THE POWER OF THE CROWN TO DISMISS PURLIC SERVANTS

In an article [1] in this Review four years ago Mr Beeby surmised that the cynical public servant would be surprised to discover that the law relating to his employment was in doubt. He might be even more surprised to learn that despite the consolidation of the public service legislation in the State Services Act 1962 this law is still uncertain. In particular it is not clear whether the Crown still has the right to dismiss public servants at pleasure. It is this question which will be considered here.

At the end of a long session of Parliament in 1962, the State Services Bill was passed to repeal and consolidate most of the many and complicated enactments relating to the public service. With the attention of Members focussed on the political "hot potato", the ruling wage rate surveys, it was unfortunate that such provisions as s. 40 – the general rule relating to the dismissal of public servants – were left without comment. It might have been hoped that the Legislature would have taken the opportunity to end the legal arguments on this subject.

The common law rule was expressed by the Privy Council in *Shenton* v. *Smith* [1895] A.C. 229, 234-235, on appeal from the Supreme Court of Western Australia, as:

> ... unless in special cases where it is otherwise provided, servants of the crown hold their offices during the pleasure of the Crown ....

It has not been finally determined whether a contractual agreement to employ a public servant for a fixed term can exclude the Crown's Common Law right to dismiss at pleasure. The advice of the Privy Council in *Reilly* v. *The King* [1934] A.C. 176 would seem to support the contention that such a contract is effective. [2]

1. "The Relationship of the Crown and its Servants" (1960) 3 V.U.W.L.R. 1. See also Professor J.F. Northey, "The Dismissibility of Crown Servants" (1961) 37 N.Z.L.J.6.

2. On the other hand the High Court in England in three recent cases has accepted that a contractual term would be ineffective: *Denning* v. *Secretary of State for India* (1920) 37 T.L.R. 138; *Terrell* v. *Secretary of State for Colonies* [1953] 2 Q.B. 482 (where Lord Goddard L.C.J. said the rule that the Crown could not waive its right to dismiss at pleasure was "firmly established by the decisions" (ibid., 497)); *Riordan* v. *War Office* [1959] 3 All E.R. 552; see also *Rodwell* v. *Thomas* [1944] K.B. 596, *Dunn* v. *The Queen* [1896] 1 Q.B. 116, C.A., is often cited as deciding that a contract is ineffective (e.g. by Lord Goddard in *Terrell's* case) but this can be doubted: see Williams, *Crown Proceedings* (1948), 64, and Street, *Governmental Liability* (1953), 113.

The answer to this question may well be largely academic in New Zealand: [3] all public servants with only a few exceptions (the Solicitor-General is the major example) are appointed under statutory authority; if the relevant statute does not itself empower dismissal, s.25(f) of the Acts Interpretation Act 1924 does:

> Words authorizing the appointment of any public officer or functionary, or any deputy, include the power to remove or suspend him ... in the discretion of the authority in whom the power of appointment is vested ... ;

The Court of Appeal in *Mansfield* v. *Blenheim Borough Council* [1923] N.Z.L.R. 842 decided that a local authority could not by contract waive its rights given under this provision (then s.24(d) of the Acts Interpretation Act 1908); and it presumably follows that the Crown by contract can not waive any of its *statutory* powers to dismiss all those public servants appointed pursuant to statutes.

To return to the original question: the problem is whether the State Services Act 1962 provides that the law shall be "otherwise". Does the State Services Act abrogate the power of the Crown to dismiss public servants at pleasure ?

Section 5(k) of the Acts Interpretation Act 1924 provides that

> No provision or enactment in any Act shall in any manner affect the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby . . . .

The interpretation of this paragraph, [4] and the identical provision in s.6(j) of the 1908 Act, generally accepted in New Zealand is that of Chapman J. in *In re Buckingham* [1922] N.Z.L.R. 771, 773. He said that the Act should be read as declaring that Acts, which might be repugnant to this provision if it were construed literally, are binding on the Crown if "by reasonable intendment the Legislature has shown an intention that the Crown shall be bound". Although this interpretation was affirmed by only two of the four judges of the Court of Appeal in *McDougall* v. *Attorney-General* [1925] N.Z.L.R. 104, it appears to be the accepted interpretation; *Andrew* v. *Rockell* [1934] N.Z.L.R. 1056, 1057-1058. Furthermore a literal interpretation

3. Unless it could be established that the same principles applied to waiver of both the *Common law* and *statutory* rights to dismiss: see remainder of this paragraph.

4. Which has been the subject of an unpublished LL.M. thesis by D.E. Paterson (Victoria University of Wellington, 1961).

of this section would involve an attempt by Parliament to require future Parliaments to use a certain form of words. Parliament can not prevent implied repeal: *Ellen Street Estates Ltd.* v. *Minister of Health* [1934] 1 K.B. 590, C.A., *Vauxhall Estates* v. *Liverpool Corporation* [1932] 1 K.B. 733 and *In re Buckingham* [1922] N.Z.L.R. 771, 773 per Chapman J.

Accordingly, for the Legislature to provide that the relevant sections of the State Services Act 1962, relating to the dismissal of public servants, exclude the Crown's right to dismiss at pleasure, it must have shown by "reasonable intendment" that the Crown shall be bound by the provisions of the Act, and that its right to dismiss at pleasure is, therefore abrogated.

The line of authority which will be discussed as a background to the relevant sections of the State Services Act 1962 begins with *Gould* v. *Stuart* [1896] A.C. 575, P.C. In that case the Privy Council advised that the New South Wales Civil Service Act 1884 excluded the Crown's right to dismiss at pleasure. Part III of the Act had provided conditions and a certain procedure before a public servant could be dismissed. Accordingly, the Government was held to have no power to dismiss a civil servant except for the reasons and in the manner prescribed by the statute. Because it was otherwise provided by law it was not possible to import into the contract a condition that the Crown had power to dismiss at pleasure.

A recent Court of Appeal case in New Zealand, *Campbell* v. *Holmes* [1949] N.Z.L.R. 949, where similar issues were raised, is of little present assistance since the Crown seems to have conceded that if Holmes was an "officer" of the public service he was, *ipso facto*, entitled to the benefit of the Public Service Act: there was no question of pleading residual powers. Nevertheless O'Leary C.J. (dissenting) was of the opinion that s.51 of the old Public Service Act 1912 abrogated the Crown's power to dismiss any "officer" of the public service at pleasure (ibid., 980). Section 51 said :

> Every officer shall be deemed a three-monthly servant, and removable by the [Commission] at any time after three months' notice.

In *Deynzer* v. *Campbell* [1950] N.Z.L.R. 790, C.A.,[5] the Court of Appeal was concerned with the Crown's right to transfer and not with its right to dismiss. But similar legal principles were involved. O'Leary C.J. was more cautious than in his judgment a year earlier in *Campbell* v. *Holmes* and preferred to reserve his

5. For a fuller discussion see Beeby, op. cit., 8-11.

opinion on whether there is any general residuum of powers or rights left with the Crown after Parliament has expressly conferred rights and powers on the Commission. Finlay J. took the view, without referring to s.51, that the Crown still had the power to dismiss at pleasure as there had been no general delegation of the powers of the Crown, and that the Commission's powers were limited to those given in the Statute (ibid., 815). (Presumably the Crown's power to dismiss would be exercised by the Governor-general on the advice of his Ministers or by the appropriate Minister). If it had been a case of dismissal, Gresson J. would have held that "it is beyond question that, since this particular matter has been dealt with by a statute, the express statutory enactments govern the terms of his employment .... " (ibid., 822). Gresson J. did not find it necessary to consider whether the statutes expressly conferred power on the Commission to transfer the appellant as it did, because he was satisfied that the transfer without enquiry was warranted by the "implied terms of the appellant's engagement" (ibid., 825). Finally, Hutchison J. was quite definite that s.51 was inconsistent with a "term", that the Crown may put an end to the employment of public servants at pleasure. The Act, he said, provided a code of the rights and duties of the Crown and public servants. Therefore, he applied *Gould* v. *Stuart* and held that there was no residuum of the Crown's common law power to dismiss – the statute was inconsistent with the common law power (ibid., 831).

Thus the Court of Appeal was undecided on this issue, under the old legislation, and the question as to the rights of the Crown in New Zealand to dismiss public servants at pleasure was still open. A. E. Currie [6] gave s.51 as a possible example of how the common law rule may be changed by legislation. Mr Beeby in his article agreed with the view of Hutchison J. that the statute should be read as excluding any right to dismiss at pleasure but concluded that the issue could be decided either way. [7]

As Mr Beeby pointed out, unless the statute expressly abrogates the Crown's rights, the Courts "have seemed anxious to preserve the Crown's common law rights whenever possible". [8] In *R. Venkata Rao* v. *Secretary of State for India* [1937] A.C. 248, P.C., the plaintiff held office in the Indian civil service under the Government

6. Currie, Crown and Subject (1953), 29 – 30.

7. Op. cit., 13.

8. Ibid., 3.

of India Act 1915 and the rules made thereunder. The Act provided that, *subject to* other provisions of the Act and *any rules* made under it, *he,* held office at pleasure. The rules required that an enquiry take place in *all* cases in which a dismissal was ordered. The Privy Council, however, advised that the plaintiff was dismissable at pleasure and that he had no legal right to hold his office in accordance with the rules. He had merely received a solemn assurance that the right to dismiss would not be exercised in an arbitrary or capricious manner. This view was accepted by the High Court of Australia in *Fletcher* v. *Nott* (1938) 60 C.L.R. 55. As Latham C.J. said at 69:

> "Thus it is recognised by the highest judicial authority that there is no necessary inconsistency between an officer of the Crown holding his appointment at pleasure, and the existence of rules, either contained in statute or made under statutory power, which purport to regulate the manner in which an officer is to be dismissed. Such rules do not legally limit the power or manner of dismissal. "

Other recent Australian cases follow this restrictive trend; see *Kaye* v. *Attorney–General for Tasmania* (1956) 94 C. L. R. 193 and *Reedman* v. *Hoare* (1959) 102 C. L. R. 177.

Yet the trend in legislation has been in the other direction – to restrict the rights of the Crown and give more security to the individual. This is apparent in the Crown Proceedings Act 1950 and, indeed, in the public service legislation itself.

Accordingly the draftsman of the State Services Bill had before him a series of cases showing generally a conservative attitude on the part of the courts towards the Crown's residual powers and, more particularly, New Zealand decisions which indicated uncertainty as to the state of the law.

The new State Services Act 1962, however, failed to remove the doubt upon this issue by expressly abrogating the Crown's right to dismiss at pleasure. The inclusion in the Act of new and amended provisions has, on the contrary, raised further doubts as to the law.

Section 51 has been replaced by s. 40 of the new Act. But whereas s. 51 provided that "every officer shall be ... removable by the [Commission] at any

Section 51 has been replaced by s.40 of the new Act. But whereas s.51 provided that "every officer shall be ... removable by the [Commission] at any time after three months' notice", s.40 of the new Act provides that officers may be dismissed by the Commission after three months' notice only on the grounds of redundancy or to effect retirement policy. Other circumstances in which the Commission may dismiss public servants and the proceedures which are to be followed are found in ss. 36, 39, 55, 58 and 60. The new Act, therefore classifies more carefully the specific circumstances when public servants may be dismissed. Because, unlike the old s.51, s.40 does not provide for dismissal without cause after three months' notice, it might be argued that some residuum of the Crown's powers has been restored. But more realistically, it is suggested that the new Act carefully and clearly codifies all the rights and duties of the Crown and public servants.

Section 10 of the Act, a new provision, sets out the powers of the State Services Commission. According to information received from a senior officer of the Commission, Departments were previously responsible to the Public Service Commission for the administration of their offices. Now they are generally responsible to their respective Ministers. However matters included in the Act are the concern of the State Services Commission. The Commission is responsible to its own Minister for the administration of the Act, except in matters of individual discipline (including dismissal) which are under the independent control of the Commission (s.10). Section 10 does not state precisely that the right of the Crown to dismiss public servants at pleasure has been abrogated. It might be suggested that because s.10 appears to give the Commission general power to act independently of the Minister in matters relating to decisions on individual employees, the Crown's right to dismiss at pleasure has impliedly been retained. It is submitted that the most likely interpretation of the Act is that the legislature, in defining with considerable particularity the circumstances in which public servants can be dismissed, showed a "reasonable intendment" that *all* the rights and obligations of public servants as to dismissal are stated in the Act and that no common law right subsists. In other words, Parliament has set out an exhaustive code.

But s.10 empowers the Commission with the administration of the Act, and the proviso to the section (concerning discipline) can only relate to the provisions of the Act, and not to any possible powers outside the Act. It is still arguable that the Crown has not delegated all its rights to the Commission but has retained a residuum to itself. In view of the detailed provisions of the Act concerning dismissal of public servants it would be regarded as a travesty of justice in the public service if an Act which sets out the rights of public servants could be ignored at

the whim of the Crown, thereby depriving those servants of their statutory rights. Furthermore, it might be significant that the definition of "public service" in the 1912 statute as "service of His Majesty in respect of the Government of New Zealand" (s. 3) is omitted from the 1962 Act. This seems to suggest that in effect, public servants are in the service of the Commission in accordance with the Act rather than of the Queen, and that the Act exhaustively codifies all the rights and obligations of the *Commission* and its servants: it may no longer be appropriate to speak of public servants as Crown servants.

In the provisions of the new Act, it is submitted, the legislature has shown by "reasonable intendment" that the Crown is bound by the provisions of the Act, and that the Crown's right to dismiss public servants at pleasure no longer exists.

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