RECENT DEVELOPMENTS IN THE LAW

A review of significant judicial decisions and legislation contributed by students of the Faculty of Law, University of Otago.

ADMINISTRATIVE LAW

Failure to comply with procedural requirements

Two recent New Zealand decisions have partially clarified the issue of what degree of compliance is required for an obligatory provision which may be read as merely directory. In *Godber* v. *Wellington City* [1971] N.Z.L.R. 184 the Supreme Court had to decide whether Reg.32 of the Town and Country Planning Regulations was mandatory or directory. Roper J. considered that the provision dealt more with formalities than matters which could be said to be essential to the securing of the object of the Legislature, and so could be read as directory. However, it was still required that the provision should be substantially complied with and not totally ignored.

A similar approach was adopted by the New Zealand Court of Appeal in *Simpson* v. *Police* [1971] N.Z.L.R. 393. The case concerned the use of the breathalyser to determine blood alcohol concentration. The Court held that the words "as far as possible" were a clear indication that the requirement that the test be done in one breath in 10-20 seconds should be read as directory. In this instance the breath possibly lasted 30 seconds, but this was still held to constitute substantial compliance. It would appear that the point at which the Court would have held the compliance insufficient would be where the result could be shown to be affected by the length of the breath.

Thus in New Zealand it appears that directory provisions need to be substantially complied with. However, it is respectfully submitted that the ratio of these two cases should be restricted to cases where a provision is held directory because it concerns a triviality or formality; and not applied to cases where a provision is held to be directory because of the public inconvenience that would be caused by requiring strict compliance. Provisions in this category may possibly be ignored completely on the basis of the Privy Council decision in *Montreal Street Railway* v. *Normandin* [1917] A.C. 170.

Review of actions of local bodies for unreasonableness

In *Gisborne City* v. *J. E. Openshaw* [1971] N.Z.L.R. 538 the defendant company was charged with a breach of a city bylaw which stated:

> No person shall
> (iv) leave standing or lying upon any public place . . . any packing case . . . so as to cause an obstruction.

The Magistrate held the bylaw unreasonable and dismissed the charge.

In the Supreme Court Beattie J. confirmed the benevolent test for the construction of bylaws and held that a bylaw should not be tested by taking possible but extreme cases. Thus the argument that the bylaw was unreasonable because it could be interpreted so as to prohibit a shopowner from leaving his goods on the street for even a matter of seconds was not accepted by the court.

Discretionary nature of the writs

In *Glynn* v. *Keele University* [1971] 1 W.L.R. 487 a group of naked undergraduates was seen in the precincts of the university. One of these was identified as Glynn and the Vice Chancellor fined him £10 and excluded him from residence at the university for the remainder of the academic year. Glynn, having been given no opportunity to be heard, pleaded that the Vice Chancellor had failed to comply with the rules of natural justice. This argument was accepted by the court. However, Pennycuick V.C. maintained that even if a fair procedure had been adopted the decision of the Vice Chancellor would have been no different and he exercised his discretion to refuse to grant an injunction.

This decision might seem to run contrary to two Privy Council pronouncements. In *Annamunthodo* v. *Oilfield Workers' Union* [1961] A.C. 945 it was held that a man need not show he was in fact prejudiced by a failure to comply with the rules of natural justice. The mere risk of prejudice is sufficient. Also in *Kanda* v. *Government of the Federation of Malaya* [1962] A.C. 322 Lord Denning remarked: "The court will not go into the likelihood of prejudice. The risk of it is enough."

One further point arising from *Glynn's* case is whether the court will decline jurisdiction in a case concerning a university because of the availability of a Visitor. The question of the Visitor is only relevant if the university raises it and in this instance the university chose not to. However, it could be argued that if in New Zealand a case similar to Glynn's arose and the availability of the Visitor was raised, the court might *not* decline jurisdiction. The failure to comply with the rules of natural justice will render a decision of nullity (see *Anisminic* v. *Foreign Compensation Commission* [1969] 2 A.C. 147) and necessitate a hearing of the matter *de novo*. But a Visitor has no power to declare a matter a nullity; his jurisdiction is in the nature of an appeal.

Natural Justice—dismissal from office

Forbes v. *Johnston* [1971] N.Z.L.R. 1117 concerned the disciplining of an engine driver employed by the Railways Department. The plaintiff pleaded that there had been a denial of natural justice. Woodhouse J. followed Lord Reid in *Ridge* v. *Baldwin* [1964] A.C. 40 where three types of dismissal from office were distinguished—(a) dismissal of a servant by his master (b) dismissal from an office during pleasure (c) dismissal from an office where there must be something against a man to warrant his dismissal. For class (c) Lord Reid held that the rules of natural justice would normally be implied. However, Woodhouse J. considered that this case fell into class (a). Thus the rules of natural justice could not be said to automatically apply because of the type of dismissal.

Woodhouse J. went on to consider the case of *Durayappah* v. *Fernando* [1967] 2 A.C. 337. He looked at the considerations laid down there in order to see if the rules of natural justice might be applied in spite of the fact that the dismissal was of type (a). After looking at the status enjoyed, the circumstances in which the person exercising control could intervene, and the sanction imposed, it was decided that the rules of natural justice were not applicable.

Finally the approach to natural justice adopted by Lord Morris in *Wiseman* v. *Borneman* [1969] 3 All E.R. 275 was considered. There Lord Morris said:

> The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said is only, "fair play in action".

Applying this approach here Woodhouse J. could find no ground for complaint by the plaintiff.

Natural Justice—Bias

In *Turner* v. *Allison* [1971] N.Z.L.R. 833 the Court of Appeal held that the fact that a judicial officer had had a preconceived opinion would not constitute bias. In order to quash a decision it would have to be shown that the judicial officer adhered to this opinion to such an extent that he shut his mind to the evidence and could not be swayed by submissions.

Turner J. adopted the test for bias laid down in *Ex parte Angliss Group* [1969] A.L.R. 504,—"A suspicion of bias reasonably—and not fancifully—entertained by responsible minds."

Natural Justice—application where procedural code laid down.

The rules of natural justice are procedural rules which an official exercising a judicial function must adhere to. However, where sufficient procedure is laid down in the authorising instrument, the courts will not imply these common law rules. In *Furnell* v. *Whangarei High Schools Board* [1971] N.Z.L.R. 782 the Court of Appeal held that the procedure laid down in the Secondary and Technical Teachers Disciplinary Regulations 1969 provided an exhaustive code upon which it was not entitled to engraft the rules of natural justice.

Voluntary Associations and the concept of fairness

Until last year it might have been said that, provided a domestic body acted honestly and in good faith when dealing with a purely administrative matter, its decision could not be reviewed. However, in *Breen* v. *Amalgamated Engineering Union* [1971] 2 W.L.R. 742 the concept of fairness appears to have been extended to administrative decisions of a domestic body. Thus a domestic body when dealing with an administrative matter must adopt a procedure which is fair having regard to all the circumstances.

Lord Denning also discussed the question of remedy. He considered that a declaration would be the most appropriate since the prerogative writs do not apply to domestic bodies. As to the granting of damages he found himself somewhat limited because of the fact that no action in tort may be sustained against a trade union. This being the case, Lord Denning was prepared to grant damages on the basis of an implied contract between Breen and the Union, even though no financial loss could be shown. This approach, I would respectfully submit, is at present without solid judicial support.

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