

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

BETWEEN RUSSELL OWEN BULLEN of
14 Pioneer Crescent,
Dunedin, Public Servant
First Applicant

COLIN JAMES REID of
55 Aberdeen Grove,
Dunedin, Public Servant
Second Applicant

AND STATE SERVICES COMMISSION
a statutory body constituted
by the State Services Act
1962
Respondent

In Chambers:

Hearing 29 February 1984

Counsel G P Barton and Lydia Mudryj for applicants
C J Thompson and D J Bradshaw for respondent

Judgment 29 February 1984

(ORAL) JUDGMENT OF DAVISON C.J.

The applicants in these proceedings are both senior officers of the Ministry of Works presently stationed in Dunedin.

As a result of moves within the Ministry of Works and an inquiry which was instituted in connection with certain of the Ministry's operations late last year, both of the applicants were on 16 February 1984 given written notice by the Commissioner of Works of the decision of the State Services Commission to transfer them to other duties out of Dunedin pursuant to s 37 of the State Services Act 1962. Both of those officers have been advised that their final

day in their present positions is to be Friday, 2 March 1984 and that they have been allowed each a period of 14 days in which to make the necessary arrangements before taking up new duties in Wellington. The Ministry of Works has indicated that it proposes to replace those officers and to introduce a substantial number of other officers into the Dunedin area with a view to the strengthening of the administration of the Department in that area.

The two applicants have filed in this Court proceedings seeking a judicial review of the State Services Commission decision under s 37 of the State Services Act 1962 transferring them from their present positions to positions in Wellington, and in view of the imminence of the dates when they were required to move, they have filed an application for interim orders under s 8 of the Judicature Amendment Act seeking to have the decision to transfer deferred pending the hearing of the judicial review. The grounds on which the review is sought are set out in paras 11, 12, 13, 14 and 15 of the statement of claim.

Dr Barton on behalf of the applicants submitted that there were two main grounds of attack of the decision made by the Commission under s 37. The first main ground was that the Commission exercised its power under that section invalidly for the reason that the power was used substantially in lieu of disciplinary measures which should have been taken against the officers if the Department had decided to proceed further: and, secondly, that the Commission had exercised its power unfairly in that it failed to give the officers or either of them a sufficient opportunity to be heard in answer to the various allegations.

Mr Thompson for the Commission in reply submitted that the papers before the Court contained no more than allegations that the power had been exercised by the Commission for disciplinary reasons and it was not supported by any evidence on which the Court should act: and, secondly, the power was not exercised unfairly by the Commission in

ordering the transfer but was exercised for purely administrative reasons.

I have examined the documents, particularly the portions of them to which Dr Barton referred in reply, and I am satisfied that the papers do raise sufficient inference that the Commission certainly considered disciplinary action but that for reasons best known to the Commission it decided to act administratively and not to charge the persons under the disciplinary provisions, which would have had the effect of allowing them to answer those charges and to deal with them.

I note in passing that whilst reference is made to disciplinary provisions, "disciplinary" under the State Services Act includes mere inefficiency and it is this matter which is at the basis of the suggestion that the disciplinary powers may have been exercised. If this direction to transfer the officers is allowed to continue then the effect will be that they are required to leave Dunedin almost immediately and take up duties in Wellington and they will be replaced in Dunedin by other officers appointed to their positions.

Each of the applicants in an affidavit has disclosed personal circumstances which will be material if they are required to make the transfers as directed.

The interim orders have been sought under s 8 of the Judicature Amendment Act 1972 and the Court is empowered to make such orders if in its opinion it is necessary to do so for the purpose of preserving the position of the applicants. The Court is also given power under s 8(3) to make such an order subject to such terms and conditions as the Court thinks fit.

I am satisfied on the material before me that having regard to the drastic consequences that will follow if these transfers are implemented as proposed that it is desirable that interim orders should be made so long as I

am satisfied that there exist reasonable grounds for concluding that such orders are necessary in accordance with s 8.

In coming to a conclusion as to whether or not such orders are necessary I record that I am satisfied that the applicants have established that there is a serious question to be tried here, namely, as to the basis of the decision of the State Services Commission in ordering the transfer and as to whether or not there has been any unfairness in the way that the applicants have been dealt with in not having been given an opportunity to answer the allegations if in fact it appears at the hearing that the decision of the Commission was based substantially on desire to avoid disciplinary proceedings in terms of the Act. In this case there will be a substantial evidentiary element to be dealt with but I am satisfied that there is enough evidence on the papers to indicate that the applicants have a case which raises a serious issue.

So far as the balance of convenience is concerned or as to the necessity for the orders, there are matters to be considered on both sides. The applicants for their part will suffer the upheaval which will result in the movement of their respective families from Dunedin and I merely note, without detailing, the various factors which each of them set out in their affidavits under this topic.

So far as the Ministry is concerned, it is instituting reorganisation of its administration and has already designated two officers to replace the two applicants. The Ministry wishes that the whole of the new organisation be placed in Dunedin rather than that the two applicants should remain in their present positions. This raises some difficulty but I think this difficulty can be overcome by an appropriate order. I have been advised by Mr Thompson acting on behalf of the Commission that the two replacements for the applicants will be transferred to Dunedin purely on an acting basis until such time as the applicants' proceedings for review have been determined. Further, that

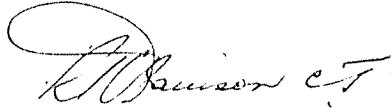
the applicants at the end of the period of two weeks when they are presently required to make their transfer will be permitted to commute from Dunedin to Wellington to take up duties there with the expenses of their transfer and accommodation paid until such time as the decision on the application for review is given. On that basis I make the following order:

1. That the respondent will not take any further action under s 37 or s 39 of the State Services Act 1962 to implement the directions for transfer given to the applicants by the Commissioner of Works by letter dated 16 February 1984 until the further order of the Court.
2. That order is made on the conditions that the applicants cease attendance at their present employment in Dunedin on 2 March 1984 and that on 19 March 1984 they attend at the Wellington office of the Ministry of Works to undertake such duties as may be directed of them, such attendance to be on the basis that they are paid their travelling, accommodation and incidental expenses and be permitted to commute weekly from Dunedin to Wellington.
3. That the applicants, having undertaken to bring these proceedings on for hearing as soon as possible, take all steps to ensure that the applications for review are in fact brought to a hearing at the earliest date.

Costs reserved.

I record that in directing the arrangements above which will result in two officers being appointed in an acting capacity to replace the applicants at Dunedin, the effect of such persons having been so appointed shall

not in any way affect the exercise of the discretion of the Court which it may be called upon to exercise on the hearing of the substantive application for review. The position at that stage is to be considered as though the two officers had not been appointed in an acting capacity.

A handwritten signature in cursive script, appearing to read "J. M. Benson C.J.", is centered on the page.

Solicitors for the applicants: Macalister Mazengarb Parkin
& Rose (Wellington)

Solicitors for the respondent: Crown Law Office
(Wellington)