THE CONTRACT OF EMPLOYMENT AND FREEDOM OF SPEECH

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Introduction

It is clear that an employee is restricted in the extent to which he can disclose or use information obtained by him in the course of employment, even in the absence of any express provision in his contract of employment. Moreover, the protection which the law affords to confidential information is not confined to those in a contractual relationship.[1] This use or disclosure of information is a separate, if related, issue from that which is the main concern of this article, namely the employee's right (if any) to criticize or comment or discuss without using or disclosing confidential information.[2] In particular, the article considers whether an employee may criticize or comment on the activities of his employer without risk of dismissal or other penalty.

It is becoming increasingly important that this question be considered for at least two reasons. First, many employers are large corporate bodies — some are so called "multi-national" corporations — and the policies and practices of these employers can have repercussions throughout a community or, indeed, on a national economy. Such matters (and many particular examples can be thought of) are now generally regarded as issues for legitimate public concern and debate. Are employees to be precluded from joining in or initiating public debate on questions such as these? If so, on what basis and to what extent?

A second reason why the employee's position should be looked at is that rising standards of education in the community are apparently changing the expectations and capacities of the work force.[3] The law should be examined to see whether it needs any adjustment to cope with these educationally caused changes.

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[1] The multitude of authorities which support these propositions is conveniently collected and analysed in Sam Ricketson, "Confidential Information — A New Proprietary Interest?" Part 1 (1977) 11 *Melb. Univ. L.R.* 223, Part 2 (1978) 11 *Melb. Univ. L.R.* 289.

[2] If the basis or material on which a comment is grounded is obtained "unduly", the case will be governed by the wrongful use of information cases: *Prince Albert* v. *Strange* 2 De G. & S.M. 652 at 697.

[3] John Niland, *Collective Bargaining and Compulsory Arbitration in Australia* (1978) at 89.

It may be conceptually easy to distinguish comment from disclosure or use of information, but in practice comment or analysis will often be combined with some disclosure or use of information. That seems to have been the case in almost all reported cases in England and Australia and those cases have concentrated on the misuse of information aspect which has been the real issue between the litigants. So Anglo-Australian authority on pure "comment" is sparse. This distinction between fact and comment has proved troublesome in defamation law and may prove equally so in labour law. But the distinction seems necessary because perfectly legitimate reasons for requiring an employee to be silent with regard to facts or information (e.g. the protection of trade secrets or property rights) can have no application to comments or observations which do not involve any use or disclosure of fact.

There is rather more American authority which deals with what can be categorized as comment, but, useful though it is, it must be used with care because many of the cases have arisen as challenges to the constitutional validity of statutes or administrative actions, rather than as litigation on the contract of employment.[4] There is, in Australia, no constitutional guarantee of freedom of speech.

This issue of free speech arises from time to time in the press with regard to public servants. Their position requires some additional observations because, aside from the considerations applicable to an ordinary employee, the case for restricting the rights of public servants also depends on arguments derived from the principle of responsible government. These will be mentioned later in this article.

Employees Generally

As Ricketson[5] and Jones[6] have pointed out, judicial restriction of disclosure or use of information has been variously based on a number of legal principles, including property, contract, fiduciary relationship and good faith. Jones concluded that a plaintiff's right to redress "is based upon the broad equitable principle that the defendant and others claiming from, through or under him shall not knowingly take unfair advantage of the plaintiff's confidence".[7] Ricketson sees many weaknesses with this approach and argues that the clearest explanation of the different cases is one which "conceives of rights in confidential information as constituting a loose sort of proprietary interest perhaps best described as an 'undefined equity' ".[8]

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[4] The first amendment to the Constitution of the United States provides that Congress shall make no law abridging the freedom of speech, while the fourteenth amendment provides that no state shall deprive any person of life, liberty, or property without due process of law.

[5] Ricketson, *supra* n. 1 at 224.

[6] Gareth Jones, "Restitution of Benefits Obtained in Breach of Another's Confidence" (1970) 86 *L.Q.R.* 463. See also George Forrai "Confidential Information — A General Survey" 6 *Syd. L.R.* 382.

[7] Jones, *supra* n. 6 at 492.

[8] Ricketson, *supra* n. 1 at 315.

Both authors are concerned with information rather than comment, but some of the more important cases which they analyse are also significant for a consideration of comment by employees, for they contain statements of principle wide enough to regulate such comment. The rationale which Jones extracts from the cases is initially attractive, for it is in terms wide enough to provide a rule regulating comment by employees, whereas that for which Ricketson contends is not. But it will not be necessary to choose between these competing explanations. The difficulty faced by both Jones and Ricketson stems, largely, from the variety of judicial explanations for the protection of confidential information. That variety is in turn attributable to the many different legal relationships which have existed between plaintiffs and defendants. Thus the courts have had to consider, for example, what rights existed against third parties who innocently acquired confidential information and who were not in a contractual relationship with the plaintiff. Such difficulties do not arise with comment by an employee who is always in a contractual relationship with his employer. So contract will provide a sufficient and familiar juridical basis for regulation of the employee's right to comment. The English Court of Appeal has explicitly rejected the idea that one should look to other branches of the law when there is a contract of employment between the parties.[9] And a contract will govern the employment relationship even in an award regulated industry.[10] Occasionally a contract of employment may contain an express clause whose terms will restrict or prohibit comment by the employee. More usually a court will need to imply a clause, but that is a familiar device with contracts of employment, especially where the obligation to be implied is the so-called duty of fidelity or good faith. A clause, whether express or implied, could also operate to restrict comment after employment had ceased, although there appears to be no reported case of this and the circumstances under which such a clause would be implied would have to be unusual. Even the representatives of a former Cabinet Minister (who is, admittedly, an office holder rather than an employee) will not be too severely restricted in the actual disclosure of information about cabinet room discussions to which the Minister was a party.[11] Comment, based on already known facts, is, *a fortiori,* even less likely to be circumscribed after employment has ceased. The point, however, is that there is no need to go beyond a contractual framework to consider the employee's right to discuss and comment.

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[9] See *per* Lord Greene, M.R. in *Vokes Ltd.* v. *Heather* LXII R.P.C. 135, at 141-2, with whom Du Parcq, L.J. and Morton, L.J. agreed. See also *Bents Brewery Co. Ltd.* v. *Hogan* [1945] 2 All E.R. 570 at 576.

[10] See *per* Latham, C.J. in *Amalgamated Collieries of W.A. Ltd.* v. *True* (1938) 59 C.L.R. 417 at 423.

[11] *Attorney-General* v. *Jonathon Cape Ltd. & Ors.* (the *Crossman Diaries Case*) [1975] 3 All E.R. 485 at 496.

General Principles

It is clear that there is implied in every contract of employment a wide, but ill defined, duty which prohibits comment in most circumstances by an employee on his employer's business. These ideas have found various forms of judicial expression. Lord Esher, M.R. put it this way in *Pearce* v. *Foster*:

> The rule of law is, that where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him. The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully, and if by his own act he prevents himself from doing so, the master may dismiss him. It is not that the servant warrants that he will duly and faithfully perform his duty; because, if that were so, upon breach of his duty his master might bring an action against him on the warranty. But the question is, whether the breach of duty is a good ground for dismissal. I have never hitherto heard any doubt that that is the true proposition of law. What circumstances will put a servant into the position of not being able to perform, in a due manner, his duties, or of not being able to perform his duty in a faithful manner, it is impossible to enumerate. Innumerable circumstances have actually occurred which fall within that proposition, and innumerable other circumstances which never have yet occurred, will occur, which also will fall within the proposition.[12]

Nine years later his Lordship re-stated the same idea, but on this occasion rested it more firmly on an implied term in the employee's contract, in the absence of some express provision. There will be an implication ". . . that the servant will act with good faith towards his master . . ." because such an implication ". . . is a thing which must necessarily have been in view of both parties when they entered into the contract".[13]

More recent Australian authority contains similar statements of general principle. So "(t)here is in every employee a clear duty of loyalty and this is implicit in every contract of employment"[14]. Perhaps the most compendious and authoritative dictum is that of Dixon and McTiernan, JJ. in *Blyth Chemicals Ltd.* v. *Bushnell*:

> Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an

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[12] (1886) 17 Q.B.D. 536 at 539.

[13] See *per* Lord Esher, M.R. in *Robb* v. *Green* [1895] 2 Q.B. 315 at 317. Note that the position in question was described as a "confidential position," suggesting that the extent of the obligation to act with good faith may vary with the nature of the position.

[14] See *per* Herron, J. (as he then was) in *Associated Dominion Assurance Society Pty. Ltd.* v. *Andrew & anor.* (1949) 49 S.R. 351 at 357.

> opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal . . . But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises.[15]

A New Zealand case has said that if an employee "develops opinions or associations, whether political or otherwise, which do or might endanger the interests of his employer, then he cannot complain if his employer takes steps by way of dismissal or transfer to other work so as to abate the danger".[16] This case concerned a public servant with suspected communist associations, but the above *dictum* is part of a general statement dealing with the contract of service. If it is correct in suggesting that the mere development of an opinion can breach the duty of fidelity, then the expression of that opinion in some comment will be an even clearer breach. But it is submitted that the statement is too wide as a general proposition, whatever may be its applicability to a particular public servant in a sensitive position. Moreover, the *dictum* was not necessary for the decision in the case, which turned on the proper meaning of sections in the relevant legislation. Apart from the impossibility, or at least the extreme difficulty, of ascertaining what opinions an employee has developed, it is a startling proposition that the mere holding of a particular opinion can be ground for dismissal in other than a totalitarian regime. Certainly in so far as the passage refers to matters which "might" endanger the employer's interests, it is at variance with the *dictum* from *Blyth Chemicals* which would be followed in Australia.

There have been some different formulations of general principle wide enough to cover comment or debate by employees. Lord Denning M.R. has suggested that an employee is subject to an implied obligation not wilfully to obstruct or disrupt the employer's undertaking. His Lordship was concerned with a "work to rule" campaign, and he laid emphasis on the object or motive with which the campaign was conducted. It was the *wilful* disruption thereby caused to the employer's undertaking which he regarded as a breach of the contract of employment.[17] His Lordship's analysis has been criticized,[18] but if it is correct it could in terms cover wilful public comment on an employer's

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[15] (1933) 49 C.L.R. 66, at 81.
[16] *Deynzer* v. *Campbell* [1949] Gaz. L.R. 444, at 448.
[17] See *per* Lord Denning, M.R. in *Secretary of State for Employment* v. *Assoc. Soc'y of Locomotive Engineers & Firemen (No. 2)* [1972] 2 Q.B. 455 at 491.
[18] See Roger W. Rideout, *Principles of Labour Law* (2nd ed., 1976) at 77.

business by an employee where such comment had a disruptive effect on, e.g., the employer's industrial relations or customer relations. There is some support for such an approach in two American cases, in which it was held that the wearing of badges or insignia by employees (which can be categorized as a form of comment) may be prohibited by an employer, at least for the time being, where such insignia might be incitements to crime or violent action in breach of peace or where they might pose a threat of disruption.[19] Similarly in cases where employees declined to answer questions before Congressional Committees, and such action caused the employer a "net loss in public prestige" or where it caused criticism from stockholders or customers or unrest among fellow employees and loss of morale, then dismissal was held to be justified. It may be noted that these cases involved refusals to answer, not positive comments.[20]

Although this formulation in terms of wilful disruption is not as authoritative or comprehensive as that in *Blyth Chemicals* (which may encompass it) nevertheless it is useful in that it emphasizes what is probably the real rationale or policy which justifies some kind of restriction on the employee. For without some restriction employees would be able to comment on and criticize their employers to the world at large with few limits. Such unfettered freedom would not merely disrupt, but could destroy or seriously erode an employer's business. Analysis of organizational behaviour suggests that privacy is a necessary element for the protection of (*inter alia*) organizational autonomy. "Privacy (*scil.* privacy for organizations) is thus not a luxury for organizational life; it is a vital lubricant of the organizational system in free societies".[21]

A formulation of the employee's duty in terms of wilful disruption or injury to the employer has a certain technical interest and danger arising from the fact that it closely resembles the cause of action defined by R. S. Wright, J. in *Wilkinson* v. *Downton,* namely liability for a wilful act calculated to cause harm to the plaintiff.[22] If restrictions on an employee were found to be grounded in tort, as well as contract, it would give an employer an additional cause of action

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[19] *Boeing Airplane Company* v. *National Labour Relations Board* 217 F. 2d 369 (1954); *Caterpillar Tractor Co.* v. *National Labour Relations Board* 230 F. 2d. 357 (1956). See also *per* Lord Greene M.R. in *Hivac, Ltd.* v. *Park Royal Scientific Instruments Ltd.* [1946] 1 All E.R. 350 at 355-6, where he speaks of injuring or prejudicing the goodwill of the employer's business.

[20] *Twentieth Century-Fox Film Corporation* v. *Lardner* 216 F. 2d 844 (1954); *United Electrical etc. Workers of America* v. *General Electric Company* 127 F. Supp. 934.

[21] Alan F. Weston *Privacy and Freedom* (1967) at 51. See also Kenneth Walters "Employee Freedom of Speech" *Industrial Relations* Vol. 15 No. 1. Feb. 1976, 26 at 28.

[22] [1892] 2 Q.B. 57 at 58-9. According to the *Report of the Committee on Privacy* (Chairman: The Rt. Hon. Kenneth Younger) July 1972 HMSO (Cmd. 5012), this principle has been superseded in Australia by a wider *Donoghue* v. *Stevenson* type of principle. See *Bunyan* v. *Jordan* (1937) 57 C.L.R. 1.

against the employee. It is difficult to see that the measure of damages would be markedly different in tort, and hence a development along tort lines would appear to be a needless complication. As was said earlier in citing *Vokes* v. *Heather*[23] contract provides a sufficient juridical basis for regulation of an employee's right to comment. So if Lord Denning's *dicta* in the *ASLEF Case* gain acceptance, it is submitted that they should be confined to the contractual context in which they were made; the close verbal resemblance to the *Wilkinson* v. *Downton* formulation ought not lead to additional tort liability for an employee. Moreover, a comment or criticism which caused wilful disruption in the *ASLEF* sense would also fall under the *Blyth Chemicals* interdiction; so the former case is probably only a particular, although useful, example of the latter more general one.

But *Blyth Chemicals*, though more detailed than say *Pearce* v. *Foster* or *Robb* v. *Green*, is still too general to enable any very precise formulation of the limits on an employee's right to comment on or discuss his employer's business, assuming the dictum in *Deynzer's Case* may be disregarded. I have so far looked at decisions which attempted to define the extent of the obligation or restriction on an employee. The matter can be taken a little further by looking at situations in which or conditions under which comment (or more usually, outright disclosure) may be allowed.

Permitted Comment

The clearest case where comment (and disclosure) will be permitted by an employee is where the employer has committed an offence. "The true doctrine is, that there is no confidence as to the disclosure of iniquity",[24] although "iniquity" in this *dictum* is merely an instance of just cause or excuse for breaking a confidence. The word does not express a principle.[25] In *Initial Services, Ltd.* v. *Putterill & anor.*[26] the English Court of Appeal had to consider the scope of this exception to the confidentiality clause on an interlocutory application to strike out certain paragraphs of a defence. Putterill, sales manager for Initial Services, resigned and took certain of his employer's documents to the press. The *Daily Mail* published an article alleging a liaison system between firms in the laundry industry to keep up prices, and alleging that Initial Services had had issued a misleading circular in which increased charges were incorrectly said to be mainly intended to offset then recent tax increases. In an action against the *Daily Mail* and Putterill, the defence alleged, among other things, that Initial Services had entered into an agreement to keep up prices; that this agreement should have been registered under the

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[23] *Supra* n. 9.
[24] See *per* Wood, V.C. in *Gartside* v. *Outram* (1856) 26 L.J.Ch. 113 at 114.
[25] *Fraser* v. *Evans* [1969] 1 All E.R. 8 at 11.
[26] [1967] 3 All E.R. 145.

Restrictive Trade Practices Act 1956, but was not; and that it should have been referred to the Monopolies Commission. The Court declined to strike out the relevant paragraphs of this defence. In so doing Lord Denning, M.R. said that the exception to the rule prohibiting disclosure of this nature by an employee is not limited to the case where the employer had been guilty of crime or fraud, but that it extends to any misconduct of such a nature that it ought in the public interest be disclosed to others. The exception extends to crimes, frauds and misdeeds, actually committed or in contemplation "provided always — and this is essential — that the disclosure is justified in the public interest".[27] Moreover, the disclosure should be made to one who has a proper interest to receive the information. After giving some particular examples, his Lordship stated: "There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press".[28]

This case dealt with actual disclosure. If an analysis of known facts and documents (that is those requiring no disclosure by the employee) indicated a "misdeed" by an employer, which it was in the public interest to debate, it would appear legitimate for an employee to initiate or join in such debate, although he may not always be at liberty to debate with the whole world. Suppose that the overt smoke emission from a factory — a fact obvious to anyone who looked — could be shown by instruments external to the factory to exceed in density and duration the levels allowed by anti-pollution legislation. It is submitted that this could be drawn to the attention of the relevant regulatory authority by an employee; and if that proved ineffective, a letter to the press might be permissible.[29] Or suppose that careful analysis of a company's publicly available documents revealed a failure to comply with some requirements of the companies legislation. An employee would, it is submitted, be entitled to provide such an analysis. These examples relate to breaches of the law, and disclosure (and, it is submitted, comment) in such cases is supported not only by the *Initial Services Case,* but also by Jordan, C.J. in the *Associated Dominion Assurance Case*[30] where he said that the *dicta* of Dixon and McTiernan, JJ. in *Blyth Chemicals* did not "supply a conclusive list for all cases . . . (It) assumes . . . an employer carrying on a legitimate business and in no relevant respect committing a serious breach of the law. For instance, if an employee discovered that his employer had made him an innocent tool in committing what was, on his employer's

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[27] *Id.* at 148. *Sed quaere* whether disclosure will be justified in the case of a "private wrong". See *per* Warrington, L.J. in *Weld-Blundel* v. *Stephens* [1919] 1 K.B. 520 at 535; affirmed by the House of Lords at [1920] A.C. 956. *Weld-Blundell* supports the general proposition that a contemplated crime will justify disclosure.

[28] *Id.* at 148.

[29] *Cf. Westberry* v. *Gilman Paper Co.* 507 F. 2d 206 (1975).

[30] *Supra* n. 14; (1949) 49 S.R. 351.

part, a deliberate breach of the law, the employee's *duty as a citizen* and his interest in exculpating himself from a possible charge of being an accomplice, might well over-ride any duty he would otherwise owe to his employer not to disclose to outsiders details of his employer's business. Indeed it may well be that the duties mentioned by their Honours (*scil.* in *Blyth Chemicals*) are reciprocal".[31] (Emphasis added).

But what if an analysis of or comment on known information revealed not a crime or misdeed, but, say, financial ineptitude or mismanagement, possibly imperilling, let us say, investors' funds or dividends or assurance policies? As the law now stands it appears that an employee could be dismissed for drawing attention to or debating his employer's commercial maladministration falling short of a misdeed. It will be argued that this is too restrictive and should be liberalized in the employee's favour.

The second case where disclosure or comment by an employee will be permitted is where what he says or does is protected by statute, such as an "anti-victimization" provision in industrial legislation. Thus s. 5 of the Commonwealth Conciliation and Arbitration Act 1912-1980, makes it an offence for an employer to dismiss or injure or prejudice an employee (or to threaten so to do) by reason of the circumstances that the employee has done or proposes to do any one of a number of things, including appear as a witness in a proceeding under that Act, or do any lawful thing he is authorized to do by his industrial organization for the purpose of furthering its industrial interests.[32] Similarly, s. 95(1) of the Industrial Arbitration Act, 1940 (N.S.W.) provides (*inter alia*) that an employer is similarly restricted in action he may take against an employee who informs any person that a breach of an award has been committed by the employer or who engages in any public or political activity which does not interfere with the performance of the duties of his employment.[33]

Third, an employee will be able to disclose and discuss his employer's business with his own legal adviser.[34]

Some Relevant Factors

These appear to be the only three situations where an employee will be safe in commenting on (or disclosing) aspects of his employer's

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[31] *Id.* at 353.

[32] The section has been amended from time to time. As it stood in 1946, it seems that it was not even argued that it protected an employee who criticized his employer's working conditions in a newspaper. In any case, the employer alleged that the criticism was a "misrepresentation of the facts of the matters contained therein". *Fed. Ship Painters and Dockers Union of Australia* v. *Cockatoo Docks and Engineering Co. Pty. Ltd.* (1946) 57 C.A.R. 137. At least in the absence of misrepresentation, the section in its present from probably protects such comment, at all events where a breach of an industrial agreement or award is involved.

[33] *Bowen* v. *Read* 1956 A.R. (N.S.W.) 873.

[34] *In re Burnett* 1955 A.R. (N.S.W.) 1160.

activities and business with outsiders.[35] There are a number of other factors which may indicate whether it is more or less likely that an employee's activities will put him at risk, but they fall far short of producing a cohesive body of principle. The factors which have at times been taken into account are:

1. The way in which the employee obtained the facts or data on which his comment is based;
2. The employee's position with the employer;
3. Whether or not the employee is bound by a code of professional ethics;
4. The employee's motives;
5. The extent of dissemination of the employee's comment.

If the material on which an employee bases his activity is obtained "unduly" (that is, without consent or right), it may be an interference with the employer's property,[36] and such activity can be restrained or be the subject of a claim for damages as in the general run of cases on confidential information. So a catalogue or description or reproduction or translation of the employer's property, or it is submitted, an analysis thereof or a comment thereon, will be impermissible if the material on which it is based is "unduly" obtained (save in the three protected situations dealt with above; the material in the *Initial Services Case,* for example, seems to have been obtained irregularly). This article is primarily concerned with comment or discussion based on or using facts or information generally known or available to the audience or in respect of which it is not suggested that the facts were obtained illicitly. In any case, to say that the principle is that the facts must not be obtained unduly and then to define unduly as meaning without consent or right really begs the question; for they will be obtained as of right if obtained under circumstances which do not constitute a breach of the very clause in the employment contract whose limits are in question. More positively, it does seem that data on which an employee bases comment or discussion need not necessarily be confined to data in the public domain. In *Ormonoid Roofing and Asphalts Ltd.* v. *Bitumenoids Ltd. & Ors.* Harvey, C.J. in Equity said:

> In my opinion the cases show that where an employee in the course of his employment and for the purposes of his employment has obtained particular information with regard to his employer's business such as knowledge of processes, details of management or particulars of customers which have become stored up in his mind as a necessary consequence of the way in which his master employed him, there is no justification in the absence

[35] Disclosure or comment by an employee to a member of parliament has been suggested as a fourth; but there seems no clear authority for this.

[36] *Prince Albert* v. *Strange* 2 De G. & S.M. 652, at 697.

> of an express contract for preventing him (*sic.*) making use of that knowledge.[37]

Presumably the use made of the knowledge so acquired could include a comment or debate upon it, at any rate after employment had ceased.

The second of the five factors listed involves the notion that the obligation of fidelity implied in the contract may extend further in the case of one class of employee than it does with others. It will generally be less extensive for manual workers.[38]

The third possible factor is the existence of a code of professional conduct. Garran suggests that, in respect of public employment at least, no conflict can arise between professional ethical codes and the obligations imposed on public servants.[39] It is easy to think of realistic examples where such conflicts could arise; the fact that Garran himself experienced none himself, as he records, seems purely fortuitous. Certainly there is no *a priori* reason which leads one to the view that conflict necessarily can not arise. In private employment such conflicts are apparently not uncommon, at any rate in America.[40] The only authority of which the author is aware is a *dictum* in a Canadian case in 1936, which suggests that a "professional man" has a right to express his opinions in the area of his professional competence ". . . in the newspaper, or elsewhere. . . ."[41] In the absence of some stronger authority it seems that obligations imposed by a code of professional ethics, without more, will not justify an employee's adverse comment of his employer in Australia.

The fourth factor which has sometimes been influential in evaluating an employee's activity is motive. The importance of motive is implicit in what has been said about disclosure in case of iniquity and in Lord Denning's *ASLEF* formulation. So if disclosure or comment is made because of some "danger to the State" or out of "public duty" it is more likely to be permissible.[42] The position is similar where disclosure is made under compulsion of law, at least in the case of a

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[37] (1930) 31 S.R. 347 at 354.

[38] See *per* Lord Greene, M.R. in *Hivac Ltd.* v. *Park Royal Scientific Instruments Ltd.* [1946] 1 All E.R. 350 at 354. *cf. per* Herron, J. in *Associated Dominion Assurance Case* (1949) 49 S.R. 351, at 357. *Swain* v. *West* (*Butchers*), *Ltd.* [1936] 3 All E.R. 261 was a case where the employee's position as General Manager was significant.

[39] A. Garran, "The Public Servant — His Responsibility to the Community", *Publ. Adm.* (*Aust.*). Vol. 11, 1962, 324 at 326.

[40] Lawrence E. Blades, "Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power" (1967) 67 *Colum L. Rev.* 1404, at 1408-9.

[41] See *per* Dennistoun, J.A. in *Hague* v. *St. Boniface Hospital* (1936) 3 D.L.R. 363, at 367. The headnote to the report must be read with care, for it does not emphasize sufficiently that the particular decision turned on *lack of evidence* as to the content of the moral code governing Catholic hospitals — a code which Hague was alleged to have broken in breach of his contract.

[42] See *per* Viscount Finlay in *Weld-Blundell* v. *Stephens* [1920] A.C. 956 at 955-6 (diss. on other grounds).

banker and presumably in all cases.[43] If disclosure, and again, it is submitted comment, is required by the "interests" of the employer,[44] or arises because of "concern" for the employer[45] it will also be more likely to pass muster. The High Court has said that while some acts or omissions by a servant are of such a nature as to be repugnant *per se* to the relationship of master and servant, others may be of an equivocal character. In those cases motive will become important "because only in the event that (the servant) has intended to prefer his own interests to those of his master . . . will it emerge that he has failed to discharge his duty of faithful service".[46] This appears to be the clearest and most authoritative statement of the way in which motive is to be used in evaluating conduct by an employee.

The last factor which the courts have at times used in assessing disclosure by an employee is the extent to which the information has been disseminated. Lord Denning, M.R. made it clear in the *Initial Services Case* that disclosure should be made to one who has a proper interest to receive it, and it seems clear from his judgment that publicity to the world at large, say through the press, is by no means automatically permissible, even in the case of wrongdoing. Presumably a needlessly wide dissemination of information would indicate improper purpose or motive.

While such a limitation may be proper in the case of disclosure of information, the principle is not as justifiable in the case of comment based on facts already known to the audience. The notion of free speech implies freedom to speak to anyone who will listen (subject, of course, to general laws as to defamation, unseemly words, etc.). To confine an employee to comment or debate, as distinct from disclosure, to those with a "proper interest" to hear the comment would be to emasculate whatever right to public debate and discussion the employee may have under contract or otherwise. It is true that there is no constitutional right of such a nature in England or Australia: but Lord Denning himself has elsewhere indicated *obiter dicta* that comprehensive contractual fetters on an employee's freedom of speech may not be enforceable.[47] So it would seem that his Lordship did not in his remarks in the *Initial Services Case* intend to confine speech or comment by an employee (as distinct from disclosure) to that made to a person with a "proper interest" to hear it.

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[43] See *per* Bankes, L.J. and Atkin, L.J. in *Tournier* v. *National Provincial and Union Bank of England* [1921] 1 K.B. 461, at 473 and 485-6 respectively. cf. *Mobil Oil Aust. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1962-1963) 113 C.L.R. 475.

[44] See *Tournier's Case, id.* at 473.

[45] See *per* Matas, J.A. in *O'Callahan* v. *Transair Ltd.* 58 D.L.R. (3d) 80 at 95.

[46] *B.L.B. Corporation of Australia Establishment* v. *Jacobsen* (1974) 48 A.L.J.R. 372 at 379.

[47] See *per* Lord Denning, M.R. in *Woodward & ors.* v. *Hutchins & ors.* [1977] 2 All E.R. 751 at 754.

Lord Denning's suggestion that wide contractual fetters on an employee's freedom of speech may not be enforceable could be supported by *dicta* from cases dealing with "servile incidents", although it was not necessary for his Lordship to refer to such authorities and he did not do so. It is not permissible to attach to a contract of service any "servile incidents".[48] It is contrary to public policy to deal with a man's "liberty of action as well as his property" under a loan contract.[49] It is submitted that in modern society it is not unrealistic to regard a wide restriction on an employee's freedom of speech as a restriction on his "liberty of action". It is suggested that the restriction of comment or discussion to discussion with a person with a "proper interest" is not warranted by the cases nor appropriate in modern conditions, apart from the difficulty of ascertaining who might have a "proper interest" in listening to the comment. This is one point where the principles evolved to deal with disclosure of information, and perhaps quite adequate for that task, are not appropriate to speech or debate with no new or improper disclosure.

While one can extract from the cases three situations where comment by an employee on the employer's business is generally permissible, and while one can suggest five factors which, singly or in combination, may justify such comment on occasion, it cannot be said that an employee has much freedom of speech in this area, and that which he does have is not easy to define. Consider again the example given earlier where an employer's announced policy or activity involved no crime or wrongdoing, but was arguably having a significant and deleterious economic effect, either local or national, and further assume that there was a public debate on the issue (for example in the press, or at local public meetings). May an employee safely join in that debate without disclosing information and perhaps outside working hours?[50] As the law now stands the answer would seem to be "no". Such participation would almost certainly be said to impede the faithful performance of his obligations or be destructive of the necessary confidence between employer and employee, both of which circumstances were said to be grounds for dismissal in *Blyth Chemicals*. The employee will escape dismissal only if what he does serves to point out a misdeed (which is not the case in the example), or is protected by statute or is for the purpose of consultation with his legal advisor. Absent one of these conditions, comment of the type under discussion would almost certainly be held to justify dismissal, unless perhaps the employee's position was a manual position and he used no illicitly obtained information (as is assumed), was well motivated and did not disseminate the offending speech too widely. In the case of a more

[48] See *per* Bowen, L.J. in *Davies* v. *Davies* [1887] 36 Ch.D. 359 at 393.
[49] See *per* Cozens-Hardy, M.R. in *Harwood* v. *Millar's Timber and Trading Company Limited* [1917] 1 K.B. 305 at 311.
[50] As to activities outside work hours, see the *Hivac Case, supra* n. 19.

senior professional employee, obligations imposed by a professional code of ethics would be unlikely to save his job.

It therefore appears that an employee's freedom to comment on or to criticise his employer's activities is limited and ill defined. It is submitted that this is not appropriate for a time when most employers are corporate entities, many of which exercise considerable economic and other power in the community. Nor are such restrictions appropriate in a society with an increasingly better educated and articulate work force. In seeking clarification or change, it must be remembered that effective functioning of an employer's enterprise and organization does require a measure of privacy and loyalty, especially at senior levels. Changes in the law which resulted in wholesale destruction of such privacy and loyalty are not suggested, but employers will need to face the prospect of greater and more critical assessment of their activities, especially from their employees.

Possible Changes

What changes or clarifications in the law seem desirable and possible? Authorities cited indicate that the "public interest" (*Initial Services; Weld-Blundell*) or an employee's "duty as a citizen" (*Associated Dominion Assurance*) may require, or at least excuse, an employee's disclosure of information. It does not seem too great a step to suggest that these ideas could be expanded to allow comment by employees in a wider range of circumstances than has hitherto been allowed. Consider again the example given where an employer's activity involves no wrongdoing but is thought likely to produce harmful economic effects. If no one else seemed really likely or was competent to present the case for such harmful effect (for example because it was highly technical), it could be argued that the "public interest" or the employee's "duty as a citizen" ought require, or at any rate permit, him to do so, assuming, as I am, that in so doing he makes no impermissible disclosure of information. Such public debate by an employee would, at the moment, be held to be conduct apt to rupture confidence or damage an employer's business. But in those cases where the public interest has been held to justify actual disclosure, the breach of confidence has not stood in the way of a decision in favour of the employee, and it is submitted that there is no reason why a similar result should not follow in the case of comment or analysis, without further disclosure, dictated by public interest or civic duty.[51]

Some expansion of the public interest justification for disclosure would be necessary to give employees more freedom of speech.[52] But

[51] In a different context it has been held that a rule of a federally registered industrial organization may not validly restrict criticism of union affairs too extensively. "*Bona fide* criticism of the officials or the administration of the union could not be regarded as calculated to injure or destroy the union, since the intention would be to eliminate, not to create weakness". *Wishart* v. *Aust, Builders Labourers Federation* (1960) 2 F.L.R. 298, at 301.

[52] *Beloff* v. *Pressdram Ltd.* [1973] 1 All E.R. 241 at 260-1.

there are signs that the courts are prepared to do this. As Lord Denning points out, confidences cannot be used to cover up wrongdoing, "nor to prevent disclosure of practices, which might be dangerous to mental health: see *Hubbard* v. *Vosper* [1972] 2 Q.B. 84; nor to hamper an investigation into breaches of security: see *Attorney-General* v. *Mulholland; Attorney General* v. *Foster* [1963] 2 Q.B. 477, 488, 489; nor in affairs of general concern where the public interest requires disclosure, see *Fraser* v. *Evans* [1969] 1 Q.B. 349".[53] It is submitted that the public interest justification should be extended to permit employees to join in or initiate debate or comment on any matter of public interest or concern, whether or not it touches their employer's business, subject to four safeguards to be mentioned shortly. In determining what is in the public interest, the test in the *B.L.B. Case*[54] should be applied, namely the action of the employee may be assessed by asking whether he has intended to prefer his own interests to those of his master.

Desirable safeguards to attend this proposed extension of the public interest justification are in some ways self evident. Since *Pickering* v. *Board of Education*[55] American courts have evolved a number of conditions on the exercise of the constitutionally guaranteed freedom of speech by public employees, and some (but not all) of these are also of assistance in suggesting appropriate safeguards.[56] The suggested conditions to safeguard the expanded right proposed are:

1. That any comment or analysis by an employee be based on an adequate knowledge of relevant facts;
2. That such comment be couched in moderate and temperate language;
3. That any comment be subject to the general law with regard to such matters as defamation, unseemly words, etc.;
4. In the event of dispute as to whether the first condition has been met, the onus should lie on the employee.

These proposals are intended as an addition to the existing law on disclosure. Comment or debate engaged in on the proposed basis ought not, it is submitted, be a breach of the employment contract or grounds for dismissal.

The Public Sector Employees

It was said in the introductory remarks to this article that the public employee required separate treatment. Such employees con-

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[53] See *per* Lord Denning, M.R. in *Norwich Pharmacal Co. & ors.* v. *Commissioners of Customs and Excise* [1972] 3 W.L.R. 870 at 877. As to public interest in disclosure situations, see also Sam Ricketson, "Public Interest and Breach of Confidence" (1979) 12 *Melb. Univ. L.R.* 176.

[54] *Supra* n. 46.

[55] 391 U.S. 563 (1968).

[56] The American cases and guidelines are dealt with in Kenneth Walters, "Employee Freedom of Speech" *Industrial Relations,* Vol. 15, No. 1, Feb. 1976, 26.

stitute a large and influential segment of the work force. They include public servants in the strict sense, that is, those engaged as officers under the provisions of the public service acts of the Commonwealth and the various States. In common usage, public sector employees also include those engaged by the many statutory corporations, most of which are governed by a board and are usually subject to some degree of Ministerial control, but not as much as a traditional government department. For some purposes one can also regard employees of local government authorities as public sector employees, but such persons will be excluded from this part of the discussion, the purpose of which is to note briefly the extent to which responsible government and the conventions which flow from it place the public employee in a different position from his private sector counterpart, who has just been considered. Hence it is only relevant to have regard to those employees who work in departments or corporations which are, to a greater or less degree, subject to Ministerial control or direction. This will exclude most local government bodies, but to the extent that any may come under a measure of Ministerial control, then their employees too will be in a slightly different position with regard to their rights of free speech.[57]

There is a preliminary question whether public servants are employees at all, or office holders.[58] If engagement of staff was still made pursuant to the prerogative it would seem clear that persons so engaged would not be employees. But the answer now may vary from service to service and will involve an analysis of the particular statute under which the public servant in question is almost certain to have been engaged and also an analysis of related legislation such as industrial arbitration statutes regulating access by public servants to arbitral tribunals with respect to wages and conditions. Doubtless engagement of a servant under the Crown prerogative or by appointment to an office creates a relationship which does not have all the usual incidents of an employer/employee relationship; for example, the Crown can dismiss an officer at will and need not have cause for so doing.[59] But prerogative rights, including the right to dismiss at pleasure, can be abrogated by statute,[60] and the extensive legislation and even more extensive body of regulations which now control the various public services have doubtless made great encroachments on

[57] Commonwealth Statistics include some groups not relevant to this discussion (such as local government employees and academics). They indicate that there are about 1½ million public sector employees in the work force. Australian Bureau of Statistics, *Year Book Australia,* No. 62, 1977 and 1978 at 159.

[58] See generally P. W. Hogg, *Liability of the Crown* (1971, Chapter 6); *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 Q.B. 641.

[59] See *Carey* v. *The Commonwealth* (1921) 30 C.L.R. 132; *per* Taylor, J. in *Reedman* v. *Hoare* (1959) 102 C.L.R. 177 at 181; *per* Windeyer, J. in *Marks* v. *The Commonwealth* (1964) 111 C.L.R. 549, at 586.

[60] *Gould* v. *Stuart* [1896] A.C. 575.

the Crown's prerogative rights with regard to its servants. There is a clear statement by Higgins, J. in the High Court that crown servants have a contract with the Crown.[61] Legislative control of public servants and their working conditions has increased since then, and the *dictum* is more likely to be true today than when it was said. But that aside, the Crown can command and direct its servants, and where the right of control exists and extends to the manner in which the employment is carried out the usual test of the relation of master and servant is satisfied.[62] The Crown has used its right to control in relation to free speech, and for present purposes it makes little difference whether the controls exist as part of a contract of employment or as a statutory or regulatory modification of the prerogative; the justification for the restrictions is the same in either case.

The statutory or regulatory controls over public servants almost invariably include explicit restrictions not only on the use or disclosure of information but also on public comment by officers.[63] I will suggest that such an all embracing restriction cannot be justified, and will suggest an alternative form of restriction which still meets the legitimate requirements of government and allows a public servant a greater degree of freedom. Even if an extensive restriction could be justified, it may be noted in passing that provisions such as that quoted in n.63 have a number of unsatisfactory features from a purely technical point of view.[64]

Ministerial Responsibility

However, it is not at all clear how an all encompassing prohibition on public comment by public servants can be justified. The basis of such justification as exists is to be found, if anywhere, in a Diceyian view of ministerial responsibility. Dicey said that ministerial responsibility "means in ordinary parlance the responsibility of Ministers to lose their offices if they cannot retain the confidence of the House of Commons".[65] Lip service, at least, has been paid to such a concept.[66]

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[61] See *per* Higgins, J. in *Carey* v. *The Commonwealth* (1921) 30 C.L.R. 132 at 137. *Cf.* teachers in Ontario: *Lacarte* v. *Board of Education of Ontario* (1955) 5 D.L.R. 369.

[62] See *per* Dixon, C.J. in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd.* (1951-1952) 85 C.L.R. 237 at 249.

[63] Typical is reg. 17(a) of the N.S.W. Public Service Regulations, which provides that "an officer shall not — (a) Publicly comment upon the administration of any Department of the State, . . ." For many years, this (or very similar) wording was almost standard throughout public services and public corporations in Australia, and it was only in 1974 that the Commonwealth repealed its regulation and replaced it with a set of guidelines: see Public Service Board, *Annual Report*, 1975 at 3. The text of the guidelines is in General Order 14/M of the Australian Public Service General Orders: *cf.* the old regulation 34(b).

[64] E.g. the use of undefined and ambiguous words and phrases, such as "publicly comment" and "Department of the State" and "administration", and the failure to deal with comment on policy.

[65] A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (10th ed., (1959) E. C. S. Wade) at 359.

[66] See, e.g., Sir E. Bridges, *Portrait of a Profession — The Civil Service*

Such a view of ministerial responsibility necessarily implies that ". . . if the minister is to be responsible for what happens neither the opinions nor the actions nor the words of civil servants who are not responsible must embarrass him, or force his decisions".[67] So the public servant, whose career is not at stake, who is not "responsible", must be impartial, loyal and neutral; and must give every appearance of being so, regardless of the political complexion of the government he serves for the time being. Restrictions on public comment are one way of contributing to an external manifestation of these qualities and (possibly) one way of fostering their existence in reality. This element of loyalty which a Minister may expect is similar to that good faith or trust a private employer may expect — no organization, public or private, can function if its employees may criticize it without limit. But as long as the private employer keeps within the letter of the law, its policies, practices and activities are not subject to debate in a publicly elected forum, nor are its directors answerable for their employees' errors in the way a minister is said to be. Hence, while both public and private employees can properly be expected to display an appropriate measure of loyalty, the impartiality and neutrality expected of public servants are not expected of private employees.

A doctrine of ministerial responsibility which operated in the way in which Dicey described it would provide a strong, although not conclusive, argument for enforced public service anonymity. But if practice ever accorded with theory, it does so no longer. It will be only in certain unusual combinations of circumstances that departmental errors will require a Minister to resign.[68] This attenuated operation of ministerial responsibility weakens the basis on which a complete restriction on comment by public servants is said to rest. Apart from that, government is becoming increasingly complicated and more extensive; often the public servant will necessarily be better informed than the Minister can hope to become, and will be actively engaged in policy formation.[69] The other main reason for preventing public comment is a corollary of the others — it protects the public service career structure from the risk of patronage.

Footnote 66 (Continued).

Tradition, The Rede Lecture, 1950, Camb. U.P., 1953; James B. Christoph. "Political Rights and Administrative Impartiality in the British Civil Service", *Amer. Pol. Sc. Review,* Vol. 51, 1957, 69; *Report of the Royal Commission on Government Organization,* Queen's Printer, Ottawa, 1962, Vol. 5 at 33; *cf. per* Lord Widgery, C.J. in the *Crossman Diaries Case* [1975] 3 All E.R. 485 at 496.

[67] G. Kitson-Clark, " 'Statesmen in Disguise': Reflexions on the History of the Neutrality of the Civil Service." *The Historical Journal* Vol. II, No. 1 (1959) 19 at 24.

[68] S. E. Finer, "The Individual Responsibility of Ministers" *Publ. Adm.* Vol. 34, 1956, 377 at 379, 386; L. A. Gunn, "Ministers and Civil Servants: Changes in Whitehall" *Publ. Adm.* (*Aust.*). Vol. 26, 1967, 78, at 79.

[69] Sir J. Crawford, "Relations Between Civil Servants and Policy Making." *Publ. Adm.* (*Aust.*). Vol. 19, 1960, 99 at 104, (Reprinted from the Economic Record).

The Case for Wider Freedom

Parker has succinctly presented the case for a relaxation of the restrictions on public servants.[70] Two of the arguments are similar to arguments for an extension of the rights of employees generally, namely the rights of public servants as citizens, and the need for disclosure in the public interest of iniquity, mismanagement, etc. The other main arguments noted by Parker are first, the value of the potential contribution of public servants to the democratic debate, the need to devise means "to put the knowledge and experience of the *public* service at the service of the public interest, and not merely the government of the day";[71] and secondly, the need to keep the public service vigorous by serious exchange of ideas and criticism with those outside the service. These two last mentioned reasons are peculiar to the public service in the form in which they are given, but, analogous arguments could be developed for many groups of private sector employees, notably those employed by enterprises whose policies and activities have significant repercussions in the community or in the economy.

Code of Ethics

It would seem that the legitimate interests of government could be served by a different and less restrictive prohibition on comment. As noted, the Australian Public Service recognized this in 1974 when it repealed its regulation and replaced it with a set of guidelines.[72] The idea of such a device, or a code of ethics, is not new, and indeed a Code of Discretion forms a part of Parker's proposals for reform.[73] This implies that there is some code or tradition to guide the exercise of the discretion, and indeed there is considerable evidence in the writings that some such code exists.[74] A code of ethics, unless reduced to writing and expressed with comprehensiveness and particularity, leaves the employee's position uncertain. Moreover, like so much regulatory law, these things only become crucial when someone is alleged to have breached the code, and there arises the problem of action to enforce it. In the absence of a clear regulation, any necessary punitive action would apparently need to be taken by charging a recalcitrant officer with misconduct or improper conduct — offences

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[70] R. S. Parker, "Official Neutrality and the Right of Public Comment", Part I "The Implications of the *Bazeley Case*" *Publ. Adm.* (*Aust.*) Vol. 20, 1961, 291; Part II "The Vow of Silence" *Publ. Adm.* (*Aust.*) Vol. 23, 1964, 193. This part of my article draws heavily on Parker's excellent analysis.

[71] Parker *supra* n. 70 Part II at 196.

[72] *Supra* n. 63.

[73] Parker *supra* n. 70 Part II at 208.

[74] See, e.g., Bridges *op. cit., supra* n. 73 at 6; W. C. Wurth "The Public Servant and Responsible Government" *Publ. Adm.* (*Aust.*) Vol. 15, 1956, 82; Stephen K. Bailey "Ethics and the Public Service" *Publ. Adm. Rev.* Vol. 24, Dec. 1964, 234; *cf.* the attempt to produce a written code of ethics for public servants in *Publ. Adm.* (*Aust.*) Vol. 24, 1965, 195 — an attempt apparently owing much to Parker's work.

invariably found in public service legislation.[75] Such a procedure raises the familiar question of what constitutes misconduct justifying dismissal.[76] In the case of the traditional professions (law, medicine, etc.) the approach to be adopted by a disciplinary tribunal is whether the conduct complained of "would be reasonably regarded as disgraceful or dishonourable by . . . professional brethren of good repute and competency".[77] Most professional disciplinary bodies consist wholly or largely of members of the profession whose standards are alleged to have been infringed, and they are the "professional brethren" who decide whether, facts being proved or admitted, the charge of misconduct has been sustained. Superior courts are reluctant to interfere with the findings of such bodies.[78] It does not appear that any public service board has explicitly analogized its position to that of a professional disciplinary body, but such boards, when sitting to hear charges of misconduct against staff, appear to be carrying out a similar function. Perhaps they, as public servants of good repute and competency, are in fact applying implicitly standards of public service ethics. If so, it would be as well to make the application overt and explicit; in that way, a code of ethics, especially if written, could become enforceable when need arose and could be sufficiently clear to enable public servants, ministers and the public to know where lines were to be drawn. But if some such process is necessary to make a code of ethics or guidelines enforceable when need arises it is suggested that it is preferable to draw up a comprehensive regulation setting out the limits on public comment by public servants. Such a regulation would be specific and enforceable without the need to analogize public service boards to professional disciplinary bodies, and would make the drawing of charges simpler.

Different Classes of Public Employees

Much of what is written about the rights of public employees in this area assumes that the staff concerned will be senior and close to ministers. Of course most officers are not and the question arises whether different degrees of restriction can apply to different classes of public servant.[79] There are great practical difficulties in such a course.[80]

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[75] The words "charging" and "offence" are used because they are terms usually found in the legislation. But statutory offences under public service acts are not criminal offences: *R* v. *White & ors*: *Ex parte Byrnes* 37 A.L.J.R. 297.

[76] A. Avins, *Employees' Misconduct as Cause for Discipline and Dismissal in India and the Commonwealth* (1968 and suppl. 1974), *passim.*

[77] See *per* Lopes, L.J. in *Allinson* v. *General Council of Medical Education and Registration* [1894] 1 Q.B. 750 at 763; adopted by Lord Esher, M.R. at 260-1.

[78] *Lawther* v. *Royal College of Veterinary Surgeons* [1968] W.L.R. 1141.

[79] An approach adopted in Great Britain: Establishment Circular 26/53 dated 14 Aug., 1953, extracted in *Publ. Adm.*, Vol. 32, (1954), 324. Some refinements to, but no radical alteration of, this system were recommended in the *Report of the Committee on Political Activities of Civil Servants,* (Chairman: Sir Arthur Armitage), H.M.S.O., January 1978, Cmnd. 7057.

[80] Parker, *supra* n. 70 Part II, at 209.

But apart from that, an employee well away from a minister and perhaps quite junior is no less likely to wish to make a public comment than a senior person, and perhaps more likely to do so. Although comment by such a person may be more easily disowned the maker of it will tend to be less well informed than a more senior person and to be less experienced in careful expression. Paradoxically, it may be easier to give greater freedom of expression to senior people. So apart from the practical difficulties, the idea is not attractive in theory.

Suggested Changes

Is it suggested that the legitimate needs of government can be met by a provision which is more precise and comprehensive than the present arrangements and yet one which affords the employee a greater measure of freedom. Unauthorized public comment should be prohibited on any matter concerning the department or institution in which the employee is presently serving or has served within the preceding six months, save in the following four situations which seem to be allowed frequently in practice now. (It is not necessary to specify these for private sector employees, for existing law or my suggested extension thereof would permit them):

1. Comment in the journal of or at a meeting of any industrial union or organization of which the employee is a member;[81]
2. In giving evidence or information to any Parliament, court, enquiry or commission which an employee is required to attend, whether on official duty or otherwise, save for evidence or information which is properly the subject of a claim for privilege;
3. In addressing a convention or meeting of any professional or learned society;
4. Where some iniquity or wrong doing is involved in which case the appropriate authority ought be able to be informed.

Any comment made pursuant to the above exceptions or on any department or institution in which the officer did not work or had not worked during the preceding six months should be subject to the same four conditions suggested for authorized comment by private sector employees.[82]

There will need to be some definition of public comment. It should include any verbal, written or visual contribution, for reward or otherwise, to television, radio or the press, or in any book, article, pamphlet or paper capable of access by persons other than other officers. The definition should also include such contributions at public lectures or meetings.

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[81] Parker, *supra* n. 70 at 208.
[82] *Supra* p. 347.

These proposals also avoid some of the difficulties inherent in some of Parker's suggestions, apart from that of enforceability. Thus he suggests that a public servant ought not be permitted to make a comment which identified him with support for or criticism of a political party or its policies or actions. Now such comment would be prohibited under the above proposals in respect of an official's present or recent departments. But it can be urged that although overt political comment will embarrass a government, and will probably constitute a breach of good faith, it is better to have it out in the open rather than have a politically committed officer tendering advice under what might well be simply a facade of impartiality and neutrality — a facade which would be very likely to affect the quality of his advice. Parker also proposes a restriction on comment on any policy which the official knows is under immediate consideration by the government. Once more the above proposals would proscribe such comment in respect of the officer's present or recent departments. But current issues are the very things upon which a citizen is most likely to wish to comment and current issues are the very areas where the public employee can make his most useful contribution to public debate. In fact this aspect of Parker's proposals runs counter to his own suggestion, quoted above, that means should be devised to put the knowledge and experience of the public service at the service of the public interest.

Summary

In summary, both public and private sector employees are subject to wide and almost complete restrictions on the extent to which they may debate or comment on the policies and activities of their employers, even where those policies or activities are the subject of serious public debate. Such restrictions arise from implied terms in the contract of employment. In the case of public employees, these are usually supplemented by explicit regulations. The restrictions seem wider than can be justified in modern conditions of large corporate employers and large complex government, both of whose operations can have profound effects on individuals, communities and nations. The attenuated operation of the notion of ministerial responsibility also weakens the case for such complete prohibitions on comment by public sector employers. Such extreme restrictions on the freedom to speak are also inappropriate in a time of rising standards of education and greater aspirations for freedom.

It has been argued that some relaxation can occur for both public and private sector employees. The term implied in contracts of employment could be modified, by a relatively slight extension of the public interest concept which has been used by the courts to justify such disclosure and speech as has been allowed. In evaluating public interest the test in the *B.L.B. Case*[83] should be used — has the

[83] *Supra* n. 46.

employee intended to prefer his own interests to those of his master? It has been submitted that employees ought be allowed, by such extension, to join in or initiate debate or comment on any matter of public interest or concern, certainly where it involves no illicit disclosure of actual information and subject to four safeguards. A liberalization for public officials is best achieved by statutory or regulatory amendments which prohibit comment on the affairs of the institution in which the official is presently serving or in which he has served within a previous period of (say) six months, subject to four exceptions and subject also to the same four safeguards suggested for employers generally. The four exceptions relate to participating in union activities, giving evidence, addressing learned societies and disclosing inequities. The safeguards proposed for all employers require that any comment be based on adequate knowledge, proof whereof should lie on the employee, that moderate language be used and that the speech be subject to the general law as to (for example) defamation.