## *COUTTS* v *COMMONWEALTH OF AUSTRALIA*[1]

*Natural justice — Judicial review — Armed forces — Air force officer — Power to dismiss where appointment held at pleasure — Governor-General in Council — Air Force Regulations 1927 (Cth) regulations 72(1), 628(1)*

Flight Lieutenant Coutts was an officer in the Royal Australian Air Force. In 1980 the Governor-General in Council terminated his appointment on medical grounds in accordance with Regulations 72(1) and 628(1) of the *Air Force Regulations*, 1927 (Cth). Regulation 72(1) reads:

> An officer shall hold his appointment during the pleasure of the Governor-General, but the commission of an officer shall not be cancelled except for cause and after he has had notice in writing of any complaint or charge made, and of any action proposed to be taken against him and has been given the opportunity of making such statement as he thinks fit regarding the cause.

Regulation 628(1) reads:

> Where a member —
> (a) is not in need of hospital treatment;
> (b) is, in the opinion of the confirming medical authority, unfit for further service; and
> (c) is capable at the time of engaging in civilian employment,
> the member shall be retired or discharged at the earliest possible date after the opinion of the confirming medical authority has been expressed.

Coutts instituted proceedings in the original jurisdiction of the High Court challenging the procedural validity of his dismissal in that he had not been accorded a hearing. By consent the matter was remitted to the Full Court of the Supreme Court of South Australia to decide certain points of law as preliminary issues.[2] The Full Court by majority (Walters and Matheson JJ, Jacobs J dissenting) found against Coutts and an appeal, by special leave, was brought in the High Court. The High Court by majority (Wilson, Brennan and Dawson JJ, Mason ACJ and Deane J dissenting) dismissed the appeal and upheld the validity of the termination.

### 1 ARMED FORCES

Counsel for Coutts argued that the effect of Regulation 628(1) was to set down defined criteria for the termination of an officer's appointment and that on general administrative law principles the decision-maker must adopt procedures that comply with the rules of natural justice and grant a hearing. The majority composed of Wilson, Brennan and Dawson JJ took the view

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[1] (1985) 59 ALR 699; (1985) 59 ALJR 548; High Court of Australia; Mason ACJ, Wilson, Brennan, Deane and Dawson JJ.

[2] *Coutts* v *Commonwealth* (1983) 33 SASR 529.

that the appointment was terminated pursuant to Regulation 72(1), and since Regulation 628(1) had no application, it could not circumscribe the power to dismiss at pleasure. The judgments of the majority were heavily influenced by the traditional common law principle that the Crown may dismiss members of the armed forces at pleasure. The policy arguments of Professor Nettheim[3] in favour of security of tenure for the armed forces were not accepted by the majority[4] although they did find favour with the minority.[5] The dissenting position of Mason ACJ and Deane J was that since the termination was stated by the Governor-General in Council to be pursuant to both Regulation 72(1) and 628(1), the latter did circumscribe the power to dismiss at pleasure and the Governor-General in Council was obliged to comply with those limitations.

## 2 NATURAL JUSTICE

The principle has been formulated that before the rules of natural justice are to be excluded this intention "must satisfactorily appear from express words of plain intendment".[6] The decision of the court in this case makes it clear that the words "at pleasure" convey this clear intention. Mason ACJ[7] joined with the majority[8] (leaving only Deane J to express some doubt on this point[9]) in holding that where an office is held at pleasure (and there is nothing to fetter that discretion) then the decision-maker is under no obligation to conform with the rules of natural justice and grant a hearing before making the decision to terminate.

## 3 JUDICIAL REVIEW

The fact that the decision-maker was the Governor-General in Council was not a factor in any of the five justices refusing to review the decision. Deane J expressly found that it was not relevant[10] relying on earlier decisions in *FAI Insurances Limited* v *Winnecke*[11] and *R* v *Toohey; Ex parte Northern Land Council*[12] while the other judges based their decisions on the wide discretion where an office is held at pleasure. Wilson J took the strongest line that since the Governor-General had made his pleasure known "neither that decision nor the procedural steps leading up to it are open to review by the courts".[13]

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[3] G Nettheim, "Do Members of the Armed Forces Have Any Rights in Their Employment?" (1973) 5 FLRev 200, 246-247.

[4] (1985) 59 ALR 699, 703-704 *per* Wilson J (with whom Brennan J agreed), 719-720 *per* Dawson J.

[5] *Ibid* 708 *per* Deane J (with whom Mason ACJ agreed).

[6] *The Commissioner of Police* v *Tanos* (1958) 98 CLR 383, 396 *per* Dixon CJ and Webb J.

[7] (1985) 59 ALR 699, 700 *per* Mason ACJ.

[8] *Ibid* 706-707 *per* Wilson J (with whom Brennan J agreed); 720 *per* Dawson J.

[9] *Ibid* 715 *per* Deane J.

[10] *Ibid.*

[11] (1982) 151 CLR 342.

[12] (1981) 151 CLR 170.

[13] (1985) 59 ALR 699, 708 *per* Wilson J.

## 4 APPOINTMENT HELD AT PLEASURE

Where an appointment is held at pleasure dismissal from that appointment may be made "at the will of the Crown ... at any time without notice",[14] "for any reason, or for no reason or for a mistaken reason",[15] "without reason being formulated or assigned",[16] "for good or bad reason or for none".[17] The phrase "at pleasure" amounts to a legislative charter for irrationality and unreasonableness and prevents the formation, by the person holding an "at pleasure" appointment, of any legitimate expectation.

## 5 CONSTITUTIONAL IMPLICATIONS

Professor Sawer has argued[18] that Ministers of the Crown who hold office "during the pleasure of the Governor-General" under s 64 of the Constitution should not be dismissed without a hearing. This decision of the High Court seems to have resolved the issue of the application of the rules of natural justice to such cases in the negative. Furthermore if the use of the phrase "at pleasure" or "during pleasure" effectively takes the exercise of a discretion beyond the review of the High Court, as would appear to be the case, then Dr Winterton's hopes[19] that specifically conferred executive powers under the Constitution should be subject to judicial review are effectively dashed.

## 6 COMMENT

It is unfortunate that the majority of the High Court felt constrained to decide this case on the basis of historic rules governing employment of members of the armed forces, thus maintaining the distinction between the rights of service persons and civilians. This approach represents a turn away from the direction of greater executive accountability. It is not consistent with the course set by the new administrative law developed by parliament and the courts, nor is it consistent with the clarion call of the full High Court in *Groves* v *Commonwealth of Australia*[20] that service persons should have the same rights as other members of the Australian community except where military necessity dictates otherwise. It is of interest to note that service persons have recently been given the right to sue for their pay.[21]

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[14] *Ibid* 719 *per* Dawson J quoting *Kaye* v *Attorney-General (Tas)* (1956) 94 CLR 193, 203 *per* Williams J.

[15] *Ibid* 709 *Per* Brennan J.

[16] *Ibid* 712 *per* Deane J.

[17] *Ibid* 708 *per* Wilson J.

[18] G Sawer, *Federation Under Strain: Australia 1972-1975* (1977) 147-148.

[19] G Winterton, *Parliament, the Executive and the Governor General: A Constitutional Analysis* (1983) 128-129.

[20] (1982) 150 CLR 113. Although this case concerned different issues the forceful statements of the High Court suggested a general approach that would remove distinction between the rights of sevice persons and others.

[21] Statute Law (Miscellaneous Provisions) Act (No 1) 1985 (Cth) which repeals s 12 of the Defence Act 1903 (Cth) and inserts a new s 117B.

The approach of the court meant that there was no necessity to deal with the question of the prerogative. Only the judgment of Wilson J[22] mentioned the recent decision by the House of Lords[23] that extended judicial review to the exercise as opposed to the extent of the Crown's prerogative powers[24] but he did not express his opinion on the issue. Mason ACJ presumably did not see the need to discuss the question of the review of the exercise of prerogative power as he had done in earlier cases.[25]

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[22] (1985) 59 ALR 699, 704 *per* Wilson J.

[23] *Council of Civil Service Unions and others* v *Minister for the Civil Service* [1984] 3 AllER 935.

[24] Although with very substantial exceptions: [1984] 3 AllER 935, 948 *per* Lord Scarman, 956 *per* Lord Roskill, 951 *per* Lord Diplock. Similar exceptions are mentioned by Mason J in *R* v *Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 219-220.

[25] *Barton and Another* v *R* (1980) 147 CLR 75; *R* v *Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

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