

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

A 61/62

No. A.61/62

A 294/62

7/10/85

BETWEEN FORESTER LINDSLEY

Plaintiff

Public Service Commission

A N D

LEONARD ATKINSON, ADRIAN RODDA
and ROBERT MACLACHLAN

First Defendants

A N D

ARTHUR BEVILL Kt

Second Defendant

Part 1
Bullen v SSC
1985 1 NZLR
at

Kelly v Commission
of Police 1985 1 NZLR
and

Pananga v SSC
[1985] 2 NZLR

Hearing: July 18th, 19th and 20th, 1962.

Counsel: O'Flynn for Plaintiff.
Bain for Defendants.

Judgment: 9-8-62
62

JUDGMENT OF TURNER, J.

In the first of these two sets of proceedings, which were heard together by consent, plaintiff, an aircraft surveyor employed by the Air Department, seeks writs of Certiorari and Injunction against the Public Service Commission and the Director of the Civil Aviation Administration, in respect of a determination made by the Commission to transfer him from his position at Auckland to a similar position at Palmerston North. In the second, plaintiff complains that, in hearing his appeal from that determination, the Public Service Board of Appeal refused to hear certain evidence tendered by him, thus in effect wrongly setting a limit upon its jurisdiction. He therefore claims a writ of Mandamus directing the Board to hear the evidence, and to assume the jurisdiction to consider the matter which it raises.

Plaintiff has at all material times been employed by the Civil Aviation Division of the Air Department as an aircraft surveyor at Auckland. He was recruited in England for employment in New Zealand in 1957, and since May of that year has been stationed at Whenuapai. The establishment there consists of one regional aircraft surveyor (Mr. Anderson), one senior aircraft surveyor (Mr. Apperley) and two aircraft surveyors

p. 19

p. 14

of whom plaintiff is one. It is common ground that plaintiff is highly efficient technically, and on every score except one his services to the Department, by general consent, leave nothing to be desired. That respect is his personal relationship with Mr. Apperley, his immediate superior; and it is on account of this relationship that the Commission decided to transfer him to Palmerston North, from which determination these proceedings take their origin.

The disharmony between plaintiff and Mr. Apperley goes back at least as far as June, 1960, when Mr. Apperley, having till that time been equal in status with plaintiff (though plaintiff was, I think, in receipt of a slightly higher salary) was appointed to the position of senior aircraft surveyor at Auckland. Plaintiff considered that he should have been given this post, and appealed against Mr. Apperley's appointment; but his appeal failed. Since that time it is common ground that the relationship between the two has deteriorated. Plaintiff says, in effect, that he is persecuted by Mr. Apperley, and, apart from this, that he is disturbed by inefficiency in the latter's administration; Mr. Apperley, that plaintiff goes close to insubordination in making things difficult for him, and in a general lack of co-operation with his senior officer. The situation at Auckland is controlled, while Mr. Anderson is present at the office, by his geniality and tact in the position of Regional Aircraft Surveyor; but he is compelled to absent himself quite frequently from Auckland on visits (e.g. to Fiji) which may last even as long as two or three weeks at a time, and during these absences the difficulties between Mr. Apperley and plaintiff are exacerbated. The upshot of this history (to use for the moment a neutral term) was that the Commission attempted to put an end to what seemed an intolerable situation by determining, on October 6th, 1961, to transfer plaintiff from Auckland to an equivalent position at Palmerston North.

Plaintiff made objection to this course, and treating it in the first place as an administrative decision of the Commission within its powers under Section 50 of the Public

Service Act, 1912, he appealed under Section 9 of the Public Service Amendment Act, 1951, with the leave of the Chairman, to the Public Service Board of Appeal, on the ground of "extraordinary hardship". When the appeal came on for hearing before the Board on November 30th, 1961, plaintiff sought to tender evidence to show that the incompatibility on account of which he had admittedly been transferred, was not due to any fault on his part; but it was submitted on behalf of the Public Service Commission (respondent on the appeal) that this evidence was inadmissible, as being irrelevant to the issue of "extraordinary hardship". After hearing argument on this question the Board reserved its decision thereon, and in an oral decision delivered on February 6th, 1962, the Chairman ruled that the evidence on the appeal must be confined to "matters personal to the appellant" and declined to receive the evidence which plaintiff sought to tender.

Plaintiff now contends on the first action that the determination to transfer him to Palmerston North made by the Commission on October 6th was not one which it was within the power of the Commission to make as a purely administrative decision under Section 50. He contends that what was really done was that he was disciplined by transferring him to Palmers North because of a temperamental disqualification - incompatibility with Mr. Apperley - and that such action could be taken by the Commission only after first conducting the inquiry prescribed by Section 11 of the Public Service Amendment Act, 1927. He therefore claims -

- (a) That the determination should be regarded as the result of an inquiry, the prescribed form of which was never entered upon, and that it should be the subject of a writ of Certiorari to quash;
- (b) That if it is to be regarded as an administrative decision, then it should be pronounced a nullity, since it was made on grounds which were not appropriate for such a decision; and therefore a

In the second action he does not contend that he has any ground on which to stand if he succeeds on the first action in obtaining a writ of Certiorari. In such case, of course, he does not need the second action at all; the original decision is quashed and there is no need of appeal. But if the Court should hold that the decision of the Commission was one made administratively and within the powers of the Commission and bona fide, then plaintiff contends that evidence as to the history of the matter, and as to where the blame lies on the issue of incompatibility, should be admitted before the Board of Appeal as evidence of "extraordinary hardship."

I will deal with the second action first, for I think that it may be quite shortly disposed of. I am of the opinion that the meaning of the word "hardship" in the context in which it is set in Section 9 of the Public Service Amendment Act, 1951 is confined to the results which flow objectively from the determination to transfer. If because of such a transfer an officer is faced, ~~more than the ordinary degree,~~ with results which hurt or injure him more than would ordinarily be the case similar transfers, then he may give evidence of such results and the Board has jurisdiction to hear him. I do not think, however that the sense of injustice under which an officer's mind may labour, when reflecting on the history of the situation, is a matter which can properly be described as "hardship", and hence I have readily been able to conclude that the learned Chairman was right in excluding the evidence tendered. Judgment in the second action will accordingly be for defendants, and plaintiff's claim for a writ of Mandamus will be dismissed. I will reserve the costs of the action.

The questions in the first action are by no means to be so simply resolved. While it is obviously and admittedly within the power of the Commission to determine on the transfer of any officer from one place to another for no reason (so far as the officer is personally concerned) at all, regarding only (to quote Section 12 (1A)) efficiency and economy in the Department, yet i

They are: (1) The undisputed fact that on May 3rd, 1961, Mr. Joyce, the Chief Surveyor, visited the Auckland office on instructions from Head Office and interviewed plaintiff. The occasion for the interview was a complaint made by plaintiff as to action taken by Mr. Apperley (in the absence of Mr. Anderson) in altering transport arrangements proposed by plaintiff in connection with a projected visit to the Bay of Plenty on departmental business. Without attempting to go into the merits of this dispute, it was one sufficiently serious to warrant the intervention of the Chief Surveyor. The important aspect of the matter which warrants mention here is the result of the inquiry, which was summed up on May 7th in Mr. Joyce's written report to Head Office. I transcribe this verbatim, having myself underlined certain passages:

"6. Referring to your direct question of whether Mr. Lindsley is getting a fair deal I am of the opinion that he is and these alleged grievances are entirely of his own making. During this interview and on previous interviews regarding complaints I find it most difficult to keep Mr. Lindsley to the point and when tied down to the actual facts of the case he immediately introduces a series of red herrings in an endeavour to avoid the issue. His manner is at times insolent.

7. It is difficult to make any worthwhile recommendations in this case, Mr. Lindsley is a good technical officer but appears to be unfortunate in his relations with the aircraft industry and his fellow surveyors. There is no doubt that he is a disturbing influence in the Auckland office and region; this in turn is having an adverse effect on good relations between C.A.A. and the industry. I am aware that the duties of a surveyor can be most difficult and frustrating at times nevertheless he should have the ability to use tact and discretion and by a friendly and helpful attitude gain the confidence and respect of the operator. Unfortunately Mr. Lindsley does not appear to have this gift and the only course open would be to transfer him to a specialised position where he has no contact with the public and his duties confined to one particular field.

To Mr. Joyce's report there is appended, apparently in the writing of the Deputy Commissioner, a note:-

"Can you recommend the duties to which Lindsley could and should be transferred?"

to which the answer was added in Mr. Joyce's writing:-

"Would be very suitable as defects officer."

(2) I now come to consider a report in writing made

at Auckland, to the

accusation of temperamental or other disqualification, such as to prevent the efficient and satisfactory performance of his duties, is made against any officer, he cannot be transferred because of such an accusation to another position or locality pursuant to Section 11 (3)(c)(iv) of the Public Service Amendment Act, 1927, unless and until the accusation against him has been the subject of a complaint and inquiry as set out in Section 11. This case falls between these two extremes, and I am therefore compelled to consider the evidence carefully, and then, having found the facts, to decide how far the Commission can go in determining upon a transfer administratively when one of the reasons, or a part of the situation, which brings about the expediency of the transfer in the interests of efficiency is a matter which could have been made the subject of a complaint and inquiry under Section 11, but was never so treated.

I must now address myself to the task of finding and recording the facts necessary for my decision; but in doing so will sedulously avoid arriving at or expressing my conclusion as to the relative merits of the two officers concerned in this situation, and their respective shares in the responsibility for bringing about the situation which has arisen. In the view which I have formed on the matters to be decided in this case, it will indeed be desirable that I shall express no opinion in these respects. Adopting, therefore, a deliberately neutral attitude as between the two officers as to this question, I find that by October, 1961, a situation had developed between them in which efficiency of the Department would have justified the Commission in deciding administratively that, on account of this situation and without necessarily attributing any blame for it to one officer or the other, one or other of them should be transferred. By that time several demonstrable events had brought the incompatibility between plaintiff and Mr. Apperley pointedly before the Head Office of the Air Department, and before the Public Service Commission. I will now refer to these events, and to the documents which they brought into existence, in which

Surveyor (Mr. Joyce) dated July 14th, 1961, - two months later. Its subject is "Mr. Lindsley, Surveyor, Auckland Regional Office". After referring to the "antagonistic attitude" of plaintiff towards the Senior Aircraft Surveyor, the report continues:-

"The temperamental incompatibility of this officer has been as you know apparent for the greater part of his service at this Regional Office and is evidenced by verbal complaints expressed by operators and engineers (i.e. as confirmed by you during your recent visit to Ardmore when you interviewed Aitken, Liddell and Westcott.)

The recommendation that this officer be re-located has appeared in the relevant annual reports over a period of years.

It is beyond dispute that his technical ability is entirely satisfactory, but it must be appreciated that his illogical attitude can no longer be condoned. It is imperative in fairness to all concerned that he be given the opportunity to readjust his outlook through the medium of a transfer to a new environment."

(3) The next document which I select for mention is the verbatim report of proceedings taken place on August 30th. Mr. Callahan, a Head Office inspector, was then visiting Auckland and he had been instructed by Head Office to inquire while at Auckland into "incidents reported by Mr. Lindsley". It was shown that plaintiff had complained in writing through his superior officers about some twenty-seven matters, in respect of each and all of which he presented some complaint against Mr. Apperley. Mr. Callahan sat at Auckland on August 30th at 9 a.m., and held what purported to be an informal inquiry into these matters. His opening remarks have their significance and I will record them:-

" The meeting commenced at 9.00 a.m.

MR. CALLAHAN.- I have been instructed by the Permanent Head to investigate incidents reported by Mr. Lindsley. Many of these incidents concern the relationship between Mr. Lindsley and Mr. Apperley, who is Senior Aircraft Surveyor. I have called this meeting to assist me in arriving at the facts concerning these incidents. I have asked for a representative of the Public Service Commission's office to be present, and Mr. Coulam is acting in this respect.

I have before me a list of occurrences which I wish to be discussed at this meeting. These may not represent all the incidents concerning the relationship of Messrs. Lindsley and Apperley. I regard them as sufficient for this meeting.

The procedure I propose to observe is to read out a brief synopsis of the incident. I will call on Mr. Lindsley to explain in what way he considers the occurrence to have been irregular or disadvantageous to him. I will then ask Mr. Apperley to give his explanation of the incident. If necessary, I will ask Mr. Anderson to comment on incidents with which he may have been personally concerned or on general organisational matters affecting Aircraft Surveyors in this region.

We have only a limited time at our disposal. This room is booked for the afternoon and I wish to terminate the meeting about 11.30. I must therefore insist that discussion be confined to the particular incident under review.*

Mr. Callahan was as good as his word. Shortly before 11.15, when eight of the twenty-seven matters put forward by plaintiff had been the subject of discussion, he said:-

"I do not think I have here any other matters which may be attended to at this meeting. Mr. Lindsley has raised other matters, but they have been investigated and reports are available which reasonably establish the position. So unless, therefore, any of the parties here have any points specifically which they would wish to raise, I will declare this meeting closed. Mr. Apperley?"

To this inquiry Mr. Apperley said "No"; so did Mr. Anderson; but plaintiff attempted to bring up some of the remaining matters which he had put forward. There was no time left, however, and after only a short conversation Mr. Callahan terminated the proceedings, the concluding part of the record reading:-

"If you have any additional points, perhaps I might raise them with you. I will declare this meeting closed.

The meeting concluded at 11.15 a.m.*

Mr. Callahan then made certain further inquiries and presented a report of these proceedings to Head Office. He pointed out, as might have been expected, that the incidents dealt with at this meeting did not cover all those which have been reported by Lindsley. He then said: "I think they provide however a fair picture of the type of thing Lindsley complains about. As Appendix (A) to this minute I attach my conclusions about the eight incidents discussed at the meeting and about eight additional incidents, details of which are on the appropriate files.* His overall conclusions were:-

"Lindsley is convinced that he is getting a raw deal from Apperley and indirectly Anderson. Certainly the relations between him and the latter two are very strained, and it is likely that Lindsley's persistent attempts to belittle Apperley have prejudiced these two officers against him. I saw, however, no direct evidence of any victimisation of Lindsley, and the attitude of his two senior officers appears to have been punctiliously correct. I think the stage has now been reached where there is little possibility of achieving a normal working relationship between these three people.

Overall I am not impressed with the incidents raised by Lindsley. Apperley and Anderson have acted correctly and within their authority. Apperley's omission referred to in item 4 appears to have been due to inadvertence. The one point on which Lindsley might have some grounds for complaint is the fact that Apperley's criticisms of him (refer items 9 and 10) were not drawn to his attention at the time. This procedure should be observed in future.

and he made the following recommendations:-

- "(1) That Lindsley be brought to Wellington and informed by D.C.A. and D.C. Air that -
 - (a) his complaints and allegations have been thoroughly investigated and that Mr. Apperley has acted correctly and within his authority. Mr. Apperley's omission to pass on a memorandum on file 62/4/1 relating to a Fletcher defect occurred inadvertently.
 - (b) that the Department now regards these incidents as having been fully aired, and the matters concerned are now to be treated as closed.
 - (c) that Lindsley's complaints appear in aggregate as an attempt to belittle Mr. Apperley's reputation, and that this mode of conduct if persisted in will be dealt with by disciplinary action.
- (2) That Lindsley be requested to explain in writing the circumstances surrounding a letter he has in his possession from Reynolds. He should be told that seeing he has raised the matter officially by showing it to the Office Inspector and by keeping it with other official records in his custody, he should submit it to the Permanent Head, together with his explanation as to why he has kept the letter in this particular way.
- (3) That Lindsley be transferred to another district."

at this stage, then, plaintiff had made a number of complaints against Mr. Apperley; Mr. Callahan had inquired into some of these in plaintiff's presence, and into others without his being present; and he had found that there was "little possibility of achieving a normal working relationship between these three people" (plaintiff, Anderson and Apperley) and had recommended that plaintiff should be "notified that this mode of conduct if persisted in will be dealt with by disciplinary action."

and had recommended, in addition, that in any case plaintiff should be transferred to another district. This report is dated September 7th, 1961.

(4) The first of the final file of documents to which I wish to refer is dated September 15th, 1961 - eight days later. This is a letter from Mr. Joyce to D.C. Air and is in the following terms:-

"Reference is made to our discussions on the above subject this day:

I do not wish to upset the present happy relations of AND staff at H.O. or the Central and Southern Regional Offices.

It is therefore proposed that Mr. Lindsley be transferred to Palmerston North.

There is at present one Surveyor in the Palmerston North office who covers all survey duties on the East Coast of the North Island (from Palmerston North to Gisborne). Over recent years the West Coast (from Palmerston North to New Plymouth) has been controlled by a Surveyor from the Wellington Regional Office.

The addition of a further Surveyor at Palmerston North to undertake survey duties in the West Coast sector will obviate a considerable amount of 'dead' travelling time from Wellington.

In addition, it will bring the strength of the Palmerston North office up to Establishment.

Unfortunately, it will be most difficult to immediately fill the vacancy created in the Auckland office.

I regret this will have to wait until a suitably qualified and reliable applicant is found."

It is clear from this that on September 15th it was now already definitely proposed that plaintiff should be transferred to Palmerston North. On October 16th he was given formal notice by the Commission of his transfer; a copy of this letter, which I need not transcribe, is annexed to the affidavit of Mr. Rae. On November 15th a further letter, to which Mr. O'Flynn attached some importance, was received by Head Office from the Palmerston North office - it amounts to a local protest against the appointment of plaintiff to Palmerston North, and is perhaps worth transcribing. It is in the following terms:-

"With reference to Memo 4/4/4548 dated 16th October, 1961, under which this office has been advised of the possibility of the transfer of Mr. F. Lindsley

In view of the difficulty in accommodation at this office and other problems which could arise out of such a transfer, it is suggested the Airworthiness Section are asked to give consideration to the opening of an office in either Wanganui or New Plymouth and that Mr. Lindsley's transfer, if effective, is to either one or the other towns and that as his duties will be confined to this section of the North Island, i.e. Wanganui to New Plymouth, they would be more efficiently discharged if he were to be stationed in one of these centres as suggested."

There is a further memorandum endorsed upon it by Head Office as follows:-

"P.C.I. considers that reply should be that the matter should be raised, if really necessary, after the event of transfer."

From the above documents and the oral evidence which was given before me, I find the following facts:-

(1) There was a situation between plaintiff and Mr. Apperley which would in itself have been sufficient to justify the conclusion that, in the interests of the efficiency of the Department, one or other should be transferred as soon as a convenient transfer could be arranged.

(2) There is no evidence that any suggestion was ever made (except by plaintiff) at Head Office that the fault responsible for this situation might be at the door of Apperley.

(3) The Department's senior officers consistently blamed plaintiff exclusively for the situation.

(4) No full inquiry, and certainly no inquiry by the Commission in the form presented by the statute, was held as to the relative shares in blame which might have been attributed to plaintiff and to Mr. Apperley (I digress at this point to say as a matter of law that unless disciplinary action was proposed it was not necessary to hold an inquiry). In so far as Mr. Callahan's inquiry could be said to justify factual conclusions attributing misconduct or blame to plaintiff, it is clear that plaintiff was never given a chance to present his case on more than a part of the matters complained of by him; moreover, the form of Mr. Callahan's inquiry was an investigation into

adversely adverting to plaintiff, was made without any specific charge having been made against him.

(5) Without any formal inquiry, therefore, the Department's file contained:-

- (a) On and after May 12th, a report from Mr. Joyce that plaintiff was "a disturbing influence in the Auckland office and region" and that "his manner is at times insolent"; this report contained a recommendation that plaintiff should be transferred from Auckland and it was minuted by the D.C. Air, to whom it was recommended that plaintiff should be transferred to the position of defects officer (at Wellington).
- (b) On and after July 14th a report from Mr. Anderson complaining of the "temperamental incompatibility" of plaintiff and of his "consistently hostile attitude" to Mr. Apperley. The use of the words "temperamental incompatibility" may be regarded as significant if compared with the wording of Section 11 (1)(c) of the Public Service Amendment Act, 1927. It may be mentioned that Mr. Anderson's report when referring to "temperamental incompatibility" must be considered as going further than referring merely to the situation between plaintiff and Mr. Apperley, for Mr. Anderson in the paragraph dealing with this matter refers to a conversation which his Chief had had in the same regard with three engineers at Ardmore, as an example of plaintiff's general temperamental incompatibility (with persons outside the Department). This was also Mr. Joyce's personal view, as may be seen from the references in his report of May 7th, to plaintiff's "unfortunate relations with the aircraft industry", and his failure to gain "the confidence and respect of the operator" which is alleged by both officers is, quite apparently, more than mere incompatibility between plaintiff and Mr. Apperley; it is consistently suggested against plaintiff that he is temperamentally incapable of maintaining good relations with aircraft operators and engineers outside the Department.
- (c) On and after September 7th Mr. Callahan's report in which he concluded that there was little possibility of achieving normal working relationship between the three people concerned in the report.

Mr. Callahan concluded with a recommendation that plaintiff should be transferred to another district. The report treated plaintiff's complaints (on only some of which he had been accorded any hearing by Mr. Callahan) as "appearing in the aggregate as an attempt to belittle Mr. Apperley's reputation". It was recommended that plaintiff should be told that this was how the matter appeared at Head Office, and should be told that "this mode of conduct if persisted in will be dealt with by disciplinary action". (It should be added that Mr. Callahan

explain in writingⁿ his possession of a letter which, by the evidence before me, appeared to be a private letter written to him by someone outside the Department before he ever came to New Zealand; what right Mr. Callahan had to report upon this letter, and to treat it as a matter for censure was not obvious to me.)

I was invited by Mr. O'Flynn to find as a matter of inference from the evidence that the position at Palmerston North to which plaintiff was "transferred" had no real existence, and had been manufactured for the purposes of transferring plaintiff from Auckland. On the evidence before me I cannot so find. It is deposed that the vacancy existed on paper, and I must accept this evidence. At the same time it is clear that nothing was being done about filling this paper vacancy until it became expedient to transfer plaintiff somewhere - anywhere; and indeed the letter from Palmerston North shows how little he was needed there. Mr. Joyce's memorandum shows, on the other hand, how his services (as distinct from his society) would be missed at Auckland. But despite these logically relevant matters, I am unable satisfactorily to draw any positive inference that there was no vacancy at Palmerston North. Though the facts may present something of the appearance of a manufactured vacancy, I accept the departmental testimony, and hold that plaintiff's transfer to his new position, if determined bona fide and administratively, was a transfer which the Commission was able to make.

But was it so determined? It was submitted by Mr. Bain on the facts that, even in the face of the factual findings which are outlined above, the Commission had power to say: We disregard any matters of complaint appearing on plaintiff's file and transfer him administratively in the interests of efficiency to Palmerston North. Indeed, said Mr. Bain, if the Department had to hold an inquiry every time a complaint was received about any officer, there would be no end to the business. I accept this last submission. It is in my opinion competent for the Commission, with a complaint about an officer on the file which

could be the subject of disciplinary action, yet to put such a complaint on one side and, bona fide, for purely administrative reasons, without regard to the complaint, to transfer him to another office; but in my opinion if in making its decision the Commission is substantially influenced by the complaints recorded on the file, it must, by the procedure which the Statute prescribes in that regard, confront the officer with the complaint and give him a chance to clear himself of that with which he is charged.

Section 11 of the Public Service Amendment Act, 1927, makes specific statutory provision for the case of an officer against whom there is made some complaint in respect of which certain penalties are contemplated. It contains the following provisions:-

11. (1) The provisions of this section as to complaints and charges against officers, and the penalties or other consequences thereof, shall apply with respect to any officer who

(a) is not qualified, either temperamentally or otherwise, for the efficient and satisfactory performances of the duties of his office.

Sub-section (2) deals with complaints of a minor nature, and then in subsection (3) graver complaints are dealt with thus:-

(3) Where (such) a complaint or charge is made against any officer (not being the permanent head of a department) the following provisions shall apply:-

(a) The officer concerned shall be forthwith furnished by the permanent head with a copy of the complaint or charge, and shall, by notice in writing, be required to state in writing, within a reasonable time to be specified in the notice, whether he admits or denies the truth of the complaint or charge, and shall also be required to give to the permanent head in writing such explanation as he may wish to give with respect to the subject-matter of the complaint or charge. If a denial of the complaint or charge is not made within the required time the officer shall be deemed to have admitted the truth thereof.

(b) The permanent head shall forward to the (Commission) the complaint or charge and the replies thereto, together with his own report on the matter and such other reports as he may have obtained, and the (Commission) shall thereupon proceed to consider and determine the matter.

(c) Where (such) a complaint or charge is

(Commission), after consideration of the reports relating to the complaint or charge and any reply or explanation furnished by the officer, and after such further investigation or inquiry (if any) as (it) deems necessary, is satisfied as to the truth of the complaint or charge, (it) may, subject to any right of appeal conferred on the officer by this Act, -

- (i) Caution or reprimand the officer, or deprive him of his annual or other leave of absence during or in respect of a specified period; or
- (ii) Order to be deducted by way of penalty from the salary of such officer such sum as (it) deems fit; or
- (iii) Make a reduction in the classification and rate of salary of the officer, or in either such classification or rate of salary; or
- (iv) Transfer the officer to some other office or locality, which transfer may be in addition to any other lawful penalty; or
- (v) Dismiss the officer from the Public Service or require him to resign within a specified time (in which case the officer shall be deemed to be dismissed unless he so resigns).

It will be seen that the section applies to complaints against officers and the penalties or other consequences thereof; and that one of the complaints to which the section applies is an allegation that the officer is not qualified temperamentally for the satisfactory performance of his duties. One of the consequences, moreover, or penalties, which the section prescribes as a possible consequence of this complaint is that the officer may be transferred to some other office or locality.

It was not contended by Mr. Bain, as I understood his argument, that the attitude of plaintiff towards Mr. Apperley could not be said to amount to a temperamental disqualification for which it would have been possible to discipline him under Section 11 (e). Indeed, it seemed to me difficult for Mr. Bain to improve his case by a contention of this kind, for if he attempted so to submit, his argument could (so it seems to me) be founded only on the submission that plaintiff's attitude towards his immediate superior was not a matter of temperament covered by Section 11 (e), because it involved a deliberate and wilful course of conduct. Such a submission must at once bring

sub-sections of Section 11, and hence the case for defendants cannot be improved by the submission. I therefore thought that Mr. Bain could not escape from Mr. O'Flynn's submission that whatever view were taken of the complaints against plaintiff as they appeared on the departmental file, they must fit either Section 11 (e) or else some other sub-section of Section 11 - which, is immaterial.

I have come to the conclusion, not without serious thought, that the special facts proved in the present case preclude a finding that the Commission's action in transferring plaintiff to Palmerston North was one to which it could have been brought in a purely administrative way, not having first attributed to plaintiff the exclusive, or principal, blame for the situation which had arisen at Auckland. I cannot bring myself to find that this was in fact a case in which the Commission said simply: Here is a situation in which two officers are found to be incompatible; let us therefore determine, purely as a matter of efficiency, which one is to be transferred. If this had been done, plaintiff would have had no remedy; both Campbell v. Holmes, 1949, N.Z.L.R. 949, and Deynzer v. Campbell & Others, 1950, N.Z.L.R. 790, are authorities for this. But here the file which the Commission had before it had pre-judged the case. Was it humanly possible for the Commission to disregard the preliminary conclusion to which the Department had already come - that plaintiff should be transferred anywhere, so long as he did not stay at Auckland - because of a situation which his temperamental disability had brought about? I remind myself of the words of Gresson, J. in the course of his judgment in Deynzer's case at p. 827 -

"The affidavit (of the Commission) deposes to the action having been taken 'solely on the grounds of the efficiency of the Public Service', as well it may have been, but this is a mere verbal nicety, since the Commission was prompted by doubts as to appellant's reliability 'satisfactorily' to perform the duties of the office he held, and so involved a finding that he was lacking in the respects set out in the paragraph. He was, therefore, by virtue of s. 11, entitled to the benefit of the procedure therein provided."

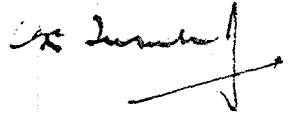
The judgment of Gresson, J. in Deynzer's case, from which I have just quoted a passage, was adopted by Hutchison, J. in his judgment. I remember, of course, that in the two judgments the two Judges were expressing a view on the whole case which failed in the Court of Appeal. That Court was equally divided, and in the result the view of O'Leary, C.J. and Finlay, J. prevailed since they supported the conclusion (but not the whole reasoning) of Northcroft, J. in the Court below. But the point on which the Court divided was one which does not arise in this case at all - viz. whether the disqualification alleged against appellant was a temperamental one. O'Leary, C.J. and Finlay, J. in the Court of Appeal, and Northcroft, J. in the Court below, were of the opinion that it was not, and hence that there was no ground on which the appellant there could ask for an inquiry. Gresson, J. and Hutchison, J. thought that it was a temperamental disqualification which was complained of, and would have given appellant an inquiry. In this division of opinion only Gresson, J. and Hutchison, J. had to go on to consider in the course of their judgments the point on which I think this case turns - viz. the validity of a determination to transfer an officer for temperamental disqualification when no inquiry has been held. I have no hesitation in these circumstances in treating the expressed views of Gresson, J. and Hutchison, J., not as part of dissenting judgments, but simply as obiter dicta, which I am at liberty respectfully to adopt and to follow.

I am not disposed to doubt in this case, any more than did Gresson, J. in Deynzer's case, that the primary aim of the Commission in the action it took was to promote the efficiency of the service; in the case before me the efficiency of the service demanded at least that consideration should be given to transferring one officer or the other. But when the Commission came to deciding which one to move, that question seems clearly to have been decided without any proper inquiry as to which officer was to blame - for the reason that that question of fact

had already been determined, and the answer was on the file. Had an inquiry under s. 11 been duly held, then, even if ^{the} plaintiff had been acquitted of all blame for the situation at Auckland, it might doubtless still have been competent for the Commission to transfer him to Palmerston North by an administrative action performed simply in the interests of efficiency. But in making such an administrative decision the Commission would have had before it the result of the inquiry; by the decision it would have determined to transfer ^{the} plaintiff to Palmerston North in spite of the fact that he was blameless - a very different matter from transferring him on the ground that he was blameworthy. In my opinion the Department is required by Section 11, where a complaint of the kind specified in the section is received, either to follow the procedure which the statute prescribes for the officer's protection, or else to treat the complaint as unworthy of serious investigation. In the latter case it may no doubt sometimes happen that the departmental file relative to staffing and appointments may still contain some reference to the complaint which has been laid on one side. If this is the case, however, then if any action is taken concerning the officer which would be appropriate as a consequence of his having been held guilty of the charge against him, it will leave the door open to the conclusion that the so-called "administrative action" which is taken "to ensure efficiency" is disciplinary action under another name. Whether this is held to be so or not will be a matter to be decided on the facts of each particular case, the onus, I think being on the officer to prove that in fact disciplinary action has been taken against him.

In the case before me I held that this onus has been discharged, and that the Commission, with the case pre-judged against plaintiff without any proper inquiry, determined upon his transfer in consequence of the department's conclusion as to his blameworthiness. This action the Commission was not entitled to take as an administrative matter, for in effect it disciplined the officer. This being so, the purported administrative decision

of the Commission was a nullity, and plaintiff is consequently entitled to an injunction restraining the Commission from carrying its decision into effect. The parties asked me in the event of my coming to this conclusion to reserve the question of Certiorari, as certain legal submissions remained unrepresented to me on this point at the end of a long hearing. I therefore reserve leave to both parties to submit, if necessary, argument as to whether a writ of Certiorari should also issue. I also reserve all questions of costs on both actions.



Solicitors:

F. D. O'Flynn, Wellington, for Plaintiff.

Crown Law Office, Auckland, for Defendants.