File Copy

Set I

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.92/83

IN THE MATTER of Part I of the Judicature Amendment Act 1972

AND

IN THE MATTER of the State Services Act 1962

BETWEEN JACQUELINE BRIDGET FRANCOISE RYALL of Christchurch, Unemployed

Applicant

AND STATE SERVICES COMMISSION a body duly established pursuant to the provisions of the State Services Act 1962 and having its office at Wellington

Respondent

Hearing 15 March 1984

Counsel W G G A Young for Applicant
C J Thompson for Respondent

Judgment 9 April 1984

JUDGMENT OF DAVISON C.J.

There are two issues raised in this application for review.

The first is a technical point as to whether the respondent has complied with its statutory obligations in the appointment and the annulment of appointment of the applicant to the permanent staff of the Public Service.

The second is whether in annulling the applicant's appointment the respondent was obliged to observe the principles of natural justice, and if it was, whether it in fact did so.

THE FACTS

As from 27 February 1979 the applicant was appointed on probation to the permanent staff of the Public Service

pursuant to s 27 of the State Services Act 1962. She was posted to the Department of Social Welfare as a Social Worker at Otahuhu. Section 27 provides:

> "27(1) Except as otherwise expressly provided in this Act or in any other Act or as determined by the Commission, every person who is first appointed to the permanent staff of the Public Service, and every person who, having ceased to be so employed in the Public Service, is again appointed thereto, shall be on probation for such period, being not less than 6 months and not exceeding 2 years (except as provided in subsection (2) of this section), as the Commission specifies either generally or in any particular case or class of cases.
>
> (2) The Commission may from time to time extend the period of probation of any probationer for a specified period not exceeding 12 months at any one time, by notice in writing to the probationer.
>
> (3) The Commission may at any time, in writing, confirm or annul the appointment to the Public Service of any probationer.
>
> (4) Every such confirmation shall take effect on the date of the instrument of confirmation, or, as the case may be, on such earlier or later date as may be specified in that behalf in the instrument.
>
> (5) Notwithstanding that the period of probation of any probationer may have expired, and whether or not he is appointed to any other position in the Public Service, he shall, while he remains in the Public Service, be deemed to be employed on probation until his appointment to the Public Service is confirmed or annulled under this section:
>
> Provided that if, at the end of 6 months after the expiration of his period of probation (including every extension thereof), he is still deemed under the foregoing provisions of this subsection to be employed on probation his appointment to the Public Service shall thereupon be deemed to be confirmed under this section. "

The applicant's probationary period was fixed in accordance with subs (1) of the section at 12 months to expire on 22 February 1980. Whilst a probationer is on probation it is the practice for probationary reports to be furnished every four months. A probation report prepared by the applicant's supervisor as at 22 June 1979 indicated that her performance was unsatisfactory. The Director of the Social Welfare Department at Otahuhu had a long conversation with the applicant during which he advised her that unless a marked improvement was made in all aspects of her approach to the job and the way she carried out her duties he would be recommending the annulment of her appointment. The Director, Otahuhu, so advised the Director General, Wellington.

In October 1979 as a result of some improvement in the applicant's standard of work and in recognition that personal factors may have adversely affected her work, the Director, Otahuhu recommended to the Director General, that her probation be allowed to run for the full period of 12 months to 27 February 1980. This was agreed to.

On 22 February 1980 a further probation report was prepared by the applicant's supervisor. It recommended that the applicant's appointment to the Public Service be confirmed. That probation report was sighted and signed by the applicant on 25 March. The recommendation was, however, not endorsed by senior management in the Head Office of the Department. In June the Department recommended to the State Services Commission ("the Commission") that the applicant's appointment be annulled. The applicant was so advised of that recommendation by letter dated 19 June 1980.

The Commission, however, considered it more appropriate to extend the applicant's probation pursuant to s 27(2) of the Act for a further period of six months to 22 August 1980 and that decision was communicated to the appellant by letter dated 8 August 1980 from the Department of Social Welfare. (In effect the extension was almost entirely retrospective).

The next probation report on the applicant by her supervisor was dated 22 August 1980. The report was shown to the applicant and signed by her. She endorsed on it the following comments:

"1. I have not had time to comment on this report fully.

2. I dispute this report.

3. I have not been in a situation to be fairly assessed.

4. Further comments on this report will be following. "

Further comments did follow when the Public Service Association took matters up on the applicant's behalf and on 5 September 1980 wrote to the Commission requesting that the applicant's probation be extended for a further period of six months. The report recommended that her appointment be annulled. The recommendation contained in the report of 22 August 1980 was supported by the Director, Otahuhu in a memorandum to the Director General dated 8 September 1980.

The Commission accepted that recommendation and acting under authority delegated to him the Secretary of the Commission annulled the applicant's appointment early in November and by letter dated 12 November 1980 advised the Social Welfare Department of that decision. The Social Welfare Department by letter dated 14 November 1980 advised the applicant that her appointment had been annulled with effect from 14 November 1980. In reaching its decision the Commission had available to it:

(a) The Probation Reports including that of 22 August 1980.

(b) A memorandum from the senior Social Worker to the Director, Otahuhu setting out in detail the applicant's alleged shortcomings and recommending the annulment of her appointment.

(c) A report from the Assistant Director, Otahuhu, to the Director, Otahuhu.

(d) The memorandum dated 8 September 1980 from the Director, Otahuhu recommending the applicant's appointment be annulled.

(e) A memorandum dated 25 August 1980 from the Assistant Director, Otahuhu to the Director, Otahuhu.

The applicant was not shown any of those documents except the Probation Reports.

On being advised of the annulment, the Public Service Association on 14 November 1980 sent a telegram to the Commission requesting a reconsideration of the applicant's case. That telegram was followed up by a letter dated 1 December 1980 enclosing lengthy submissions made by the applicant. The letter was expressed to be by way of appeal against the annulment. The Commission declined to reopen the matter.

APPLICANT'S CASE

The applicant seeks in these proceedings:

(a) A declaration that she is still a member of the Public Service.

(b) An order setting aside the purported decision to annul her appointment to the Public Service.

She bases her application on two grounds:

First:

That her initial period of 12 months probation expired on 22 February 1980.

That no notice in writing by the Commission to the applicant as required by s 27(2) of the Act was given extending her period of probation.

That accordingly the provisions of s 27(5) of the Act apply to her case and her appointment as an officer of the Public Service was thereby confirmed.

Second:

That in reaching a decision whether to confirm or annul her appointment in terms of s 27 of the Act the Commission was under a duty to act in accordance with the rules of natural justice or to act fairly.

THE FIRST GROUND

Applicant's Case

The basis of the argument advanced can be simply explained. Section 27(2) of the Act authorises the Commission to extend probation "by notice in writing to the probationer". Such notice, it was said, could only have been given by the Commission. It was then claimed that the Commission did not give notice in writing to the applicant but that the notice given extending probation was given in writing by letter dated 8 August 1980 from the Director General of Social Welfare. Therefore, it was said the notice of 8 August 1980 was not a proper notice and was ineffective to extend the period of probation for six months to 27 August 1980. The period of probation not having been lawfully extended, the applicant had continued on in the Public Service after her initial period of probation expired on 27 February 1980 for a period of more than six months and by virtue of the proviso to s 27(5) of the Act her appointment to the Public Service was deemed to have been confirmed.

The issue resolves itself simply to this: Must the Commission under s 27(2) itself give the required notice in writing or can it be given on its behalf? No question of delegated authority arises here. Although the Commission has powers of delegation under s 14 of the Act, it was accepted that such powers were never exercised.

Respondent's Case

For the Commission the applicant's case was answered in this way:

1. The decision to extend probation was given in writing.

2. There is nothing in the scheme of the Act to indicate that the communication to the probationer of the decision, by the Commission itself, is mandatory.

3. It is compliance with s 27(2) of the Act if the Commission makes a decision and that decision is communicated to her in writing.

Alternatively:

4. If there has not been actual compliance with s 27(2) by the Commission there was certainly substantial compliance.

Alternatively:

5. To succeed under this heading of argument on review proceedings the applicant must show that the means of communication of a statutory decision is part of the decision-making process.

THE SECOND GROUND

Applicant's Case

The applicant alleged that under s 27 of the Act the Commission was required to observe the principles of natural justice or act fairly. There were two respects in which it was alleged the Commission fell into error. They were:

1. In failing to give the appellant any or sufficient opportunity to deal with allegations made against her.

2. It took into account in reaching its decision material in respect of which the applicant had no or insufficient opportunity to comment.

Respondent's Case

1. The scheme of the Act relating to probationers is very different from that relating to permanent officers and the requirements of natural justice or fairness do not apply.

2. The applicant was well aware of the general tenor of the concerns about her suitability for permanent appointment and had ample opportunity to put her case.

DECISION

THE FIRST GROUND (No proper notice)

Section 27(2) provides that the Commission may extend the period of probation "by notice in writing to the probationer". The notice given was contained in a letter dated 8 August 1980 written on the letter paper of the Department of Social Welfare addressed to the applicant and signed by Mr W J Coley, the Director General of that Department. The relevant parts of that letter are:

> " In a letter dated 19 June 1980, we advised you that a recommendation had been sent to the State Services Commission annulling your appointment within the Public Service.
>
> Instead however, the Commission has decided to extend your probation by 6 months to 22 August 1980. Please note however that this decision was arrived at with some reluctance, and that your appointment to the service will be confirmed only if your performance has shown a very significant improvement from the time of the 12 months report to 22 August 1980. "

The first step in interpreting s 27(2) is to read the words of the subsection in their ordinary meaning and context.

It is quite clear that the decision to extend the period of probation must be given "by notice in writing". The subsection does not say, however, that such notice must be given by the Commission itself nor that it should be signed by an officer of the Commission. The subsection does two things. It empowers the Commission to extend the period of probation and then directs that such power may be exercised "by notice in writing to the probationer".

I was referred by both counsel to the Canadian case of Emms v R [1978] 2 F.C.174 which had some similarity with the present case. The relevant statutory provision was contained in the Public Service Employment Regulations, Reg. 30(3).

> " Where the probationary period of an employee is extended, the deputy head shall forthwith advise the employee and the Commission thereof in writing. "

There were two issues before the trial Judge. They were an issue of fact which was whether the plaintiff Mr Emms had received a notice in writing as required by subs 30(3) of the State Service Employment Regulations. The trial Judge held he had not received such a notice. The issue of law was whether if the facts were found in the plaintiff's favour, the probationary period had been extended: that is, were the obligations imposed by the Regulations to be construed as mandatory. The trial Judge held they were.

On appeal Mr Justice Ryan in delivering the judgment of the Court said at p 181:

> " The critical question before us was stated in argument as being whether subsection 30(3) of the Regulations is directory or imperative. This is, I agree, the question, if the significance of the distinction is what I understand it to be. Subsection 30(3) is, of course, mandatory in the sense that it imposes an obligation on the deputy head of the department, an obligation which, if not observed, may have legal consequences. But that, for present purposes, is not in my view the significance of the distinction between 'imperative' and 'directory'. The question is whether performance of the duty imposed by the subsection is an essential element in the exercise of the power to extend. Would failure to perform the duty render the extension a nullity? If so, the subsection is imperative in the sense in which the word has been used for the purpose of the distinction between 'imperative' and 'directory'. "

And later at p 183:

> " As I read subsection (3), it imposes a duty to advise the employee in writing forthwith after the probationary period is extended. It is not necessary to define 'forthwith' precisely. It is enough that the word contemplates a possible interval between the extension and the giving of advice of it to the employee. Communication in the manner specified is not an essential part or condition of the extension itself. Extension precedes the duty to advise.

> I have also considered whether the duty to give written advice forthwith is a condition subsequent to the extension in the sense that failure to perform it would operate to nullify the extension when the permitted interval expires. I do not construe the subsection as intending to attach so drastic a consequence to a failure to comply with the mandate of the provision. It is, it seems to me, of some value to note that an extension of a probationary period may well be to the mutual advantage of the employer and the employee. Such an extension may afford the employer additional time in which to assess an employee whose performance has not been altogether satisfactory, and the employee a further opportunity to prove himself rather than be rejected. It would be as well not to encumber the power to extend with the perils of literal compliance, and I do not find an intent so to encumber it. "

There is a difference, however, between the Canadian Regulation and our s 27(2). The Canadian Regulation 30(2) empowers the deputy head to extend a probationary period and Reg 30(3) requires the deputy head to forthwith advise the employee in writing of such extension. The extending is done by the deputy head. It is only the notice of the extension already made that is required in writing. Our s 27(2) makes the giving of the notice in writing part of the process of extending the period of probation and as such it is part of the process by which the power to extend is exercised by the Commission. To express it in another way - the Commission is empowered to extend the period of probation not by making a decision and then giving notice of that decision in writing as under the Canadian Regulations, but the extension is made by giving a notice in writing of the extension to the probationer.

The scheme of the Act is that all appointments to the Public Service are made by the Commission: see s 26. The Commission is the employing authority acting in that regard on behalf of the Crown. It is expressed in s 12(1)(e) of the Act to be the central personnel authority for the Public Service. Appointments initially are made on probation: see s 27.

It is authorised by s 36 to transfer employees from one Department to another or, if redundant, to terminate their employment and by s 40 to terminate employment after three months' notice. The Commission is the employer. It is for the Commission (unless it has delegated its powers under s 14) to perform the functions and exercise the powers given it by the Act. This includes the power to extend a period of probation under s 27(2).

It is mandatory for the Commission to give a notice in writing to the probationer in order to extend the period of probation. It is not sufficient for it to have the notice given by some other body - in the present case the Social Welfare Department. It was said on behalf of the Commission that there is nothing in the scheme of the Act to indicate that the communication to the probationer of the decision by the Commission itself is mandatory. I disagree. I think that the scheme of the Act making the Commission the employer - giving it power to delegate if it so chooses (but it has not done so) - and a plain reading of the Act, all indicate that s 27(2) should be read as requiring the notice to be given by the Commission itself.

The present case is clearly distinguishable from the Emms case (ante). In the Emms case the extension was granted by the employer but there was a failure to ratify the extension in writing as required by the regulation. In the present case there is no extension unless the Commission notifies the probationer by notice in writing that the probationary period is extended.

It was further submitted on behalf of the Commission that if there had not been actual compliance with s 27(2) then there had been substantial compliance: see A J Burr Ltd v Blenheim Borough [1980] 2 NZLR 1, 12. That case does not, however, assist the Commission. The present case is not one of substantial compliance with a procedural requirement but failure to observe an essential obligation imposed by the section. A probationer is entitled to know from his/her employer whether the period

of probation has been extended, not to receive the notice third hand from some other body. The communication is part of the process of the decision-making by the Commission.

The effect of the failure of the Commission to give the notice to the applicant in the proper manner as required by s 27(2) is that the applicant's period of probation was not extended.

When, therefore, after 22 August 1980, a period of more than six months had elapsed from the date when the applicant's initial period of probation expired on 22 February 1980 and no valid step had been taken to confirm or annul her appointment, she was by virtue of the proviso to s 27(5) "deemed to be confirmed" as a permanent employee. The subsequent purported annulment of her employment on 14 November 1980 was therefore ineffectual or invalid. It was invalid on two grounds:

First: Because there was no power to annul at that time because the applicant had already after 22 August 1980 been deemed to be confirmed as a permanent employee; and

Second: The notice of annulment given by the Department of Social Welfare under s 27(3) also required that the annulment be effected by the Commission in writing. The notice was not so given.

THE SECOND GROUND

Natural Justice

The second ground of the application for review is the allegation that the Commission failed to observe the rules of natural justice or to act fairly in making its decision to annul the applicant's appointment without calling on her for detailed comments on the probation report.

It is convenient to start by inquiring whether the Commission had any such obligation towards the applicant. For the Commission it was submitted that it did not because a probationer holds office at the pleasure of the Commission:

see: Ridge v Baldwin [1964] A.C. 40, 65; Morrison v Rodda & Ors (High Court, Wellington, A.224/70, 19 August 1971, Wild C.J.); Fraser v State Services Commission (Court of Appeal, Wellington, CA 28/83, 21 December 1983, Richardson J.). See too: ss 56, 57, 58 and 64 of the State Services Act. McConnell v Urquhart [1968] NZLR 417 is distinguishable.

In Morrison v Rodda & Ors Wild C.J. held:

> " That the Commission may annul the appointment of a probationer for any reason or for none".

For the applicant, however, whilst acknowledging the authority of Ridge v Baldwin (ante) and Morrison v Rodda (ante) it was submitted that cases decided since 1971 have indicated that some departure from the view expressed in those and earlier cases that the rules of natural justice do not apply to dismissal from office held under pleasure.

The first of such cases is Malloch v Aberdeen Corpn [1971] 1 WLR 1578 involving an action by a teacher who alleged that his purported dismissal was a nullity in that it was contrary to natural justice since he had not been given a hearing. It was not disputed that Mr Malloch held his office during pleasure, but three of the five Law Lords expressed the view that teachers in Scotland had in general a right to be heard before they were dismissed and since in view of the ambiguity of the regulations the appellant might have had an arguable case before the Committee and might have influenced sufficient members to vote against his dismissal, the Committee was in breach of duty in denying him a hearing, and the resolution and dismissal were accordingly nullities.

A passage from the speech of Lord Wilberforce (one of the majority) at p 1596 explains clearly the reason for not following strictly the decision in Ridge v Baldwin (ante). Lord Wilberforce said:

> " I come now to the present case. Its difficulty lies in the fact that Mr Malloch's appointment was held during pleasure, so that he could be dismissed without any reason being assigned.

There is little authority on the question whether such persons have a right to be heard before dismissal, either generally, or at least in a case where a reason is in fact given. The case of Reg v Darlington School Governors (1844) 6 Q.B. 682 was one where by charter the governors had complete discretion to dismiss without hearing, so complete that they were held not entitled to fetter it by by-law. It hardly affords a basis for modern application any more than the more recent case of Tucker v British Museum Trustees decided on an Act of 1753 - The Times, December 8, 1967.

In Ridge v Baldwin my noble and learned friend, Lord Reid, said [1964] A.C.40,65: 'It has always been held, I think rightly, that such an officer' (sc. one holding at pleasure) 'has no right to be heard before being dismissed.' As a general principle, I respectfully agree: and I think it important not to weaken a principle which, for reasons of public policy, applies, at least as a starting point, to so wide a range of the public service. The difficulty arises when, as here, there are other incidents of the employment laid down by statute, or regulations, or code of employment, or agreement. The rigour of the principle is often, in modern practice mitigated for it has come to be perceived that the very possibility of dismissal without reason being given - action which may vitally affect a man's career or his pension - makes it all the more important for him, in suitable circumstances, to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void. So, while the courts will necessarily respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not, in my opinion, prevent them from examining the framework and context of the employment to see whether elementary rights are conferred upon him expressly or by necessary implication, and how far these extend. The present case is, in my opinion, just such a case where there are strong indications that a right to be heard, in appropriate circumstances, should not be denied. "

Next there was the Canadian case Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police (1978) 88 D.L.R. (3d) 671. That was a case involving the dismissal of a probationary constable within his probationary period of 18 months.

Laskin, C.J.C. at p 679 referred to the state of the law as discussed by Lord Reid in Ridge v Baldwin in this way:

> " I would observe here that the old common law rule, deriving much of its force from Crown law, that a person engaged as an office holder at pleasure may be put out without reason or prior notice ought itself to be re-examined. It has an anachronistic flavour in the light of collective agreements, which are pervasive in both public and private employment, and which offer broad protection against arbitrary dismissal in the case of employees who cannot claim the status of office holders. As S.A.de Smith has pointed out in his book Judicial Review of Administrative Action, 3rd ed. (1973), at p 200, 'public policy does not dictate that tenure of an office held at pleasure should be terminable without allowing its occupant any right to make prior representations on his own behalf; indeed, the unreviewability of the substantive grounds for removal indicates that procedural protection may be all the more necessary'. The judgment of the House of Lords in Malloch v Aberdeen Corporation, [1971] 2 All E.R.1278, is a useful reference in this connection. In that case the statutory provision for appointment of teachers at pleasure was qualified by a restriction against dismissal without due notice and due deliberation by the school board. Observations were there made about the holding of an office at pleasure, and I refer particularly to what Lord Wilberforce said, at pp. 1295-6, where he commented as follows on Lord Reid's statement in Ridge v Baldwin, supra, that an officer holding during pleasure has no right to be heard before being dismissed:
>
> 'As a general principle, I respectfully agree; and I think it important not to weaken a principle which, for reasons of public policy, applies, at least as a

starting point, to so wide a range of the public service. The difficulty arises when, as here, there are other incidents of the employment laid down by statute, or regulations, or code of employment or agreement. The rigour of the principle is often, in modern practice, mitigated for it has come to be perceived that the very possibility of dismissal without reason being given - action which may vitally affect a man's career or his pension - makes it all the more important for him, in suitable circumstances, to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void. So, while the courts will necessarily respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not, in my opinion, prevent them from examining the framework and context of the employment to see whether elementary rights are conferred on him expressly or by necessary implication, and how far these extend. The present case is, in my opinion, just such a case where there are strong indications that a right to be heard, in appropriate circumstances, should not be denied.'

This case does not, however, fall to be determined on the ground that the appellant was dismissable at pleasure. The dropping of the phrase 'at pleasure' from the statutory provision for engagement of constables, and its replacement by a regime under which regulations fix the temporal point at which full procedural protection is given to a constable, indicates to me a turning away from the old common law rule even in cases where the full period of time has not fully run. The status enjoyed by the office holder must now be taken to have more substance than to be dependent upon the whim of the Board up to the point where it has been enjoyed for 18 months. Moreover, I find it incongruous in the present case to insist on treating the appellant as engaged at pleasure when he was first taken on as a third class constable (and not, as was possible, as a fourth class one) and when he was promoted to second class constable after serving 12 months.

> In short, I am of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than 18 months' service, he cannot be denied any protection. He should be treated 'fairly' not arbitrarily. I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in Bates v Lord Hailsham of St Marylebone [1972] 1 W.L.R. 1373 at p 1378, 'that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness'. "

The distinctions which form the basis of the rule in Ridge v Baldwin have been criticised by Wade, Administrative Law (4th ed) 476, and by de Smith, Judicial Review of Administrative Action (4th ed) 227.

It is clear that the three categories of cases referred to by Lord Reid in Ridge v Baldwin no longer provide any conclusive guidance as to whether or not principles of natural justice or fairness should apply to dismissal from an office held under pleasure. The Courts must, as Lord Wilberforce said in Malloch v Aberdeen Corporation (ante) examine the framework and content of the employment to see whether elementary rights are conferred upon an employee expressly or by necessary implication and how far these extend. Such New Zealand cases as Campbell v Holmes [1949] NZLR 949 and Morrison v Rodda (ante) may no longer indicate the approach which the Court will now follow in every case in relation to dismissal from office held under pleasure. Each case will need to be considered on its own merits.

In the present case, if there was a dismissal or annulment of the applicant's appointment it took place on 14 November 1980. Prior to that time the applicant was kept informed of the departmental assessments made of her performance. A probation report prepared as at 22 June 1979 indicated her performance was unsatisfactory and she had a long conversation with the Director of Social Welfare

about the matter. As a result of some improvement in the applicant's work, her probationary period was allowed to run its full term of 12 months to 27 February 1980. A further probation report of 22 February 1980 recommending her appointment to the Public Service was prepared by the applicant's supervisor and shown to the applicant and signed by her on 25 March 1980. This no doubt raised in her expectations that appointment would follow as of course.

The senior management of head office did not endorse that recommendation and recommended that the applicant's appointment be annulled and she was so advised by letter on 19 June 1980. The Commission, however, did not adopt that recommendation and decided to extend probation for a further six months to 22 August 1980. That decision was conveyed to the applicant by letter only on 8 August 1980, by which time the extended probationary period had almost run out. The letter stated "I sincerely hope that you take full advantage of this extension, and I look forward to seeing the improvement hoped for from you on your final probation report so that your appointment can be confirmed". The period from 8 August 1980 did not allow much time for the applicant to take advantage of the extension because the next probation report was made as at 22 August 1980 - two weeks after the date of the letter.

That probation report was highly critical of the applicant's performance. The report was handed to her on 2 September 1980 by an officer of the Social Welfare Department and for an hour and a half the officer and the applicant discussed the report. The applicant then took the report away. On 5 September 1980 the applicant returned the report and before leaving the officer of the Department she was asked if there was anything else she would like to discuss. She said "No". The report when returned was signed by the applicant and in the place reserved for comments she wrote in the four items referred to earlier in this judgment. Pursuant to the reference "Further comments on this report will be following" the applicant did not herself communicate

those comments to the Commission but approached the Public Service Association to make representations on her behalf, the Public Service Association having already on 27 June 1980 written to the Commission about the proposed annulment which was not effected when a decision to extend probation to 22 August 1980 was made.

On 5 September 1980 the Secretary of the Public Service Association wrote to the Commission and made representations on the applicant's behalf, ending with a request that the applicant be transferred to another Department and that her probation be extended for a further six months from the date of transfer. No reply having been received to that letter, the Secretary wrote on 7 October 1980 and enquired regarding progress. No reply was received. He wrote a further letter on 5 November 1980. No reply was received until 12 November 1980 when the Commission dealt with the submissions which had been made by the Secretary on behalf of the applicant and gave reasons why the Secretary's request for a transfer and for an extension of the probation period could not be acceded to, and advised that the applicant's appointment would be annulled. That was done by letter dated 14 November 1980 from the Social Welfare Department.

The applicant complains that the fact that the letter of 5 September 1980 to the Commission from the Secretary of the Public Service Association was not answered until 12 November 1980, gave her no opportunity to forward further submissions as she was awaiting an answer to her requests, and she further complains that she was given no opportunity to comment upon reports on her which were considered by the Commission other than probation reports. One such report was one of five pages from one G J Putland, Senior Social Worker, dated 27 August 1980, and another was a report from one J G Luckock, Assistant Director, Social Work, dated 25 August 1980.

On considering the course which the inquiry by the Commission into the applicant's suitability for appointment took, it is hard to avoid the conclusion that the applicant

was not treated fairly, especially from August 1980 when the question of annulment of her employment loomed large. First she was given no time to show improvement from the 8 August to 22 August. Second, she noted on the report of 22 August 1980 that further comments on the report would be following. Comments did in fact follow through the Public Service Association on 5 September 1980 but she knew nothing of the reports of Messrs Putland and Luckock, both of which went far beyond the probation report of 22 August 1980 and were highly damaging to her chances of appointment; the Putland report even raising questions of her honesty which had not been previously raised. Third, the Commission failed to reply to the letter of the Secretary of the Public Service Association of 5 September 1980 until 12 November 1980. The letter of 5 September 1980 had asked for an urgent reply to the request for transfer and extended probation. When that was refused on 12 November 1980 there was no time to make the further representations before the letter of annulment was received on 14 November 1980.

No doubt the course of dealing between the Commission and the applicant raised in her expectations that she might be able to satisfy the Commission of her suitability for appointment and had she been able to make the further representations and answer some of the matters contained in the reports of Messrs Putland and Luckock she may have persuaded the Commission to take a different view of her case. Whether she could have done so is, however, irrelevant. She was not given the opportunity.

The Courts will normally respect the right of the Commission to dismiss a probationer who holds office at pleasure without assigning reasons, but this as Lord Wilberforce pointed out in Malloch v Aberdeen Corporation (ante) "should not prevent them from examining the context and framework of the employment to see whether elementary rights are conferred upon him (the employee) expressly or by necessary implication and how far these extend".

Did the applicant have any elementary rights connected with her employment or probation? I think she did. She had the right to be shown the probation reports on her and the right to comment upon those reports. She also had the right, I think, where probation reports were supplemented by other reports from Messrs Putland and Luckock, to comment on those reports, especially where one of them - the Putland report - commented upon her honesty. If she had indicated on the probation report that she had no comment then the position may well have been very different. But she indicated: "Further comments on this report will be following".

The letter from the Commission to the Secretary of the Public Service Association dated 12 November 1980 stated:

> " Ms Ryall has indicated that she does not accept the comments in that probation report but no refutation in substance has been received by the Department. "

There is no doubt the obligation rested on the applicant to supply her comments to the Commission. I think that had the Commission promptly replied to the letter from the Secretary of the Public Service Association of 5 September 1980 and indicated that the requested transfer and extension of probation would not be granted then the applicant would have replied to the report made against her and also replied to the reports of Messrs Putland and Luckock if she had known of them. But the Commission gave her no opportunity to do so. It replied to the Secretary on 12 November 1980 and annulled her appointment by letter dated 14 November 1980. She was clearly awaiting the reply to the Secretary's letter before making the further comments in reply. The contents of the letter dated 28 November 1980 sent by the Public Service Association to the Commission after the annulment trying to have the applicant's case reconsidered indicate that she had material comments to make.

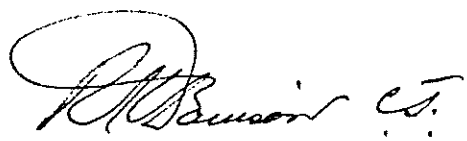
In all the circumstances, I do not think the Commission gave her a proper opportunity to comment on what were serious allegations against her; allegations which must have influenced the final decision of the Commission to annul her appointment. To that extent I think it acted unfairly to her.

In reaching that conclusion I do not suggest what procedure should be followed where there is annulment of probationary appointment in every case. The requirements of natural justice must depend on the subject matter under consideration and the circumstances of the case. If it were necessary for me to do so, I would declare the annulment void on that ground.

The applicant having succeeded, however, on the first ground, she was after 27 August 1980 deemed to be confirmed as a member of the Public Service. She is entitled to a declaration to that effect.

It follows that she is also entitled to an order setting aside the purported decision to annul her appointment to the Public Service as made without authority. The Commission's power to terminate employment under s 40 of the Act may now have to be considered if the Commission decides to follow such a course.

The consequences of these findings are matters now to be resolved between the parties. The question of costs is reserved. Counsel may make submissions by memoranda.



Solicitors for the applicant: R A Young Hunter & Co (Christchurch)

Solicitors for the respondent: Crown Law Office (Wellington)