

A REVIEW OF NATURAL JUSTICE PRINCIPLES AFTER JARRATT

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Introduction

This evening I would like to discuss the entitlement to, and content of, natural justice in the context of the termination of employment of senior public servants.

When will a senior public servant be entitled to natural justice? And, what is the content of natural justice in such circumstances? The two cases I wish to consider are the High Court's recent decision in *Jarratt v Commissioner of Police for NSW*¹, and the full Federal Court's decision in *Barratt v Howard*.²

What are the practical implications of these decisions? As a lawyer, how does one advise a person in the position of a Mr Barratt or a Mr Jarratt? On the other hand, if you are acting for a public sector agency in such circumstances, what would your advice be?

Jarratt v Commissioner of Police for New South Wales

On 5 February 2000 Mr Jarratt was appointed – for a term of five years – to the position of Deputy Commissioner of the NSW Police Service. He was removed from that position on 12 September 2001.

In a press release issued by the NSW Police Commissioner it was said that Mr Jarratt had been removed 'on the grounds of performance'. However, and this was not disputed by the Commissioner, Mr Jarratt was given no opportunity to respond to any performance issues prior to the recommendation that he be removed from his office.

It was the Commissioner's case that Mr Jarratt was not entitled to an opportunity to be heard because his removal was pursuant to s 51 of the *Police Service Act 1990* (NSW) (the Act).

Section 51 of the Act relevantly provides that a Deputy Commissioner 'may be removed from office at any time' by the Governor on the recommendation of the Police Commissioner, providing that any such recommendation must first be approved by the Minister.

The issue for the High Court was whether the exercise of power pursuant to s 51 of the Act was conditioned by the requirement to afford Mr Jarratt natural justice. The High Court held unanimously that it was.

The Commissioner's arguments – dismissal at pleasure

It was the Commissioner's case – accepted by the NSW Court of Appeal – that Mr Jarratt held office 'at the pleasure of the Crown' and hence he was not entitled to natural justice.

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As Gleeson CJ explained in *Jarratt*, where an office is held at pleasure, whoever may remove the office holder may do so at any time and without providing any justification to the office holder or to a court considering the decision.³

In the NSW Court of Appeal, Mason P (with whom Meagher and Santow JJA agreed) said that s 51 of the Act did not support an implication of a duty of procedural fairness. Rather, s 51 stood 'in the long line of provisions affirming and applying the dismissal at pleasure principle as an opportunity of last resort to the Executive in the efficient administration of a disciplined police force. The words "at any time" suggest this'.⁴ His Honour also considered that the rights of return to public sector employment and to compensation provided for in ss 52 and 53 supported this approach.

This argument received short shrift in the High Court.

According to Gleeson CJ, the respondents 'are driven to rely on an implication, founded upon the words "may be removed at any time", read in the context of the common law principle as to service of the Crown at pleasure'.⁵ But, Mr Jarratt's removal did not involve the exercise of Crown prerogative. 'We are concerned with a statutory scheme for the management of the Police Service and the employment of its members, likely to have been intended to embody modern conceptions of public accountability'.⁶ Further, his Honour said: 'The Act provided the framework and context of the applicant's appointment, and determined the nature and extent of his rights'.⁷

The other members of the Court approached the matter in the same way.⁸

In holding that Mr Jarratt was entitled to be accorded natural justice, the decision may be read as a simple application of the principle stated in *Annetts v McCann*.⁹ It will be recalled that in that case, Mason CJ, Deane and McHugh JJ said: 'It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intentment'.¹⁰

And, as Gleeson CJ said in *Jarratt*: 'There are no plain words of necessary intentment, in s 51 of the Act or elsewhere, that indicate that the power of removal conferred by s 51 may be exercised without giving a Deputy Commissioner a fair opportunity to be heard'.¹¹

Mr Jarratt was entitled to procedural fairness.

Content of procedural fairness

The High Court did not need to decide what the content procedural fairness should be in the *Jarratt* case. The respondents had conceded that Mr Jarratt had not been accorded procedural fairness at all and the case was decided on that basis.

However, the Court made it plain that the content of natural justice, where it applies, is not fixed. Gleeson CJ said: 'Of course, to conclude that the requirements of natural justice must be complied with leaves open the question of the practical content of those requirements in a given case'.¹²

And, in their joint judgment, McHugh, Gummow and Hayne JJ said, referring to *Barratt v Howard*: 'No doubt the content of the hearing rule may vary from case to case'.¹³

In *Barratt v Howard* a full Federal Court said that the content of procedural fairness 'depends upon the statutory framework', as well as the particular circumstances of the case.¹⁴

The facts in *Barratt v Howard* may be shortly stated for present purposes. In December 1997 Mr Barratt was appointed to the office of Secretary to the Department of Defence for a term of five years commencing in February 1998. He was appointed under ss 36 and 37 of the *Public Service Act 1922* (Cth) (the PSA). In mid 1999 procedures were commenced to terminate Mr Barratt's employment. These procedures – under s 37 of the PSA – involved the Secretary to the Department of Prime Minister & Cabinet (PM&C) advising the Prime Minister to recommend to the Governor-General that Mr Barratt's appointment be terminated.

Mr Barratt successfully obtained a declaration in the Federal Court that he was entitled to procedural fairness before any report was made by the Secretary of PM&C to the Prime Minister recommending his employment be terminated.

The Secretary of PM&C then wrote to Mr Barratt advising him, amongst other things, that he was considering whether to report to the Prime Minister that he recommend to the Governor-General that Mr Barratt's employment be terminated on the following grounds:

- (a) that the Minister for Defence has lost trust and confidence in your ability to perform the duties of Secretary to the Department of Defence; and
- (b) that this lack of trust and confidence is detrimental to the public interest because it is prejudicial to the effective and efficient administration of the Department of Defence.¹⁵

The Secretary of PM&C asked Mr Barratt if he wished to place any material before him. In his letter to Mr Barratt, the Secretary of PM&C also included material setting out the reasons why the Minister for Defence had lost trust and confidence in him.

Mr Barratt then returned to the Federal Court seeking a further declaration that procedural fairness required that he be given a 'statement of the grounds upon which the Minister for Defence states that the Minister has no trust and confidence in [him].'

This application was dismissed. Mr Barratt appealed to a full Federal Court, which dismissed his appeal.

In preparing his report, the Full Court said, the Secretary of PM&C is required:

- (a) to consider whether the proposed reason for termination has been established to his satisfaction; and
- (b) whether the circumstances relied upon warrant a recommendation that Mr Barratt's appointment be terminated.¹⁶

Natural justice required that Mr Barratt be heard 'in respect of all aspects of the report'.¹⁷

But that did not mean that Mr Barratt was entitled to further and better particulars of the basis upon which the Defence Minister had lost trust and confidence in him. The Secretary of PM&C was not bound to inquire of the Defence Minister why he had lost trust and confidence in Mr Barratt.

In *Jarratt*, Callinan J made a number of observations about the content of procedural fairness in the circumstances of that case. His Honour said that Mr Jarratt was entitled to:

- (a) reasonable notice of the Police Commissioner's intention to recommend removal, and, perhaps, notice of the Minister's intention to approve the recommendation;

- (b) The notice should give reasons for the recommendation (and arguable also for the approval).¹⁸

However, his Honour stressed that he had used the word 'reason', rather than the word 'cause' deliberately as the word 'cause' 'may imply a need for dereliction in duty before removal'. However, s 51 of the Act does not require that.

Without attempting to be comprehensive, incompatibility, restructuring, or the emergence of a superior performer might well and quite properly provide a reason for removal. But it must be assumed that there be a reason in fact capable of articulation and communication to the officer concerned; otherwise caprice might rule. The applicant should also have the opportunity to attempt to persuade the Commissioner and perhaps the Minister not to proceed, even if the reason be any of the three that I have suggested as possible examples of a sufficient reason.¹⁹

Interestingly, however, Callinan J observed that the Act requires appointments to be made on the basis of merit (which is also defined in the Act). His Honour continued: 'It might therefore reasonably be assumed that the applicant must have been appointed on merit and that accordingly, subject to the Act, would retain his position for its term unless his service ceased to be meritorious.'²⁰

It is noteworthy, also, that the Public Service Act, considered by the Federal Court in *Barratt v Howard*, expressly excluded the merit principle in relation to the appointments of Departmental Secretaries.²¹

Would the reason given in *Barratt v Howard* be sufficient in circumstances like those in *Jarratt*? Must dismissal be for a 'cause' or simply for a reason that may be logically articulated? This is perhaps a question best left for another day.

In terms of the requirements of natural justice, would a person in Mr Jarratt's position be entitled to further and better particulars if the reason given was that the Minister had lost and trust and confidence in him?

While it seems likely that the answer to this question would most likely be yes, it can only be answered in the circumstances of each particular case, having regard to the particular legislation under which the person is employed.

Mr Jarratt's remedy

Where there has been a denial of natural justice in the exercise of statutory powers, the law does not recognise a cause of action for damages. The person aggrieved by the failure to observe the requirements of natural justice is confined to public law remedies.

Nevertheless, at trial, Mr Jarratt was awarded damages in excess of \$600,000.00. The award of damages was upheld by the High Court.

Given the Commissioner's failure to accord Mr Jarratt natural justice in recommending his removal from his office, the decision to remove him and to terminate his contract of employment was invalid. As a consequence of this invalidity, the refusal to allow Mr Jarratt to perform his duties for the balance of the term and receive his remuneration was without justification and 'amounted to, or was 'analogous to', wrongful dismissal'.²²

Mr Jarratt was not, therefore, limited to administrative law remedies but was entitled to an award of damages. Here the amount of those damages was calculated by reference to the balance of Mr Jarratt's term of employment.

Summary

In short: does natural justice apply?

Whether or natural justice applies or not depends on the terms of the statute under which the employee or officer concerned is employed. The terms of the statute need to be considered carefully and one must not start with any preconceived notions of Crown prerogative. In *Jarratt* it was suggested that there may be cases where Crown prerogative will continue to apply but these cases are now likely to be few and far between.

If, natural justice applies, what is its content?

Again the terms of the statute, as well as the particular circumstances of the case, need to be considered carefully. The content of procedural fairness in *Barratt v Howard* might not be the same in all cases, even in those cases involving public servants at the very pinnacle of the public sector. For example, what difference, if any, would the 'merit principle', or the seniority of the officer concerned, play in determining the content of natural justice?

Endnotes

- 1 *Jarratt v Commissioner of Police for New South Wales* (2005) 79 ALJR 1581.
- 2 *Barratt v Howard* (2000) 96 FCR 428.
- 3 *Jarratt* at [8].
- 4 *Commissioner of Police (NSW) v Jarratt* 59 NSWLR 87 at [113].
- 5 *Jarratt* at [26].
- 6 *Ibid.*
- 7 *Ibid* at [10].
- 8 See for example Callinan J at [79] and Heydon J at [157].
- 9 *Annetts v McCann* (1990) 170 CLR 596.
- 10 *Ibid* at 598.
- 11 *Jarratt* at [25].
- 12 *Ibid* at [9].
- 13 *Ibid* at [51].
- 14 *Barratt v Howard* at [54].
- 15 *Ibid* at [21].
- 16 *Ibid* at [77].
- 17 *Ibid.*
- 18 *Jarratt* at [145].
- 19 *Ibid.*
- 20 *Ibid* at [122].
- 21 *Barratt v Howard* at [33].
- 22 *Jarratt* at [58].