

COMMISSIONER OF LABOUR v ELECTRIC POWER CORPORATION

Supreme Court Apia
12, 22 July 1977
Nicholson CJ

ADMINISTRATIVE LAW (Statutory corporations) - Express terms required to constitute a statutory corporation a servant of the State:

Tamlin v Hannaford [1949] 2 All ER 327, Smith and Smith, Ltd v Smith, State Advances Corporation et al [1939] NZLR 589, Christchurch City Corporation v Canterbury Education Board [1934] NZLR s. 22, Launceston Corporation v The Hydro-Electric Commission (1959) 100 CLR 654.

No such express terms appearing in the Electric Power Corporation Act 1972 defendant Corporation is not in "the service in any capacity of the Independent State of Western Samoa": Act s 3(4) quoted in support; also s 20 which expressly grants special immunities to the Corporation in the area of tax and customs duty. Accordingly, the Corporation is subject to the provisions of the Labour and Employment Act 1972 as an employer.

APPEAL by way of case stated against convictions for failure to pay overtime rates under the Labour and Employment Act 1972.
Appeal dismissed.

Enari for appellant.
Sapolu for respondent.

NICHOLSON CJ. This is an appeal by way of case stated against four convictions entered against the appellant in the Magistrates' Court at Apia for failure to pay overtime rates under Sections 24(2), 29(1)(2) and 41(1)(3) of the Labour and Employment Act 1972.

The short point for decision is whether or not the Electric Power Corporation, a statutory corporation brought into existence by the Electric Power Corporation Act 1972, is subject to the provisions of the Labour and Employment Act 1972 as an employer. The parties to the prosecutions presented an agreed statement of the facts to the learned Magistrate so that there is no other issue before me.

Mr Enari for the appellant has argued that by virtue of Section 3(1) of the Labour and Employment Act 1972 the Act does not apply to the appellant. This Section reads:-

The provisions of this Act shall not apply to "service of Western Samoa", as that expression is defined in Article 111 of the Constitution, or to service rendered to a matai under the aiga system, or to any service or class of service which may be excepted therefrom by order of the Minister published in the Western Samoa Gazette and the Savali.

Mr Enari seeks to bring the appellant within the classification of "Service of Western Samoa" only. The charges here involved failure to pay overtime rates of pay to a nightwatchman, and the appellant argues that because it is a corporation in effect controlled by the Government of Western Samoa it is in the service of Western Samoa, and the

provisions of the Act governing the duties of employers do not therefore apply to it. Mr Enari developed his argument by reference to the terms of Article 111 of the Constitution which provides:-

"Service of Western Samoa" means service in any capacity of Western Samoa; and includes service in any of the capacities named in sub-clauses (a) to (k) inclusive of Article 83, but not service in respect of the Western Samoa Trust Estates Corporation.

Article 83 names certain high officials of the Executive, the Legislature, the Judiciary, and police and defence forces. Mr Enari suggests that by implication, the appellant must be deemed to be in the service of Western Samoa since Article 111 does not expressly exclude the appellant as it has done with "WSTEC", a similar statutory corporation under Government control. Again, he refers to the definition of "Western Samoa" as the "Independent State of Western Samoa" and to the definition of "the State" in Article 3 of the Constitution as including "all local and other authorities established under any law."

Finally, Mr Enari refers to the provisions of the statute of which the appellant Corporation is the creature to demonstrate the high degree of Government control implicit in the organisation of the appellant, to support his contention that the appellant is an arm of Government. He submits, too, that traditionally electric power reticulation is the business of government and that authorities cited dealing with such organs as the British Transport Commission are not relevant parallels. He suggests that insofar as any legislative practice can be spelled out from the Western Samoan legislation on the topic, the practice in England of expressly providing that the corporation should act on behalf of the state does not apply here. Rather, the exclusion of "WSTEC" under Article 111 suggests a practice of expressly providing when a corporation shall not so act.

Mr Sapolu for the respondent cited Tamlin v. Hannaford [1949] 2 All E.R. 327 relating to the British Transport Commission as authority for the proposition that there should be express provision in the empowering legislation to render a corporation an organ of government. He pointed out the characteristics of the appellant Corporation, which suggests its autonomy, rather than its being in the position of a government department. He suggests the appellant's argument based upon the position of "WSTEC" is superficial, there having been no other statutory corporation but "WSTEC" in existence at the date the Constitution took effect.

The agreed summary of facts in this case shows that the night-watchman in question was formerly an employee of the electric power supply division of the Public Works Department, and that with the creation of the appellant Corporation he became an employee of the appellant. Historically, then, the business of electric power reticulation was an undertaking of Government, but by Section 9 of the Electric Power Corporation Act 1972 the appellant acquired all Government assets pertaining to this activity. The appellant by virtue of Section 3(2) has perpetual succession, a common seal, capability of acquiring, holding and disposing of real and personal property, of suing and being sued, and of doing all such other acts and things as bodies corporate may lawfully do. Its Chairman of Directors is the Minister of Works and the remaining directors include the Financial Secretary to Government, the Attorney-General, the Corporation Manager, and two persons representing commercial and consumer interests appointed by the Head of State acting on the advice of Cabinet. The Manager is appointed by the Head of State on Cabinet advice. The Corporation has the power to carry out the functions of an electric power supply business, including employment of staff, and the conditions of staff employment are under the Corporation's jurisdiction. The Corporation by virtue of Section 20 is not liable to income tax, customs duty, or other taxation. Profits are transferred to Treasury for the benefit of the public revenue. Audited accounts must be laid before the Legislature annually.

The general question of whether statutory bodies have the immunities granted by common law and statute to the Crown has been considered in

New Zealand in a line of cases culminating in Smith and Smith, Ltd. v. Smith, State Advances Corporation And Others [1939] N.Z.L.R. 589, where Fair, J. of the New Zealand Supreme Court held that the State Advances Corporation of New Zealand was not entitled to such immunities. He considered the terms of Section 8 of the State Advances Corporation Act 1936 which provide for greatly similar characteristics to the ones contained in Section 3(2) of the Electric Power Corporation Act 1972 of Western Samoa. The learned Judge quoted with approval the observation of Ostler, J. in Christchurch City Corporation v. Canterbury Education Board [1934] N.Z.L.R. s. 22 at s. 24 dealing with a similar question relating to an Education Board as follows:-

In my opinion, if the Legislature had intended that Education Boards should possess the prerogatives and exemptions of the Crown it would have used language very different from the words used in s. 24. I agree with the judgment of Mr. Justice Blair in McCallum v. Official Assignee of Sagar and Lusty(1) that the effect of s. 24 is to constitute an Education Board a statutory corporate body separate and distinct from the Crown, so that it cannot claim any of the privileges of the Crown. I agree also with the reasons given for that decision..

(1) [1928] N.Z.L.R. 292.

And then he went on to say that, "Section 24 of the Education Act, 1914, corresponds to s. 8 of this Act, but does not contain the words 'capable of suing and being sued.' Those words indicate even more clearly that the Corporation is not entitled to the privileges of the Crown."

A similar view was expressed by the English Court of Appeal in Tamlin's case, supra, at pp. 329, 330 where Denning, L.J. in delivering the Court's judgment observed that, "When Parliament intends that a new corporation should act on behalf of the Crown, it, as a rule, says so expressly, In the absence of any such provision, the proper inference, in the case, at any rate, of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department."

In Launceston Corporation v. The Hydro-Electric Commission (1959) 100 C.L.R. 654 the Australian High Court took the view that the Commission was a separate statutory corporation and was not a servant of the Crown in spite of an express provision in its statute that it may do certain things for and on behalf of the State.

I take the view that these authorities present a clear picture, within the Commonwealth at least, of the Courts requiring express terms to render a statutory corporation an arm of government. Now the test in Western Samoa is more precisely whether the Corporation is in "the service in any capacity of the Independent State of Western Samoa", but the broad principle spelled out by the authorities should in my opinion have application here. I respectfully adopt those authorities in concluding that in the absence of express words in its empowering statute the Corporation is not in the "service of Western Samoa". Indeed the only express words on the subject which appear in Section 3(4) of the Act strongly suggest that the Corporation is not in the service of the State. It provides:-

No person, by reason only of being a director or employee of the Corporation, shall be deemed to be employed in the "Public Service" or in the "Service of Western Samoa", within the meaning of those terms as defined in Article 83 and Article 111, respectively, of the Constitution of the Independent State of Western Samoa.

Mr Enari argued that this Section did not affect the situation of the Corporation, which is different from that of its directors and employees. I agree with the learned Magistrate's view of this interpretation as artificial. Section 3(4) presents the implication that the intention of the Legislature is that the Electric Power Corporation as a separate statutory entity does not have any special governmental immunity as an employer from the provisions of the Labour and Employment Act 1972. I think, moreover, that it is significant that where the

Legislature intended the appellant to have special immunity, namely, in the areas of tax and customs duty, it expressly provided for it in Section 20 of the empowering Act. For the reasons given, the question posed upon the case is answered in the affirmative. The appellant will pay costs of \$50.00.