THE RELATIONSHIP OF THE CROWN AND ITS SERVANTS

The case of Deynzer v. Campbell [1950] N.Z.L.R. 790 C.A. remains important as the leading New Zealand case in a field of law which is both difficult and unsatisfactory: the relationship of the Crown and its servants. It might be thought that the difficulties in the common law would have been overcome by the relatively large volume of legislation[1] controlling the employment of Crown servants, but there remain problems which, in the present writer's submission, call for legislative change. The cynical civil servant might expect that, despite fairly recent changes in our law cutting back the privileges of the Crown, the law relating to his employment would remain weighted against him. He would perhaps be surprised that the law itself is in doubt.

Deynzer v. Campbell raises two problems. The major one concerns the general nature of the relationship of the Crown and its servants. Within it is the other problem, less purely legal, which relates to the extent of the Crown's powers to dismiss or transfer employees whose political beliefs are suspect - who are, in the modern jargon, 'security risks'. The case deals specifically with the power of the Public Service Commission to transfer a public servant who has refused to answer questions about his political beliefs to the satisfaction of the Commission.

Deynzer, since 1947, had been an assistant technician in the Department of Scientific and Industrial Research. In September 1948 he was interviewed by a member of the Public Service Commission and asked whether he was a Communist. Rightly or wrongly (according to one's taste for civil liberties), he refused to answer, saying that his political

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1. The majority of Crown servants are controlled by one or other of the following statutes: Public Service Act 1912; Government Railways Act 1949; Post and Telegraph Act 1908; Police Act 1958; Royal New Zealand Air Force Act 1950; New Zealand Army Act 1950.

beliefs were no concern of the Commission. He was then told that, in the absence of an assurance that he was not a Communist, the Commission could not regard him as a good security risk. On that ground he was subsequently transferred, without the benefit of any enquiry, to a position in the Social Security Department. No suggestion was made either then or at the trial that he had been guilty of negligence, indolence, inefficiency or any other sort of incompetence. Deynzer then brought proceedings in the Supreme Court against the members of the Public Service Commission, claiming that the Commission had acted ultra vires in so transferring him and asking for relief by way of writs of prohibition and certiorari or alternatively a declaration or injunction. His claim was dismissed in the Supreme Court and, on appeal, by the Court of Appeal.

Before the Court of Appeal it was common ground between the parties that, except where the right is taken away or qualified by statute, the Crown has an absolute right, in its uncontrolled discretion, to transfer or dismiss any of its servants. It is relevant here to consider in some detail the development of that rule.

It was, originally, a rule applied to members of the armed forces[2]: see In the Matter of John Waller Poe (1833) 5 B. & Ad. 681, 688; De Dohsé v. Reg. (1886) H.L. unreported but noted at [1896] 1 Q.B. 117. In Dunn v. The Queen [1896] 1 Q.B. 116 C.A., the rule was applied for the first time by an English Court to a civil servant[3], though not without subsequent severe criticism; a year earlier it had been clearly and authoritatively laid down by the Privy

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2. There is an interesting discussion by Blair: The Civil Servant - A Status Relationship? (1958) 21 M.L.R. 265, 268, 274 on the differences in the legal position of the military and civil servant.
3. See Logan, A Civil Servant and His Pay (1945) 61 L.Q.R. 240, 255. "The necessity for, and justice of, this decision are equally open to question." Street in Governmental Liability (1953) 111 has similar comments,

Council in Shenton v. Smith [1895] A.C. 229 P.C., on appeal from the Supreme Court of Western Australia. The statement of Lord Hobhouse (at 234-5) is often quoted:

> . . . unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. . . .

In other words, the power to dismiss at pleasure is an implied term of the contract of service.

Shenton v. Smith (supra) was recognized as authoritative but distinguished a year later in Gould v. Stuart [1896] A.C. 575 P.C. Faced with the intervention of statutory rules contained in the New South Wales Civil Service Act, 1884, the Privy Council held that the provisions of that Act were plainly for the benefit of civil servants and so inconsistent with a power to dismiss at pleasure. The Crown's common law powers were, in those circumstances, restricted. If the implied term were still imported into the contract of service the provisions of the statute would be "superfluous, useless and delusive".4 Gould v. Stuart (supra) was approved in a later decision of the Privy Council, Reilly v. The King [1934] A.C. 176 P.C., though it was not necessary on the facts of that case to decide this point.

Despite a growing volume of legislation regulating very closely the employment of Crown servants, the Courts have been unwilling to follow this lead. Rather they have seemed anxious to preserve the Crown's common law rights whenever possible.

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and there is a general discussion by Jackson, Individual Rights and National Security (1957) 20 M.L.R. 364, 366-7.

4. Ibid. at 578 per Sir Richard Couch delivering the advice of the Board.

It appears, for example, from Adams v. Young (1898) 19 N.S.W.L.R. (L) 325 that the fact that a statute limits the Crown's right to dismiss its servants at pleasure, by prescribing a formal enquiry in certain cases, will not be taken to imply that the Crown's right to dismiss at its pleasure on other grounds is in any way restricted. The attitude of the courts is probably best summed up by the statement of Lord Roche in R. Venkata Rao v. Secretary of State for India [1937] A.C. 248 P.C. who (at 256) refers to

> . . . the general category defined and illustrated by Shenton's case, or the more exceptional category defined and illustrated by Gould's case . . . .

A further rule has been developed by which the words of Lord Hobhouse in Shenton v. Smith (supra, at 234-5)

> . . . unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown . . . .

are interpreted to mean 'unless otherwise provided by statute': see Thorpe v. Government Insurance Commissioner (1884) 3 N.Z.L.R. S.C. 200; Terrell v. Secretary of State for the Colonies [1953] 2 Q.B. 482; Adams v. Young (supra). The Crown may repudiate what appears to be a binding contract between one of its servants and, for example, the head of a government department, to employ that servant for a fixed term of years, on the ground that such a contract cannot restrict the Crown's power to dismiss at pleasure. That power, it is said, can only be taken away by express words in a statute.

This extension of the Crown's power to dismiss at pleasure has been rightly criticized as permitting the Crown the doubtful privilege of avoiding its obligations.[5]

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5. See for example the comments of Bailhache J. in Denning v. Secretary of State for India (1920) 37 T.L.R. 138,

Characteristically, Denning J., (as he then was), has made the most open attack in Robertson v. Minister of Pensions [1948] 2 All E.R. 767, where he said (at 770) that the Crown is bound by its express promises as much as any subject. That view however was expressed at first instance, was probably obiter and, though receiving some support in other cases[6] can hardly stand in the face of the main line of authority.[7] A logical difficulty, however, remains. On one view at least, the rule that the Crown has the right to dismiss its servants as and when it likes contains an internal contradiction. That right has most often been said to rest on the basis that the Crown-servant relationship is truly contractual and in particular upon an implied term in the contract of service. This view is strongly supported in Shenton v. Smith (supra), and by a line of other English authority.[8] In New Zealand the contractual nature of the Crown-servant relationship has been emphasized in Coker v. The Queen (1896) 16 N.Z.L.R. 193 and more recently in two important cases: Campbell v. Holmes [1949] N.Z.L.R. 949 and the present case.

If the majority view just stated is correct, then it is hardly consistent with the decisions denying any force to express undertakings given by the Crown as to its servants' terms of office. For it is clear law that an implied term cannot co-exist with an express term dealing with the same matter to the contrary effect. If it is suggested that this is a special sort of implied term which cannot be negated by an express term, there is little point in using the terminology of contract. The fact is that the attempt to base Crown service on contract, although widely accepted, is inconsistent with the firm rule of law that the Crown's right cannot be taken away except by statute. The rationale of the Crown's right should, logically, be found elsewhere.

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139 on the doubtful morality of reliance on this rule.

6. For example McLean v. Vancouver Harbour Commissioners [1936] W.W.R. 657: Genois v. The King [1938] 1 D.L.R. 807.
7. See in addition to the cases cited, Rodwell v. Thomas [1944] K.B. 596.

Other suggestions as to the general nature of Crown service have been made from time to time and, most recently, in a rather different area of the law. In two cases from Australia it was decided that an action per quod servitium amisit would not lie at the suit of the Crown for the loss of a Crown servant: The Commonwealth v. Quince (1943-44) 68 C.L.R. 227 H.C. of A. and Attorney-General for N.S.W.[9] v. Perpetual Trustee Co. (Ld.) [1955] A.C. 457, 477-80 P.C. In each case, the Court held that Crown service was quite different from the ordinary relationship of master and servant. In a later decision, Inland Revenue Commissioner v. Hambrook [1956] 2 Q.B. 641 C.A., Lord Goddard C.J., at first instance, was more positive in his approach. He took the view that (exceptional cases apart) there is no contract of service between the Crown and servant. The latter's employment depends on an appointment to an office, not a contract. For that reason, it was said, the Crown was not able to bring an action for the loss of one of its servants. The Court of Appeal upheld Lord Goddard's decision but on quite different grounds. Denning L.J. (as he then was) merely referred to the suggestion by counsel that there is no contract of service between Crown and servant with the comment that it did not appeal to him. Other decisions do give some weight to the view that a Crown servant is appointed to office. Lord Goddard inclined to that view although the point did not fall to be decided in the earlier case of Terrell v. Secretary of State for the Colonies (supra) and there is some support for it in the New Zealand case of The King v. Power [1929] N.Z.L.R. 267, 282 C.A.

Difficult though it may be to concede that there is no contract between the Crown and its servants, the view that a Crown servant is merely appointed to office is

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8. Gould v. Stuart [1896] A.C. 575 P.C.; Owners of S.S. Raphael v. Brandy [1911] A.C. 413, H.L. and other cases of lesser authority.
9. These two cases are discussed in notes in (1953) 69 L.Q.R. 177; (1956) 19 M.L.R. 701.

logically preferable as the basis of the rule that the Crown may dismiss at pleasure. Nevertheless, as has already been pointed out, it is not the majority view.

A more rational basis than either of these theories for the Crown's right to hire and fire its servants at will might, it is submitted, be found in its prerogative powers. One would have thought that such a right, recognized by common law, must necessarily derive from the prerogative. Moreover, the rule that the right can be disturbed by statute and in no other way is more readily understood if that right is viewed as a part of the Crown's prerogative. Lord Hobhouse, however, by denying in Shenton v. Smith (supra at 235) that any prerogative right was in question, virtually put an end to any such suggestion; the courts have certainly shown considerable reluctance to adopt it.

That is the background against which the decision in Deynzer v. Campbell must be considered. Before the Court of Appeal a number of arguments were advanced by the appellants. The Public Service Act 1912 (as amended), in common with other statutes dealing with other classes of Crown servants, contains quite detailed provisions regulating and controlling such matters as appointment, salary, grading, transfer and dismissal and the administration generally of the public service. The appellant's contentions were: that the Crown's inherent right to transfer or dismiss its servants at pleasure had been taken away by the public service legislation; that if any inherent right to transfer remained that right was exercisable only by the Crown and not by the Public Service Commission; and finally, that no statutory right, in place of the common law right, had been conferred on the Commission. For the respondents, it was argued that each one of those propositions was false, and the contradictory true.

The Court of Appeal divided evenly, O'Leary C.J. and Finlay J. finding for the respondents, Gresson and Hutchison JJ. for the appellant, Deynzer. A good part of all the judgments is concerned with the argument that the Commission had express statutory authority to effect Deynzer's transfer. Two sections were considered in some detail.

First, s.50 of the principal Act which provides (in part):

> . . . but no officer shall be allowed to refuse compliance with any order of the Commissioner directing his removal from one position to another or from one division or Department to another . . . .

In the appellant's submission that section applied only to 'routine', not to disciplinary, transfers, nor to those consequent upon some form of unsuitability. The respondents claimed that it applied to all transfers. The second provision examined by the Court was s.11 of the Public Service Amendment Act 1927 which prescribes certain penalties (including transfer and dismissal) for a number of specific offences and sets out a procedure of enquiry to be followed when action is taken under that section. S.11 (1)(e) provides specifically for the imposition of such penalties on any officer who

> . . . Is not qualified, either temperamentally or otherwise, for the efficient and satisfactory performance of the duties of his office . . . .

The appellant's case, it was argued, fell within the terms of s.11 (1)(e) and he was entitled to the benefit of the enquiry procedure laid down by s.11 but denied to him.

The four judgments are, with respect, extremely divergent in their reasoning, particularly (and this is unfortunate when the case is considered as an important precedent) on the vital issue of the effect of the Act on the common law rules. O'Leary C.J. held that the Commission had acted within the scope of its authority under s.50, which confers on the Commission the same power as is possessed by the Crown, namely the power to transfer its employees arbitrarily. He also found s.11 (1)(e) to have no application to the transfer of the appellant. His view was, therefore, that the case before him fell under the statute and he found it unnecessary to decide and preferred to make no comment on whether or not there might be a residuum of inherent power left in the Crown which could be exercised by the Commission.

Finlay J. for reasons very similar to those advanced by O'Leary C.J. found that the Commission had acted within the power given it by statute, but went on to consider whether any common law powers were vested in the Commission. He took the view that the Public Service Act 1912 is not an exclusive code governing the public service and does not detract from the rights of the Crown to any greater extent than is made plain by express terms and necessary implication. He was also of the opinion, however, that the right to transfer or dismiss at will remained exclusively with the Crown and had not been conferred on the Commission.

Gresson J. agreed with Finlay J. that the Act left unaffected the Crown's common law rights but differed in finding that the Commission could exercise those rights "by virtue of an implied term in [the appellant's] engagement".[10] He therefore was not called on to decide whether s.50 was in point, but found that s.11 (1)(e) was apt to cover the appellant's case, and that, since s.11 was designed to secure to public servants a proper enquiry into every case falling within its ambit, the appellant was entitled to, and had not been given, the benefit of an enquiry into the allegation against him that he was a security risk.

Hutchison J. agreed with the other members of the Court in finding s.50 applicable, and with Gresson J., in finding that the requirements of s.11 should have been met. His judgment on the larger issues raised is in strong contrast with the judgments of the other members of the Court. After referring to the fact that the Act makes provision for very many matters to do with the administration of the public service, he cited s.51 of the Act, the force of which appears to have been largely overlooked in the other judgments. That section states:

> Every officer shall be deemed a three-monthly servant, and removable by the Commissioner at any time after three months' notice.

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10. Ibid. at 825.

He then concluded his argument on this point by saying (at 831):

> . . . The provisions of the statute are inconsistent with a term that the Crown may put an end to the employment of these officers at pleasure; and I do not think that there is room for a view that a residuum of the common-law right still remains with the Crown in its relationship to them. In my opinion, the effect of the Act and its Amendments is to provide a code regulating the employment of public servants to whom it applies, and these officers fall within the category illustrated in Gould v. Stuart. I think, then, that the question before the Court is to be answered on a consideration of the various statutory provisions.

Hutchison J.'s conclusion, it is submitted, is correct. The time has now passed when Gould v. Stuart (supra) can any longer be regarded as an exceptional case. It was surely only exceptional in 1896 because at that time the conditions of employment with the Crown were not generally regulated by statute as, outside the United Kingdom, they now are. The provisions of our Public Service Act 1912 govern in considerably greater detail the employment of civil servants than did the legislation which the Privy Council had to consider in Gould v. Stuart.[11] By the same token much of the force behind the reason given for the decision in Shenton v. Smith (supra) has now gone. Today, the existence of an implied term in the Crown servant's contract of service, permitting his dismissal at pleasure, can scarcely be "well understood throughout the public service" as was suggested in Shenton v. Smith. Again, some reliance was placed in that case on

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11. It is also worth noting that that case resulted in an amendment to the New South Wales legislation providing that the Crown's common law powers to dismiss its servants at pleasure should remain unaffected by the legislation. No such provision has at any stage been included in any of the relevant New Zealand statutes.

the fact that a Crown servant unjustly dismissed had a remedy of an official or political but never of a legal kind. The position in New Zealand now is very different. Specific procedures are laid down in the Public Service Act 1912 and related statutes providing for charges and complaints, and consequential enquiries. The law is at least clear to this extent, that in the vast majority of cases, a public servant, dismissed or transferred for stated reasons, will be entitled to the benefit of the procedure laid down by the Act and to legal remedies if that procedure is not followed. All the judgments in Deynzer v. Campbell and an earlier case in this field, Campbell v. Holmes [1949] N.Z.L.R. 949 C.A., are in agreement on that point.

The decision in Deynzer v. Campbell had repercussions in the form of legislation which recognizes and in no way limits the powers of the Public Service Commission to effect transfers on the grounds of national security. The Public Service Amendment Act 1951 s.7 lays down a procedure which may be followed where a public servant is transferred in the interests of national security. This section deals only with transfer and not dismissal. Power is given by s.7 (1) to transfer a public servant,

> . . . if in the opinion of the Commission the transfer is necessary in the interests of national security.

Subsequent proceedings are also regulated by the section. S.11 of the Public Service Amendment Act 1927 (providing for an enquiry) is not to apply to such a transfer and no appeal lies to the Board of Appeal. The Commission's decision under the section to transfer a public servant is, however, on the application of the employee transferred, to be referred to a Review Authority. That Authority must make full enquiry and report back to the Commission with its recommendations; and "the Commission shall be guided accordingly".

In some respects these provisions are more liberal than the measures adopted in the United Kingdom. The procedure there is entirely administrative in character, being laid down by regulation and departmental memoranda. We have at least

obtained a procedure written into a statute. On closer examination, however, it seems that the protection afforded by the statutory provision is largely illusory. Care has been taken to avoid laying down any criteria by which either the Commission or the Review Authority are to be guided in forming an opinion; the Review Authority may accept such evidence as it thinks fit (s.7 (10)); and the usual privative clause bars access to the Courts (s.7 (12)). There is in addition the somewhat extraordinary provision (s.7 (11)) which entitles the employee transferred to appear in person or to be represented by counsel before the Review Authority and to advance evidence, provided that, if in the opinion of the Authority the interests of national security are threatened, he shall not be entitled to be present or to be represented, or to be told what evidence has been adduced or the reasons for the decision of the Authority. Finally, and most important, the procedure is not mandatory. S.7(7) states that the powers conferred by the section are in addition to and not in derogation of the powers conferred by the principal Act, and also appears, by its wording, to confirm the correctness of the decision in Deynzer v. Campbell on the extent of those powers. It would seem, although the words of the subsection are not wholly clear, that the Commission, by proceeding under s.50 of the principal Act may avoid entirely any procedure of enquiry under either the amending Act of 1927 or that of 1951.

It is also unfortunate that the section does not deal with the power to dismiss for security reasons. Presumably it follows from the judgments in Deynzer v. Campbell (though only Hutchison J. specifically refers to the point) that, if the Commission considers an employee to be a security risk, he may be dismissed under s.51 of the Public Service Act 1912 on three months' notice without any reason assigned and, again, without a right to any enquiry.

The decision in Deynzer v. Campbell has left largely untouched the more general problem of the extent of the Crown's powers to deal with its servants at common law apart from statute. It is unfortunately not possible to advance the judgment of Hutchison J. as correctly stating the law to the effect that the Crown-servant relationship is entirely

controlled by statute. In the light of the other judgments in Deynzer v. Campbell, the extent to which the Crown's common law power to dismiss or transfer its servants at will is cut back by the Public Service Act 1912 and related statutes remains unclear.[12] It is submitted, therefore, that the time has come to reintroduce, by legislation, the certainty which existed in this field at common law. That legislation, of course, might merely reinstate the common law rule. Yet, in face both of the different view of the Crown's responsibilities taken today and of the changes that have already taken place in the position of Crown servants, the continued application of the common law rule would be anomalous. The appropriate step would seem to be to deprive the Crown of power "to dismiss at pleasure and to contract to dismiss at pleasure".[13]

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12. Cf. Currie, Crown and Subject (1953) 25, who takes the view that Deynzer v. Campbell decides that the Public Service Act 1912 is not a self-contained code and suggests that a similar construction would be placed on other statutes controlling the employment of other Crown servants. It is submitted that neither that view nor Jackson's ("Two of the learned judges held further that the Crown only had a right to dismiss for the causes stated in the Public Service Act 1912" (op.cit., 370)), can be supported on a close consideration of the judgments. The matter remains in doubt.
13. The suggestion is Jackson's (op.cit., 367).