FRANCIS PITUVAKA –v- ATTORNEY-GENERAL, SOLOMON STAR COMPANY LIMITED AND PRESLEY WATTS

HIGH COURT OF SOLOMON ISLANDS
(F.O. KABUI, J.)

Civil Case No. 113 of 2002

Date of Hearing: 11th July 2002
Date of Judgment: 16th July 2002

Mr M. Ipo for the Applicant
Mr S. Manetoali for the 1st Respondent
Mr A. Radclyffe for the 2nd Respondent
Mr P. Watts in person

JUDGMENT

(Kabui, J.): This is an application by Notice of Motion filed on 10th May 2002 by the Applicant for an order of certiorari to remove into this Court and quash the decision of the Trade Disputes Panel "**the Panel**" made on 25th October 2001. The ground for this application is that the Panel made its decision in breach of the rule of natural justice. That is to say, the Panel denied the Applicant the opportunity to be heard before it made its decision.

The Facts

The Applicant was a former employee of the 2nd Respondent up until 2000 when he was terminated from his employment. He then claimed unfair dismissal and thereby commenced his action against his employer on that basis. Form TDP 1 was filled in and he signed it on 9th February 2001. By letter dated 17th September 2001, the acting Secretary to the Panel informed the Solicitor for the 2nd Respondent that the hearing of the Applicant's case was to take place on 25th October 2001 at 10:00 am on that date. The letter was copied to the Solicitor for the Applicant, addressed to Watts & Associates, P. O. Box R 215, Honiara. The Solicitor for the 2nd Respondent attended the hearing on 25th October 2001 at 10:00 am. The Applicant nor his Solicitor did. The Solicitor for the 2nd Respondent told the Panel that he had met Mr. Watts, the Solicitor for the Applicant, that morning who told him that he was no longer acting for the Applicant. The Panel then struck out the Applicant's case on the request of the Solicitor for the 2nd Respondent in the absence of the Applicant. The Applicant was not aware of the date and time of hearing.

Is there a case for an order of certiorari?

First, the law. **..."The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice. It has been**

stated to reflect God's treatment of Adam, before the expulsion from Eden; and indeed to be an aspect of natural law in the sense of the laws of God and man. It embodies a principle which would be universally perceived as inherent in the concept of fair treatment"... (See Judicial Review by Michael Supperstone Q C and James Goudie Q C, 1992 at155). This principle has developed over the years in terms of its application to changing times and circumstances to become a principle of fairness. That is, there is a duty to be fair on the part of the body that makes decisions, which affect the rights of persons who come to it for justice. Failure to apply this principle will, in appropriate circumstances, result in the decision made being quashed by the High Court. There are examples of this in this jurisdiction. I need not cite them. The principle is not always smooth in its application. It can be bent to suit the justice of the case. One such instance is that of Al-Mehdawi v. Secretary of State for the Home Department [1989] 3 A. E. R. 843. The facts of that case were these. The respondent was an Iraqi student who overstayed in England. He instructed a firm of Solicitors to appeal against a deportation notice served on him by the Secretary of State who had decided to deport im. The hearing date having been fixed, his Solicitors wrote to notify him of that date but they made a mistake and sent the letter to his previous address and so the letter never reached him. The adjudicator dismissed the appeal on the ground that neither the appellant nor his Solicitors had appeared. When his Solicitors received the notice of the dismissal of the appeal, they again made a mistake by misdirecting the relevant information so that by the time the information reached him the appeal time for appealing against the decision of the adjudicator had lapsed. The respondent applied for certiorari and was granted the application. The Court of Appeal affirmed that decision. The Secretary of State appealed to the House of Lords. In allowing the appeal, Lord Bridge of Harwich with whom the other four Law Lords agreed, at page 849, said, **..."It has traditionally been thought that a tribunal which denies natural justice to one of the parties before it deprives itself of jurisdiction. Whether this view is correct or not, a breach of the rules of natural justice is certainly a sufficiently grave matter to entitle the party who complains of it to a remedy ex debito justitiae. But there are many familiar situations where one party to litigation will effectively lose the opportunity to have his case heard through the failure of his own legal advisers, but will be left with no remedy at all except against those legal advisers. I need only instance judgments signed in default, actions dismissed for want of a prosecution and claims which are not made within a fixed time limit which the tribunal has no power to extend. In each of these situations a litigant who wishes his case to be heard and who has fully instructed his solicitor to take the necessary steps may never in fact be heard because of his solicitor's neglect and through no fault of his own. But in any of these cases it would surely be fanciful to say that there had been a breach of the audit alteram partem rule. Again, take the case of a country court action where a litigant fails to appear at the hearing because his solicitor has neglected to inform him of the date and consequently judgment is given against him. He can at best invite the court in its discretion to set aside the judgment and it is likely to do so only on the terms that he should pay the costs thrown away. Yet, if it can be said that he has been denied natural justice,**

he ought in principle to be able to apply for certiorari to quash the judgment, which, if he is personally blameless, should be granted as a matter of course.

These considerations lead me to the conclusion that a party to a dispute who has lost the opportunity to have his case heard through the default of his own advisers to whom he has entrusted the conduct of the dispute on his behalf cannot complain that he has been the victim of a procedural impropriety or that natural justice has been denied to him, at all events when the subject matter of the dispute raises issues of private law between citizens. Is there any principle which can be invoked to lead to a different conclusion where the issue is one of public law and where the decision taken is of an administrative character rather than the resolution of a lis inter parties? I cannot discover any such principle and none has been suggested in the course of argument"... His Lordship again continued at pages 851-52. **..."Here again the argument proceeds from the assumed premise that where a party has been deprived of a hearing through his own solicitor's negligence there has been a breach of natural justice and a flaw in the decision-making process. I have already sought to explain why I think this premise cannot be sustained. But I would add that if once unfairness suffered by one party to a dispute in consequence of some failure by his own advisers in relation to the conduct of the relevant proceedings was admitted as a ground on which the High Court in the exercise of its supervisory jurisdiction over inferior tribunals could quash the relevant decision, I can discern no principle which could be invoked to distinguish between a 'fundamental unfairness', which would justify the exercise of the jurisdiction, and a less than fundamental unfairness, which would not. Indeed, counsel for the respondent was constrained to rest on the proposition that, in the last analysis, it was all a matter of discretion and the court could be trusted only to exercise its discretion in extreme cases where justice demanded a remedy. I am of the opinion that the decision of the Court of Appeal can only be supported at the cost of opening such a wide door as would indeed seriously undermine the principle of finality in decision-making"...** The above quotes do speak for themselves clearly in this regard. I need not summarize them. It is the present law in England. Now, the facts. Clearly, the notice of hearing was posted to the wrong postal address. The notice would not, in any case, have reached the Applicant nor his Solicitor because of the wrong address. However, the reason for the Applicant's Solicitor being unwilling to attend the hearing was the alleged non- payment of professional fees. This fact was stated in the affidavit filed on 28th June 2002 by the 2nd Respondent's Solicitor. In fact, the Applicant's Solicitor was present outside the Panel's hearing room on the hearing date when he told the 2nd Respondent's Solicitor that he was not going to attend the hearing that morning. So the Applicant's Solicitor did know about the date of the hearing but apparently not the Applicant. Clearly, the Panel cannot be blamed because no one was before them to explain the absence of the Applicant. Apparently, the Applicant has not so far said why he was not able to check with his Solicitor prior to the hearing date as a matter of personal concern for his case. The other complainant, Mr. Natei, for whom the same Solicitor was also acting, did attend very briefly before the hearing commenced. It might have

been that the Applicant was out of Honiara at the relevant time. However, the fact was that he was not at the Panel hearing nor his Solicitor. The fault lie with his Solicitor like in the Al-Mehdawi case cited above although his absence was for a different reason in this case. The House of Lords' decision though not binding on this Court under paragraph 4(1) of Schedule 3 to the Constitution is obviously of persuasive authority. I am therefore, on the authority of the Al-Mehdawi case, persuaded to adopt and apply it here as a precedent. The result therefore is that the Applicant is not entitled to an order of certiorari in this case. The application is refused. I make no order as to costs.

Hon. Justice Frank O.Kabui
Judge