Power Board Act. Reference to that Act does not help. The power of employment is in the same terms as in this Act, and I find nothing else of any relevance. Section 27 gives Privy Council power to impose further duties and powers on the Board, but no relevant orders have been made.

130 I base my decision solely on section 19 of the Act, and make a declaration that public law applies to the contract of employment between the Plaintiff and the Defendant.