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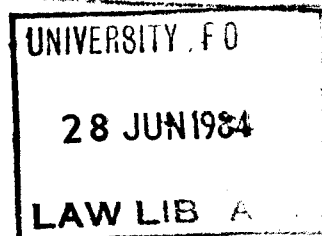
IN THE COURT OF APPEAL OF NEW ZEALAND

CA 21/84

BETWEEN

KENNETH ALFRED GEORGE BIRSS
of Christchurch, Senior
Probation Officer

Appellant



AND

STANLEY JAMES CALLAHAN
acting in his capacity as
Permanent Head of the Justice
Department, Charles Ferguson
Building, Wellington

Respondent

Coram: Richardson J
McMullin J
Sir Thaddeus McCarthy

Hearing: 16, 17 May 1984

Counsel: E W Thomas Q C with P H B Hall for Appellant
R M Elliott with L G Fergusson for Respondent

Judgment: 1 June 1984

JUDGMENT OF RICHARDSON J

The appellant, Kenneth Alfred George Birss, joined the probation service in 1967. On 18 May 1982, the then Secretary for Justice, John Fraser Robertson, handed him a notice containing various charges which were made against him under the State Services Act 1962. The appellant continued his work at the Christchurch Probation Office. Nineteen months later and without any immediate prior notice to the appellant Mr Robertson's successor, Stanley James Callahan, purported to

suspend the appellant pending the hearing and determination of the charges. The suspension letter dated 21 December 1983 and delivered to the appellant the next day, reads as follows:

" Pursuant to s 58(9) of the State Service Act 1962 I direct that you are to be suspended from duty with effect from the date of receipt of this notice.

The State Services Commission has approved that the period of suspension shall be with pay until the expiry of your period of annual leave on 20 January 1984 and from 21 January 1984 it will be without pay.

You are to hand in your warrant card and any office equipment and keys you hold, collect your personal effects and vacate the premises without delay. "

The appellant then sought judicial review of the decision of the Secretary for Justice. His application was heard during the vacation and was dismissed by Holland J in a judgment delivered on 25 January 1984. But in view of his conclusion that the proceedings had been brought about by what he characterised as "a very precipitate" and "hasty" action by the Secretary for Justice, the Judge did not regard it as an appropriate case for awarding costs against the present appellant.

Against that background the essential question for decision in this appeal is whether, after that lapse of time and in the circumstances existing as at 21 December 1983, the Secretary for Justice breached the principles of natural justice and fairness in suspending the appellant in that way, and in particular without then giving him any prior opportunity to be

heard on the matter. Before turning to the facts it is convenient to refer briefly to the scheme of the legislation and to the governing principles in this branch of administrative law.

The Scheme of the Legislation

Section 56 creates a wide range of offences (in the disciplinary sense) against the Act: from indolence, inefficiency and intoxication to insubordination, improper conduct affecting adversely the performance of the officer's duties or bringing the Public Service into disrepute, and behaviour calculated to cause unreasonable distress to other employees. Section 57 provides a relatively simple informal procedure for minor offences for which the sanctions are a fine not exceeding \$20, caution and reprimand. Section 58, with which this case is concerned, deals with offences under s 56 other than minor offences dealt with under s 57, and allows for the imposition of dismissal and other specified lesser penalties.

Disciplinary proceedings under s 58 are instituted by service on the officer concerned of the written copy of the charge against him (subs (1)). The officer is required to state in writing whether he admits or denies the truth of the charge and to give the permanent head such explanation as will enable proper consideration to be given to the alleged offence (subs (2)). The permanent head then forwards to the Commission a copy of the charge and any replies thereto, together with his own report on the matter and such other reports as he may have

obtained (subs (3)). The Commission is required to "thereupon proceed to consider and determine the matter" (subs (3)). How it does so must depend on the nature of the charges and the sufficiency of the material forwarded to it. Further investigation and inquiry may be necessary before the Commission reaches a decision and subss (4) and (6) provide appropriate powers to enable the Commission to do so fairly and effectively. It may appoint a member of the Commission and any other person or persons to conduct an inquiry into the matter (subs (4)) or it may itself make such further investigation or inquiry as it considers necessary (subs (6)). As soon as practicable after the conclusion of any such investigation or inquiry the Commission must inform the officer concerned of the Commission's decision and of the penalty (if any) imposed by it (subs (7)). The decision of the Commission is appealable to the Public Service Appeal Board. On the hearing of the appeal the Board may receive such evidence as it sees fit (s 64(4)) and, except where the appeal relates only to a decision imposing a penalty or directing the recovery of any amount under s 58, the onus of proof rests on the Commission.

In contrast to the detailed provisions governing the institution and consideration of disciplinary charges themselves, the provisions governing suspension are short and sparse. There are 3 specific powers of suspension expressly provided for under the legislation: suspension for insobriety (Public Service Regulations 1964 (Reg 49)); suspension of an officer charged

with having committed a criminal offence punishable by imprisonment for a term of one year or more (s 55(1); and suspension where, as here, disciplinary charges are brought or are contemplated under s 58. The material provisions of s 58 read as follows:

- " (9) Any officer against whom a charge is made or contemplated under this section may, pending the hearing and determination of the charge, be suspended or transferred to other duties by the permanent head, or by the controlling officer having authority over the officer.
- (10) Every suspension under subsection (9) of this section shall be forthwith reported to the Commission, and may be removed only by the Commission.
- (11) Except with the express approval in writing of the Commission, no person who has been suspended under the foregoing provisions of this section shall be entitled to receive any salary or payment for loss of earnings in respect of the period of suspension if the charge made against him is sustained on inquiry or investigation as hereinbefore provided.
- (12) An officer shall not be paid any salary or any amount in respect of loss of earnings in respect of any period of suspension from duty under this section unless the Commission otherwise directs or he is acquitted of the charge. "

There is no appeal to the Public Service Appeal Board against a suspension under subs (9).

The Relevant Principles of Natural Justice

The principles of natural justice and fairness have been reviewed in a number of cases in this Court in recent years: see for example Ronaki Ltd v Number One Town and Country Planning

Appeal Board [1977] 2 NZLR 174; Daganayasi v Minister of Immigration [1980] 2 NZLR 130; and, in relation to the administration of s 58, Fraser v State Services Commission CA 28/83 judgment dated 21 December 1983. It is unnecessary to traverse the whole ground again. Paraphrasing what was said in Fraser: the requirements of natural justice depend on the nature of the power being exercised, the effect which the decision may have on persons affected by it, and the circumstances of the particular case; where they find it necessary to do so in order to ensure that the procedure is fair in all the circumstances the Courts will require the adoption of appropriate procedures or the supplementation of the procedures laid down in the legislation; in determining whether an opportunity to be heard must be given before a decision potentially adverse to the person is made it is necessary to consider the scheme and context of the governing statute; and the precise content of the rules of natural justice and standards of fairness have to be tailored in a realistic way to meet the needs of the particular case. In Fraser it was dismissal that was in issue. In that situation there is what Lord Reid in Ridge v Baldwin [1964] AC 40, 65 described as "an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without telling him what is alleged against him and hearing his defence and explanation"; and see also Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141. In Fraser we held that the powers of investigation and inquiry under s 58 had to be exercised so as to accord with

the principles of natural justice and that the Commission had failed to satisfy those requirements in not giving the appellant adequate opportunity to answer allegations never disclosed to her which had been made against her by the Commissioner of Patents - at an inquiry under subs (4) or by inviting her comments on the report of the Commissioner under subs (6). So we upheld the order of Quilliam J setting aside the decision of the Commission.

Suspension and Natural Justice

In this case it is suspension, not dismissal, which is at stake. How should it be characterised in the statutory context? In Vaillancourt v The King [1927] Ex CR 21, 25 Audette J observed: "What does suspension mean, if not suspension of work which carries with it suspension of the right to wages? ... Does not this amount to dismissal?" And more recently in John v Rees [1970] Ch 345, 397 Megarry J expressed the same view: "... suspension is merely expulsion pro tanto. Each is penal, and each deprives the member concerned of the enjoyment of his rights of membership or office." While the equating of suspension and dismissal may be debated the observations serve to emphasise 2 important features that suspension and dismissal have in common: in each case the officer is deprived of his entitlement to perform his duties in the Public Service so long as the suspension or dismissal stands; and in each case (where suspension is without salary) the officer is deprived of his

entitlement to salary until the charges against him are determined. In those major respects a decision to suspend without salary inevitably and adversely affects the rights and reasonable expectations of a permanent officer of the Public Service.

However, in Lewis v Heffer [1978] 1 WLR 1061, 1073 Lord Denning drew a distinction between suspensions inflicted by way of punishment and suspensions made as a holding operation pending inquiries. He went on to say:

" Very often irregularities are disclosed in a government department or in a business house: and a man may be suspended on full pay pending inquiries. Suspicion may rest on him: and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department or the office is being affected by rumours and suspicions. The others will not trust the man. In order to get back to proper work, the man is suspended. At this stage the rules of natural justice do not apply: see Furnell v Whangarei High Schools Board [1973] AC 660. "

With respect, I cannot agree. It is not a question of whether the officer is to have an opportunity of defending himself against the charge, but of whether pending the hearing and determination of the charge he can be suspended without any prior opportunity to be heard as to that. And Furnell v Whangarei High Schools Board is not in point. It was concerned with a detailed and elaborate code which the majority of

the Judicial Committee considered precluded the superimposition of the additional safeguards derived from the ordinary rules of natural justice. On the general issue, in Dixon v Commonwealth (1981) 55 FLR 34, 44, the Federal Court of Australia (Bowen CJ, Deane and Kelly JJ) took the view that the fact that the relevant statutory power is in the form of a power to suspend pending inquiry does not import any general exclusion or modification of the rules of natural justice which are prima facie applicable to a statutory power adversely to affect the rights, property or legitimate expectations of another. Like the State Services Act 1962, the Act there contained no provisions specifying the procedure to be observed in reaching a decision to suspend. Having regard to the adverse effects on the officer - loss of entitlement to perform his duties and of salary - and to the likelihood that it would have profound emotional, social and financial effects on him, in the absence of any clear legislative intent to the contrary the rules were applicable in respect of that decision.

For very much the same reasons that have led the Courts to attach such importance to the importation of natural justice and fairness into the dismissal process, I am of the opinion that in the absence of any clear expression of a contrary legislative intent the rules of natural justice and fairness prima facie apply to suspension from office without salary.

Where and how they do so under s 58 is a matter of construction of its provisions in their statutory context.

Subsection (9) does not specify that any particular procedure be followed. I do not think it can possibly be said that the legislature intended to leave such an important question of natural justice to the unfettered discretion of the permanent head or controlling officer. It does not necessarily follow that notice and an opportunity to be heard must be given in every case where suspension is in contemplation. The nature of the charge and the exigencies of the moment may perhaps call for immediate action. But there is nothing of that kind in this case - at least in the circumstances obtaining on 21 December when the Secretary for Justice purported to suspend the appellant. And the ability of an officer who has been suspended to ask the Commission to lift the suspension (subs (10)) is no answer. In the meantime the officer loses his right to work in his chosen career, he suffers the stigma of suspension from duties, and unless and until the Commission rules otherwise he is deprived of the financial support provided by his salary. The potentially adverse effects in this regard are highlighted in this case by the fact that it was over 3 months before the Commission responded (negatively) to a request from the appellant's solicitors that it either set aside the suspension or direct that it be with full pay pending determination of the charges.

The Facts of This Case

In the view I take of the application of s 58 in the circumstances of this case it is not necessary to review in any detail the reasons for the extraordinary delays that have taken

place in the hearing and determination of the charges. As initially laid they read as follows:

- " 1. YOU have behaved in a manner calculated to cause unreasonable distress to other employees or to affect adversely the performance of their duties contrary to section 56 (d) of the State Services Act 1962 IN THAT
- (a) on divers occasions over the past years you have made derogatory comments about the management of the Christchurch Probation Office and in particular about the District Probation Officer, Mr Leech, both to junior staff within the Probation Office and to persons outside of the Probation Office.
 - (b) in June 1979 you did make allegations at the Albion Tavern to a group of people that Mrs J Smith a staff member of the Christchurch Probation Office had entered New Zealand illegally and had made a false declaration under the Oaths and Declarations Act.
 - (c) on divers occasions between February 1979 and April 1979 you made phone calls purporting to be Mr D Leech arranging for various supplies or services to be delivered to Mr Leech's home address, or to be made available to him without his prior knowledge or permission.
 - (d) you have failed to regularly attend staff meetings with the result that your relationships with other staff in the Christchurch Probation Office have been adversely affected.
 - (e) you provided information to Mr Morgan in respect of his appeal against the promotion of Mr Kennett which was of a deliberately damaging nature.
2. YOU have been guilty of improper conduct in your official capacity contrary to section 56 (i) of the State Services Act 1962 IN THAT
- (a) having become aware of in mid 1979 of alleged irregularities between a probation officer, Miss J McCracken, and a probationer, Miss C Burridge, you did fail to disclose forthwith these allegations to the District Probation Officer.

- (b) on or about 8th and 9th October 1981 you did obtain details from the Probation Office records regarding a probationer, Mr J Luff, and proceed in the company of a Mr Gilchrist to the home of a Probation Officer, Miss Campbell, where Mr Gilchrist proceeded to discuss with Mr Luff matters relating to the Probation Office.
- 3. YOU have in the course of your duties disobeyed, disregarded or made wilful default in carrying out a lawful order or instruction given by a person having authority to give the order or instruction contrary to section 56 (b) of the State Services Act 1962 IN THAT
 - (a) at the time of the 1977 marking of officers you did release the Order of merit details to Mr A J Rodgers when you had been specifically instructed by the District Probation Office, Mr Leech that the Order of Merit list was to be kept confidential to senior staff.
 - (b) you have failed to regularly attend staff meetings after having been directed to do so by the District Probation Officer, Mr Leech.
- 4. YOU have otherwise than in the proper discharge of your duties directly or indirectly disclosed or for private purposes used information acquired by you in the course of your duties or in your capacity as an employee of the Public Service contrary to section 56 (g) of the State Services Act 1962 IN THAT
 - (a) you have provided to the newspaper "NZ Truth" information about the Christchurch Probation Office
 - (b) you did in June 1979 at the Albion Tavern disclose personal information concerning the appointment of Mrs J Smith. "

On 28 May 1982 the charges were denied and further particulars were sought. On 2 June the appellant instituted proceedings in the High Court. In those proceedings he challenged on natural justice grounds the report (not disclosed to him) of a Commission of Inquiry (referred to as the Coad/Willy Report) that had investigated questions relating to the

administration and functioning of the Christchurch Probation Office and which he contended had subsequently led to the laying of the charges against him. So in relation to the s 58 charges it was pleaded that the notice of the charges was invalid, being based on invalid proceedings and findings in the inquiry as well as being in breach of natural justice or fairness in not giving sufficient details to the appellant to fully acquaint him with the allegations made against him. On 10 August 1982 certain further particulars were supplied to the appellant. Those further particulars did not satisfy the appellant's concern and his application to the High Court was heard on 17 December. In his judgment delivered on 20 December Hardie Boys J ordered that certain other further particulars be provided. These were eventually supplied to the appellant on 27 January 1983. Then on 18 March 1983 the appellant filed a motion on appeal to this Court against the decision of Hardie Boys J. A week earlier a motion on appeal had been filed in Fraser v State Services Commission. That case was heard in this Court on 8 August 1983. The primary question there was whether the Commission had failed to comply with the principles of natural justice and fairness in not giving Miss Fraser any opportunity to consider and comment on new allegations made by the Commissioner of Patents in a report furnished by him for the purpose of consideration by the Commission of the disciplinary charges. There was also some argument directed to the suspension of the appellant in that case, but when this Court gave judgment on 21 December 1983 it did not find it necessary to examine that question in any detail.

Returning now to the chronological sequence in the present case, the letter suspending the appellant was dated and signed on 21 December, the date on which judgment was given in the Fraser case. The present proceedings followed and the appellant's application to have the suspension declared invalid was dismissed by Holland J on 25 January. In the light of the judgments on the primary question in the Fraser case, the appellant's solicitors wrote to the Commission 2 days later pointing out that the attitude previously adopted by the Commission as to what documentary evidence had to be disclosed to the appellant and in its refusal of a hearing with rights of cross-examination would have to be reviewed. They asked for an answer as soon as possible. On 1 May 1984, over 3 months later, the Commission replied that it was "inclined to the view that in special cases of this nature it should not rely on a Report like the Coad/Willy Report but should hold a hearing to determine the facts of the case that are in dispute. The exact nature of the hearing would be dependent upon the facts of the individual case." It added that "a hearing in this case would be directed to determine the issues of credibility that are regarded by the Commission to be in dispute". It seems that on the one hand the Commission has felt inhibited from reaching a final conclusion as to those matters by the fact that the appeal from the judgment of Hardie Boys J is still extant; and on the other hand that the appellant's advisers are reluctant to abandon that appeal until they know and are satisfied with what is proposed.

So after all this time the hearing and determination of the charges is still in limbo. In practical terms the appellant must accept whatever procedure for the hearing and determination of the charges is offered by the Commission or have recourse to the Courts, in which case he faces an extension of the period when he is off work without pay.

Applying s 58 to the Facts

I turn now to the question of suspension. There is no evidence as to what consideration Mr Robertson gave to it before he retired in June 1982. But the Chairman of the Commission in his affidavit of 16 December 1982 in the original High Court proceedings testified that the appellant was not suspended at the time that he was charged: "such actions are wherever possible avoided in fairness to the officer who is being charged". In a letter of 23 March 1983 to the appellant's solicitors, Crown Counsel, after referring to a number of other matters, expressed the opinion that the Secretary for Justice was still entitled to exercise the discretion to suspend if he so decided and notwithstanding the withholding of the hearing and determination of the charges against the appellant pending the determination of the appeal in Fraser's case which had been filed earlier that month. However, at no time was the appellant advised that suspension was under consideration and given an opportunity to be heard as to that. Then, moving ahead to 21 December 1983, the Secretary for Justice took the view that once the decision of

this Court in Fraser's case had been delivered there was no impediment to his coming to a conclusion on the exercise of his discretion as to whether or not he should suspend the appellant. He testified that in the exercise of his discretion under s 58 he took into account the following factors:

- " (a) The gravity of the charges preferred against the Applicant and the strength of the evidence in support of those charges.
- (b) The reply made by the Applicant to the charges through his earlier Counsel.
- (c) The situation as it had existed and continued to exist in the Christchurch Probation Office as set out in my previous Affidavits to which I have referred above.
- (d) Representations received from staff in the Probation Office at Christchurch and also the Public Service Association as referred to in my previous Affidavits.
- (e) The general state of all Court Proceedings involving the Applicant from which I concluded that quite some time would still elapse before the charges could be resolved and the situation as described in the Probation Office could be correspondingly improved.
- (f) That in weighing up the aforesaid factors I realised that quite some time had elapsed since the original laying of the charges against the Applicant but nevertheless the fact that quite some further time would still elapse before those charges could be concluded led me to the view on balance that I should exercise the power of suspension against the Applicant before the commencement of a further year, notwithstanding the distaste which I naturally felt at exercising such power immediately prior to the Christmas vacation. "

The reasons for the appalling delays in the hearing of the disciplinary charges in this case were debated at considerable length in the course of argument of the appeal.

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- (d) Representations received from staff in the Probation Office at Christchurch and also the Public Service Association as referred to in my previous Affidavits.
- (e) The general state of all Court Proceedings involving the Applicant from which I concluded that quite some time would still elapse before the charges could be resolved and the situation as described in the Probation Office could be correspondingly improved.
- (f) That in weighing up the aforesaid factors I realised that quite some time had elapsed since the original laying of the charges against the Applicant but nevertheless the fact that quite some further time would still elapse before those charges could be concluded led me to the view on balance that I should exercise the power of suspension against the Applicant before the commencement of a further year, notwithstanding the distaste which I *naturally felt* at exercising such power immediately prior to the Christmas vacation. "

The reasons for the appalling delays in the hearing of the disciplinary charges in this case were debated at considerable length in the course of argument of the appeal.

However it is neither necessary nor desirable to allocate or apportion blame. This is because I am satisfied that after working in the Christchurch Probation Office for 19 months after the charges were first made against him the appellant was entitled to notice that suspension was under actual consideration and to an opportunity to be heard before a decision was reached as to that. Even if some or all of the blame had been attributable to the appellant - and I am not suggesting for one moment that it was (after all the primary responsibility for arranging the expeditious hearing and determination of disciplinary charges must rest on the Commission) - the simple fact is that no steps were taken to suspend the appellant for 19 months. Whatever the legal position may have been had the Secretary of Justice purported to exercise the power of suspension without notice on 18 May 1982 (and I express no views to that), after that extraordinary lapse of time the appellant had a legitimate expectation that a draconian decision so adverse to his position as a serving member of the Public Service would not be made without any warning that it was in contemplation, and the reasons why it was in contemplation.

Holland J concluded that there was a good deal to be said for the appellant's submission that if 19 months was permitted to go by then there was no such urgency to suspend as required the suspension to be given without prior notice. However, the Judge considered that in the light of the litigation and all that had gone in the past giving notice to him would have

been a waste of time and that the Secretary for Justice was sufficiently apprised of the appellant's case to be able to proceed to make his decision whether to suspend or not without giving notice to the appellant.

In rare cases it may, perhaps, be appropriate for a court which has found a breach of natural justice to refuse to grant the relief sought on the ground that had proper opportunity to make an explanation been given to the applicant the final decision would inevitably have been the same (see Stininato v Auckland Boxing Association (Inc) [1978] 1 NZLR 1, 29 and the subsequent decision of this Court granting leave to appeal to the Privy Council to have that important issue explored [1978] 1 NZLR 609, and, generally, Wade, Administrative Law (5th ed) 477-479). Assuming that is so I am satisfied that this is not such a case. Suspension is a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by a suspension can never be assuaged even if he is ultimately vindicated at the disciplinary hearing and is then restored to office and paid his arrears of salary. A permanent head faced with that difficult responsibility must be prepared to consider and weigh carefully arguments which the officer at risk may raise against the exercise of the power. Had the respondent given the appellant the opportunity of being heard in the matter the appellant could have questioned whether after 19 months the situation in the

Christchurch Probation Office on 21 December 1983 required, for sound administrative reasons, that he be immediately removed from there pending hearing of the charges; he could have submitted that circumstances bearing on the gravity of the charges and the evidence against him were unlikely to have changed materially over the preceding 19 months; and he could have emphasised the particular financial implications for the appellant of a suspension without pay. That last aspect was not expressly adverted to by the Secretary for Justice in his affidavit and his counsel, Mr Elliott, submitted that he was neither required nor entitled to take considerations of that kind into account. I cannot agree. A senior officer entrusted with a power of this kind must surely pay regard to the wellbeing of the officer concerned. This appellant was 57. He had spent the whole of his career in government service. He has been unable to get another job - which is not surprising given the present employment situation - and he is living on his savings and his wife's part time employment earnings. Had the Secretary for Justice stayed his hand the appellant would have had the opportunity to argue that in his particular social and financial circumstances suspension without pay was so harsh and punitive in its consequences that other alternatives such as transfer to other duties and suspension with pay should be explored further with the Commission if the Secretary finally concluded that conditions in the Christchurch Probation Office in December 1983 required his temporary removal pending hearing of the charges.

BETWEEN KENNETH ALFRED GEORGE BIRSS
 of Christchurch, Senior
 Probation Officer

Appellant

A N D STANLEY JAMES CALLAHAN
 acting in his capacity as
 Permanent Head of the Justice
 Department, Charles Ferguson
 Building, Wellington

Respondent

Coram: Richardson J
 McMullin J
 Sir Thaddeus McCarthy

Hearing: 16, 17 May 1984

Counsel: E.W. Thomas QC with P.H.B. Hall for Appellant
 R.M. Elliott with L.G. Fergusson for Respondent

Judgment: 1 June 1984

JUDGMENT OF McMULLIN J

The history of this case is set out in the comprehensive judgment of Richardson J which I have had the advantage of reading in draft, and with which I express my general agreement. I venture to add a few words of my own, not because I can usefully add to the narration of facts or statements of principle, but because we are interfering with the decision of a permanent departmental head on a matter affecting domestic discipline within his own department. The Court should be ready to recognise that a departmental

head who is accountable for the smooth running of his department may have to take into account and balance a number of competing factors in making a decision to suspend a departmental officer. On the one hand there is the need to consider the welfare of the officer whose suspension is contemplated; on the other hand there is the need to have regard to the reputation of the department and the welfare of other staff members. And where an officer's conduct gives rise to the laying of charges under s 58 of the State Services Act there may be cases where it is undesirable, even intolerable, that the officer so charged should remain working in the very environment where, by his challenged conduct, he has given his superiors reason to think that he should not remain. It is not unlikely that Mr Callahan faced a balancing exercise of this kind when he took office as Secretary for Justice in June 1982, by which time a notice containing the charges had been delivered to Mr Birss by Mr Callahan's predecessor in office.

Mr Callahan inherited a state of affairs which existed before his arrival. Moreover, the delays occasioned in part by the reference to the Courts of various procedural matters were not of Mr Callahan's making, and I think it is realistic to assume that in giving the suspension notice to Mr Birss on 23 December 1983, following on the delivery of the judgment of this Court in Fraser v State Services Commission, he was acting as the alter ego of the State Services Commission which alone, in terms of s 58(1) of the Act, had power to lift the suspension.

In Fraser's case this Court held that the rules of natural justice applied to the dismissal of a state servant. Ridge v Baldwin [1964] AC 40 and Chief Constable of the North Wales Police v Evans [1982] 2 All ER 141 are clear authorities to that effect in the United Kingdom. I see no reason in principle why the rules of natural justice should not also apply to a suspension which may be almost as devastating in its effect. A suspension can affect the status, financial emoluments and legitimate expectations of the suspended officer. The decision of the Federal Court of Australia in Dixon v Commonwealth (1981) 55 FLR 34, with respect to the Public Service Act 1922 (Cth) which, like our own State Services Act, contains no detailed provisions as to the procedure to be adopted on the question of suspension, accepted that the rules of natural justice apply.

While recognising that these rules cannot be clearly defined, and that their observance cannot be fitted into a judicial template, I am satisfied that in the circumstances of this case their proper application required that Mr Birss be given notice of the Secretary's intention to suspend him. At that time he had been employed in the probation service for 16 years. There is no position in the private sector comparable to this specialised occupation with the consequence that he could not obtain a similar job. Moreover, although he had been notified of the charges made against him as far back as May 1982, it had not then been

thought necessary to suspend him and so for the next 19 months he was allowed to continue with his occupation. Apart from some legal sparring nothing occurred in the following 19 months to bring the charges to a hearing. It is not necessary to decide who it was who was responsible for the ensuing delays, but at least it was the responsibility of the Commission to bring the charges to a conclusion one way or the other. But the Commission does not seem to have displayed any keenness to have the matter finally resolved. In this connection I note that on 27 January 1984 Mr Birss's solicitors wrote to the State Services Commission seeking a reply "as soon as possible" to their letter regarding certain matters. The Commission did not reply until 1 May 1984, tempting one to ask how much further the reply would have been delayed if the solicitors' letter had merely asked for a reply to be made "as soon as convenient". In these 19 months Mr Birss continued to work in the probation office, unhappily I suspect for himself and the other members of the staff. Yet when the notice of suspension was given he effectively lost his employment and his pay, apart from a short period of accrued leave.

The effect of the suspension notice in today's economic climate was such that he was likely to remain unemployed, finding it necessary to resort to his own capital. The very risk that he would be unlikely to find other employment has indeed materialised.

I would hold the suspension to be invalid, and allow the appeal.

Arthur Lunn

Solicitors:

Wood Hall & Co, Christchurch, for Appellant
Crown Law Office, Wellington, for Respondent

the suspension of the appellant which is the subject of these proceedings. Nevertheless I am forced to the conclusion that the argument for the appellant that he should have been told that suspension was being contemplated and given an opportunity to advance his reasons against that course before it was finally imposed, is sound.

I reach this conclusion for the reasons which are canvassed extensively in the judgment of Richardson J which I have had the advantage of reading. I think it unnecessary to cover again the facts of the case or the statutory provisions which apply. All I wish to do is to emphasise very briefly a few points which are made in that judgment.

First, it may well be that there are suspensions which can be claimed to be wholly administrative and to which the principles of natural justice do not apply: they will be rare, and certainly this is not such a case. Here, the suspension was a step in disciplinary action, being closely linked to charges which were laid under the provisions of the State Services Act. I agree with Richardson J that the principles of natural justice applied.

Second, there is no perfect recipe which covers for all cases what natural justice may require to be done. What is necessary in a particular case must be determined in the light of the facts of that case. In some nothing beyond ordinary administrative procedures will be called for: in others much

more is necessary. When that is and what should be done is not always easy for a permanent head to decide, and it ill befits us to be unduly technical or critical. In the final analysis we are concerned with what is fair, and that means fair between the persons concerned. In some situations, as Richardson J points out, a permanent head may have to act immediately and suspend without notice or without giving an opportunity for discussion. But it is impossible to contend that this was one of those cases. Here some 19 months had elapsed since the charges were laid, and there is nothing in the evidence which would enable me to say that the situation was so urgent that time did not permit Mr Birss to be informed and given a reasonable opportunity to advance what he wanted to say concerning the contemplated suspension. The fact that he had been told earlier that the possibility of suspension had not been abandoned is not a sufficient answer. I can only think that an error of judgment was made which we must seek to put right.

Third, Richardson J has referred to the delay which has taken place since the charges were laid. As I understand it, each side in this dispute places the blame on the other. We are not able to judge where it lies, but I must, for myself, confess to being appalled that after two full years charges officially laid in terms of the State Services Act have not been disposed of. As Richardson J points out, the primary responsibility for ensuring that the disciplinary procedures of the Act are complied

with and completed rests with the department. In this case it seems that the delay has only made the situation worse.

I agree that the appeal should be allowed with the consequences stated in the judgment of Richardson J.

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