

SPRAGUE v. ATOASUPREME COURT. 1964. 10, April; 5, May. MOLINEAUX C.J.

Public Service - inquiry into misconduct of public servant, appeal against dismissal.

This was an appeal against the decision of the Assistant Public Service Commissioner dismissing the appellant from the Western Samoa Public Service, following an inquiry into the appellant's alleged misconduct, and on the grounds that the decision was against the weight of evidence and that the penalty imposed was unreasonable and out of proportion to the misconduct. The inquiry was made pursuant to section 27 of the Samoa Amendment Act 1949 and was in respect of several charges of a similar nature alleging that the appellant, as an officer of the Public Service, had been present in the Apia Club during working hours and had thereby disobeyed the instructions of the Public Service Commission as set out in a Circular Memorandum.

HELD: That having regard to the language of ^{the} Circular Memorandum and the nature and circumstances of the misconduct, dismissal was too drastic a step to take in the first instance; and that a warning or some opportunity to reform should have been given. Furthermore, the misconduct complained of was dealt with not only by the Circular Memorandum but also by the Public Service Regulations 1953; the latter providing only a monetary penalty.

Appeal allowed, in part. Dismissal cancelled; other penalties imposed.

APPEAL under section 28 Samoa Amendment Act 1949 to the Chief Justice as Appeal Authority.

Metcalf, for appellant.
Frapwell, Attorney-General, for respondent.

Cur. adv. vult.

MOLINEAUX C.J.: On the 10th March 1964 the Assistant Public Service Commissioner acting under powers delegated to him pursuant to section 27 of the Samoa Amendment Act 1949, conducted an inquiry into allegations of misconduct on the part of the Government Printer, Francis Walker Sprague, an officer of the Western Samoa Public Service in which the following six charges were preferred:

- (1) That on the 22nd November 1963 Mr Sprague's presence was noted in the Apia Club during working hours.
- (2) That on the 27th November 1963 his presence was noted in the Apia Club during working hours.
- (3) That on the 2nd December 1963 he was found drinking intoxicating beverage in the Apia Club during working hours.
- (4) That on the 3rd December 1963 his presence was noted in the Apia Club during working hours.
- (5) That on the 10th February 1964 he was in the Apia Club during working hours.
- (6) That he had disobeyed instruction of the Public Service

Commission Circular Memorandum P.S.C. 1963/28 of the
21st October 1963.

On the 24th March 1964 the Assistant Public Service Commissioner delivered his decision to the effect that Mr Sprague was not guilty of the first charge but that he was guilty of the remaining five charges and he was dismissed from the Western Samoa Public Service with effect from the 24th March 1964. Against this decision Mr Sprague has appealed, pursuant to the statutory remedy available to him under section 28 of the Samoa Amendment Act 1949, upon the grounds that the decision was against the weight of evidence and that the penalty imposed was unreasonable and out of proportion to the misconduct alleged. At the request of Counsel the appeal took the form of a rehearing and the evidence taken at the inquiry was presented again. The wording of the charges was rearranged to constitute them as separate breaches of the Circular and the sixth charge heard at the inquiry dropped. Five allegations of disobedience similar in nature were presented of which the first may be taken as a sample, being to the effect that the appellant had disobeyed instruction of the Public Service Commission (Circ. Memo. P.S.C. 1963/28 of 21st October 1963) in that on the 22nd November 1963 his presence had been noted in the Apia Club during working hours. It is not proposed to traverse the evidence relating to the allegations in detail as I am in substantial agreement with the Assistant Public Service Commissioner as to his findings of fact. It was established that the appellant on four of the dates mentioned namely, on the 27th November, the 2nd December, the 3rd December and the 10th February was in the Apia Club during working hours and that on the 3rd December he had been drinking intoxicating liquor there. Whether or not his presence there on these dates constituted wilful disobedience of the Circular, was perhaps not as fully canvassed as it might have been and is a question that depends partly upon the construction of the language of the Circular and partly upon the circumstances surrounding the appellant's presence in the Apia Club on the days mentioned. The wording of the Circular was as follows:-

CIRCULAR MEMORANDUM P.S.C. 1963/28 FOR: 21 October, 1963

PERMANENT HEADS:

UNAUTHORISED ABSENCE FROM DUTY

The presence of Public Servants in the R.S.A., Apia, and other clubs during working hours, has been reported upon unfavourably by members of the public. These reports indicate the drinking of intoxicating liquor, or the playing of games such as billiards or pool during normal duty hours.

The Commission would appreciate your advising all staff that such conduct will not be tolerated and any officer found guilty in this matter will be subjected to disciplinary action by the Commission.

SECRETARY
PUBLIC SERVICE COMMISSION

Addressed to Permanent Heads the Circular is in the form of a request to advise staff of the attitude of the Commission towards the type of conduct referred to and of the consequences of indulgence. It does not differentiate between the presence of public servants in clubs during working hours who may be there on leave, on duty, or whose presence is otherwise authorised on the one hand, and the presence of those public servants who have no authority to be there at all on the other. It simply imposes a blanket restriction against the presence of public servants in clubs during working hours. Nor does it purport to extend to hotels, billiard saloons, cinemas and other places of entertainment or indeed to any other place but

is limited to clubs of which two are mentioned by name. I have accordingly experienced some difficulty in ascertaining the full intention and scope of the Circular. Looking at it broadly, it seems that what is really aimed at, as set out in its heading, is the stopping of the practice of unauthorised absence from duty and to that end the place to which recourse is had is perhaps not as material as the fact of absence from the place of employment with the consequent loss of efficiency to Government, both in morale and in output. The appellant infringed against the provisions of the Circular on each of the four occasions that he was in the Apia Club. Had he been able to establish that he was on leave or otherwise authorised to be on the premises no doubt that would have been the end of the matter as far as the Commission was concerned. He was unable to do this, but he did however make a submission which although a little curious is nevertheless entitled to consideration - namely that he was justified in being in the Apia Club or anywhere else for that matter, for short periods during working hours as some kind of set-off or recompense for the hours of overtime alleged to have been worked by him and for which he could not, because of his salary scale, receive payment. He felt justified, now and then, in taking time off during working hours to make up, in part, for the hours of overtime worked. It was not challenged that he had in fact worked overtime for considerable periods largely due to the periodic and irregular nature of the demand for work from the Printing Office. He himself stated that he had adopted this practice shortly after his appointment as Government Printer some two years previously and that his Permanent Head had known all about it. It did not affect turnover, in fact production was up. He admits having read the Circular but that for the reasons given he felt it did not apply to him to the same extent as to the general body of the Public Service. This naive and somewhat unilateral conception of his position as a public servant cannot in my view possibly be sustained in the absence of specific authority either from his Permanent Head or from the Commission, but it does perhaps ameliorate to some extent the element of wilfulness in the disobedience alleged as tending to show that what happened here may not have been so much an example of a servant deliberately acting in defiance of the written instructions of his master as of a person having fallen into a bad habit being under the erroneous impression that because it had gone unchecked for a long time that there was nothing wrong in it and perhaps that he was even entitled to continue in it. In my opinion the practice was irregular and one that could have only been justified by the expressly given permission of the Commission itself or his Permanent Head. No express authority of that kind had been obtained and subject to what I have said about the sustained effect of such a practice as lessening the element of wilfulness in his failure to comply with the Circular I am in agreement with the finding that the conduct of the appellant was such as to call for the imposition of some form of penalty. To that extent the first limb of the appeal fails.

The penalty, however, imposed by the Assistant Public Service Commissioner is in my view out of all proportion to the irregularity of the conduct disclosed. I formed the impression that the practice adopted by the appellant if not expressly condoned by his Permanent Head at least carried the tacit acquiescence of that officer. Had his conduct been considered unsatisfactory the Regulations require that he be informed of the fact and given an opportunity to mend his ways: "Whenever it is found that the conduct of any employee is unsatisfactory he shall be notified in writing of the fact by his controlling officer and if his conduct thereafter continues to be or is again unsatisfactory a report shall be made to the Permanent Head who shall notify the Commissioner". (Western Samoan Public Service Regulation 1953 Reg: 36). There was no evidence that this was done and prior to the inquiry there was no indication that the practice adopted in regard to overtime had met with official disapproval. Dismissal for a practice that was apparently acquiesced in by his Permanent Head, the officer responsible for discipline within his Department, is too drastic a step to take in the first instance - there should be some opportunity to reform, some warning given. Had he returned to his place of employment heavily intoxicated or had there been some objectionable behaviour of a serious nature

inconsistent with the responsibilities of his position the Commission may well have had no alternative, in the public interest, but to dismiss him. Intrinsically however his misconduct consisted, simpliciter, in absenting himself from his place of employment during working hours, a form of conduct that is dealt with not only by the Circular but also it is to be noted by the 1953 Regulations. Under the heading "absence from place of employment" Regulation 13 provides that "no employee shall be allowed to leave his place of employment during his prescribed hours of attendance, except on official business or by express permission of his Permanent Head or his controlling officer". There being no specific penalty for breach the general penalty provided in Regulation 92 would apply, namely a fine not exceeding £5. It is at once apparent that the penalty imposed by the Assistant Public Service Commissioner for breach of the Circular is at variance and widely so with the penalty fixed by the Legislature for breach of the Regulation. It is true that he is charged with breach of the Circular and not of the Regulation, but they both strike at the same thing, namely - unauthorised absence from duty or place of employment. Had the Circular been intended to create a new offence whereby unauthorised presence in the Clubs would be punishable by dismissal it does not say so but simply that disciplinary action is to be taken. If the intention had been to create an offence punishable by dismissal the Circular would appear to invest Clubs with sinister qualities not possessed by hotels, billiard saloons, cinemas or other places of entertainment, since not being caught by the Circular unauthorised presence at such places would have to be dealt with as breaches of the Regulation. There was evidence that consequent upon his presence in the Apia Club the appellant did not keep appointments with a Mr Pritchard on three of the dates mentioned. No separate charges were brought in respect of this aspect of his conduct and it seems to have been added as a makeweight in support of the general finding, but is not sufficient in my view to bridge the gap between the penalty fixed by the Legislature for breach of the Regulation and the penalty imposed by the Commissioner for breach of the Circular.

Section 28 of the Samoa Amendment Act 1949 empowers the Appeal Authority to confirm, vary or cancel any penalty imposed by the Commissioner following an inquiry held pursuant to the provisions of section 27. Acting under these powers the penalty of dismissal will be set aside and a penalty more in conformity with that fixed by the Legislature for the type of misconduct disclosed substituted. The penalty of dismissal is consequently cancelled and the following penalties imposed:

- (a) In respect of each of the four occasions that the appellant was found to be in the Apia Club during working hours he will be fined £3.
- (b) In respect of his failure to keep the appointments with Mr Pritchard he will be severely reprimanded.

As the Appeal is only partially successful there will be no order as to costs.