

FROM BARRATT TO JARRATT: PUBLIC SECTOR EMPLOYMENT, NATURAL JUSTICE, AND BREACH OF CONTRACT

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Introduction

The High Court's decision in the case of *Jarratt v Commissioner of Police for NSW*¹, is significant for a number of reasons. It provides an authoritative analysis of the applicability (or otherwise) of Crown prerogative and the meaning of service 'at pleasure' in the context of employment heavily regulated by statute in a modern public service. It also analyses the interaction between the statutory and contractual aspects of a government appointment. Finally and not surprisingly given the course of recent High Court decisions, it restates and reemphasises the central importance of affording natural justice to those whose livelihoods are affected by government decision making.

A very interesting aspect of the decision is the way in which a highly favourable outcome for Mr Jarratt contrasts with that in the case of another senior public official dismissed from office in recent memory, former Defence Secretary Paul Barratt (see *Barratt v Howard & Ors*². The facts of both cases have been covered extensively previously, so apart from a brief comparison of some of the important facts and statutory provisions, I will concentrate on the procedural history and actions of the two employee applicants, the timing of those actions, and the reactions of the two public service employer respondents which were determinative of the two outcomes: \$642,936.35 awarded to the Deputy Commissioner (plus costs), compared with nothing in damages for Mr Barratt, and an order against him for payment of the Commonwealth's costs.

Procedure and actions of the two applicants compared

Jarratt

On 5 September 2001 the NSW Police Commissioner, without prior notice to Mr Jarratt, notified the media that he had recommended to the Police Minister that Mr Jarratt's appointment be terminated 'on the grounds of performance'. Two days later, Mr Jarratt received written notification of the Commissioner's actions, and on 10 September 2001, he received a 'Statement of Reasons' for dismissal for the purpose of the Statutory and Other Officers Remuneration Tribunal assessing his entitlement to statutory compensation under s 53 of the *Police Service Act 1990* (NSW). The Governor in Council acted to terminate his appointment on 12 September 2001.

¹ Partner, Phillips Fox. This paper was presented at an AIAL Seminar, Canberra, 14 February 2006. I would like to acknowledge the assistance of my former colleagues, Liana Westcott, and Robert Walsh. Liana for researching material for the seminar paper and preparing an earlier draft, and Robert Walsh for drawing my attention to the factual and legal similarities between the Barratt and Jarratt cases notwithstanding their outcome.

Having been so dismissed, Mr Jarratt applied to the Tribunal and was awarded the maximum amount of compensation available, being the equivalent of 38 weeks' salary.

Mr Jarratt then applied to the Supreme Court for declarations that his removal from office was invalid and that the consequent termination of his contract was wrongful. Simpson J at first instance granted these declarations and awarded compensation for breach of contract in the amount of \$642,936.35, assessed by reference to the salary he would have received for the remainder of his 5 year term, less the amount already received from the Tribunal.

The Commissioner appealed all the Judge's findings, and was successful in having them overturned by the Court of Appeal.

Mr Jarratt was granted special leave to appeal to the High Court, and the appeal was heard *instanter*. The High Court unanimously, albeit in four separate judgments, overturned the Court of Appeal's findings and reinstated those of Simpson J.

Importantly, Mr Jarratt made no interlocutory administrative law application to the effect that he was entitled to be afforded natural justice *before* he was dismissed. On the respondent's side, because of the attitude taken by the Police Commissioner and those advising him, that natural justice need not be afforded in cases such as this, because of (ultimately erroneous) reliance on the employment at pleasure principle, no natural justice was afforded to Mr Jarratt:

- he was not notified at the contemplation stage of the impending removal action proposed to be taken against him;
- he was not told of any specific allegations against him;
- he was not told of the contents of any adverse report about his performance;
- nor was he given the opportunity to respond to any such allegations or criticisms of his performance.

Mr Jarratt of course took issue with this behaviour, but *only* in the substantive proceedings themselves, and after the event of dismissal, which, very wisely, involved a combination of an administrative law challenge on natural justice grounds, *and* an action for damages for breach of contract.

Barratt

In December 1997, Mr Paul Barratt was appointed to the position of Secretary to the Department of Defence for a 5 year term. At the time of his appointment, he was Secretary to the Department of Primary Industries and Energy.

There was a cabinet reshuffle following the 1998 Federal election, and the Hon John Moore MP was appointed as Minister for Defence. Following Mr Moore's appointment to this position, there appears to have been a progressive breakdown in his relationship with Mr Barratt, and he apparently raised his concerns with the then Secretary of the Department of Prime Minister and Cabinet, Mr Moore-Wilton, on a number of occasions.

In July 1999, Mr Moore-Wilton informed Mr Barratt that a report recommending his termination was imminent. Mr Barratt asked what he had done to warrant his termination and was told the reason was nothing specific, just 'things in general'.

Mr Barratt then filed two applications in the Federal Court. The first was to restrain Mr Moore-Wilton from issuing the report until Mr Barratt had been accorded procedural fairness, including a reasonable opportunity to be heard. He also sought an order that the Prime Minister be restrained from recommending his termination 'except for cause shown', and declaratory relief. After an urgent hearing, Hely J made a declaration in accordance with the first order sought, namely that Mr Barratt be provided with reasons for his dismissal and be afforded an opportunity to make written submissions, before any report recommending his termination went to the Prime Minister. Mr Moore-Wilton duly provided Mr Barratt with written reasons for the recommendation in accordance with this order and asked Mr Barratt to place any material before him which he would wish to be taken into consideration in making his report to the Prime Minister. An exchange of correspondence ensued in which Mr Barratt provided his responses to the matters raised in those reasons, which in essence amounted to the Minister's lack of confidence in Mr Barratt's performance of his duties.

In the second application heard by Hely J, Mr Barratt sought a declaration that he was entitled to know the reason for the Minister's lack of confidence in him. This application was dismissed and Mr Barratt appealed against both judgments in September 1999.

In March 2000, after Mr Barratt's appointment had been terminated as proposed, the Full Federal Court dismissed both appeals. He made no private law claims, for example for breach of contract, and received no statutory or other compensation, and had a costs order made against him arising from the dismissal of both of his appeals.

Comparison of relevant facts and statutory provisions

Element	Jarratt	Barratt
Type of appointment	Appointed on 5 February 2000 to the position of Deputy Commissioner under the <i>Police Service Act 1990 (NSW)</i> , s36	Appointed on 31 December 1997 to the position of Secretary to the Department of Defence under ss 36 and 37 of the <i>Public Service Act 1922</i>
Duration of appointment	Fixed term of 5 years	Fixed term of 5 years
Relevant statutory provisions	<p><i>Police Service Act 1990 (NSW)</i></p> <p>s 40 office to be held for period (up to 5 years) specified in contract</p> <p>s 41 employment governed by contract, but not appointed by the contract</p> <p>s 51 appointment can be terminated '<i>at any time</i>' by the Governor acting on recommendation from the Commissioner with the approval of the Minister</p>	<p><i>Public Service Act 1922 (Cth)</i></p> <p>s 36 (1) The Governor-General may, in writing, appoint a person to an office of Secretary.</p> <p>s 37 instrument of appointment may specify fixed term of up to 5 years;</p> <p>s 37 (5) Governor-General may direct that the appointment be terminated on a specified day ... where Governor-General so terminates the appointment, the person will be retired from the Service</p>

		(Note: the <i>Public Service Act 1999</i> has the relevant termination provision at s 59. It provides that the Prime Minister, not the Governor-General, has the power of dismissal, and the words may terminate ' <i>at any time</i> ' have been added. In <i>Jarratt</i> , these words were not seen as excluding the operation of natural justice, but rather identifying the timing at which an otherwise valid termination could take effect.)
Source of power to terminate	s 51 of the Act	s 37 of the Act
Reason given for termination	<p>'Performance' – later elaborated upon (after the purported termination took effect) as comprising:</p> <ul style="list-style-type: none"> • Management of operations in Cabramatta, including recommendations for senior appointments and supervision of other officers; • Provision of inaccurate and inappropriate advice with respect to the working environment in Cabramatta during 1999 and 2000; • Timeliness and accuracy of advice on operational issues; and • A series of unsatisfactory judgement decisions on a range of issues. 	<p>'Irreconcilable conflict' between Mr Barratt and the Minister – later elaborated upon (before the termination took effect) to comprise:</p> <ul style="list-style-type: none"> • The Defence Minister's loss of trust and confidence in Mr Barratt's ability to perform his duties as Secretary; • That this loss of trust and confidence is detrimental to the effective and efficient administration of government.
Content of the duty to afford natural justice / procedural fairness	The Commissioner argued that there was no such duty and conceded that, if there was one, it had not been complied with here, whatever its content.	Found to comprise at least an entitlement to be told the grounds upon which a recommendation for termination was proposed, and an entitlement to be heard in relation to them, before such recommendation was sent to the Prime Minister for consideration.

	The High Court said it would have been what Simpson J at first instance identified as the appropriate content, namely: notification of the proposal to remove him, advice of any specific allegations or adverse reports against him, and an opportunity to respond to allegations and criticisms.	Found not to extend to an entitlement to know the reasons why the Minister had lost confidence in him
<i>Was the appointment validly terminated under the relevant Act?</i>	No, by reason of the failure to afford natural justice in the exercise of the power in s 51.	Not a matter to be determined by the Court, but seemingly yes because there was no failure to afford natural justice because of the application to Hely J, his orders, and the subsequent affording of natural justice (reasons, and an opportunity to be heard) before termination.
<i>Contractual consequences of termination</i>	<p>Valid termination has the automatic consequence that the individual ceases to be an executive officer, and ceases to be a member of the Police Service if not appointed to another position.</p> <p>Invalid termination of the appointment constitutes either a repudiation of the contract of employment, or alternatively, that the termination has not taken effect and the officer remains an officer and is therefore entitled to be paid for the remaining term of his contract.</p>	Valid termination has the automatic consequence of retirement from the Service. As the appointment was impliedly found to be validly terminated, the contractual relationship would likewise have been found to have been validly terminated, had it been pleaded. No discussion of what would have been the contractual consequences had the appointment been invalidly terminated.
<i>Available remedy</i>	<p>Damages, calculated by reference to the salary that would have been received had the appointment continued for the full 5 year term.</p> <p>The cap on compensation under s 53 applies only in the case of a valid removal from office.</p>	None.

Outcomes

In financial terms, the discrepancy between the outcomes for Mr Jarratt and Mr Barratt are vast. Mr Jarratt was awarded damages in the amount of \$642,936.35 and his costs at first instance and for both the first appeal to the NSW Court of Appeal, and the subsequent appeal to the High Court. Mr Barratt received no monetary compensation, and was ordered to pay the Commonwealth's costs. In total, the disparity between the financial positions of the two applicants after the decisions would be likely to be well over \$1 million.

Analysis and discussion

The cases are consistent on all relevant points of law, despite variances in the exact statutory terminology, and the authorities cited by each court. They each found that:

- An appointment 'at pleasure' must be interpreted in the context of the modern public service, and in light of developments in the law;
- Termination of a statutory appointment must be by reference to a provision of the Act authorising such dismissal;
- Natural justice is only excluded from the operation of a statutory power where there is clear legislative intent;
- The characterisation of a statutory appointment as being validly or invalidly terminated will flow through to the contract of employment.

The factual scenarios that gave rise to the disputes are likewise almost identical. Both applicants were senior public officials, appointed under statute to terms of employment of 5 years each, and whose appointments were terminated for reasons other than misconduct in the second year of their term. Both were subject to statutory provisions which provided for termination at any time, but without any requirement for clear grounds. Both sought to be afforded natural justice, in the form of notification of the reasons for their termination and a chance to respond.

The only identifiable difference between the cases is the timing at which judicial assistance was sought: Mr Barratt had notice of his impending termination, and was able to seek urgent interlocutory relief to secure his legal rights. As a result, he was afforded natural justice (at the appropriate level of content) before his appointment was terminated. Mr Jarratt had no warning that his appointment was to be terminated, and thus could not seek relief until after the fact. He had no opportunity to receive natural justice prior to his termination, so was compensated for being denied that right given the contractual consequences of that denial.

The question, then, is of what benefit is the exercise of a legal right if, in exercising it, an individual is denied the substantial compensation to which he or she may be entitled if it is not exercised? Put another way, why is there an apparent disparity in value between the right itself, and the remedy for its deprivation?

The answer lies, perhaps, in the well known words of Megarry J in *John v Rees*³:

As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases, which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change.

What this excellent summary of the underlying reasons for affording natural justice makes clear is the value which the law places on the right of a person affected by a potential adverse decision, to be heard, to put an opposing point of view, to answer charges, to explain conduct, to influence, persuade, and change another's mind, particularly when that other person is in a powerful position to affect livelihood.

Notwithstanding the high importance which natural justice or procedural fairness is afforded by the law, historically, the denial of such a right usually only results, in straight applications for judicial review, in no more than a declaration of the existence of the right, together with an order for a reconsideration by the original decision maker, sometimes with the result that

the same decision is reached again. All the natural justice in the world will not make up for a fundamentally unmeritorious claim.

To put it another way, the remedy for a failure to afford natural justice, when looked at in isolation from any other concurrent or resultant private law remedy, is an order that natural justice be afforded: not damages. The case of *Jarratt* does not change that position: whether it is a step towards opening up the possibility for damages to be awarded in cases of administrative defect remains to be seen, but it was decided on the basis of the particular statutory circumstances of an appointment to an office concurrent with a contract of employment so it is much more likely that its effects will be limited to such cases, or cases capable on their facts of argument by analogy where a public law remedy subsists with a private law one.

A further answer to why Mr Jarratt succeeded where Mr Barratt failed, is perhaps an understanding of the limitations of administrative law remedies such as that just described, coupled with the requisite *sang-froid* to keep one's powder dry and not launch an immediate challenge to a potentially flawed process, particularly where one's claim contains private law remedies as well, such as damages for breach of contract, and one can show that the procedural flaw either led to the breach, or had consequences akin to cases in which damages might be awarded.

Mr Jarratt was awarded damages because the failure to afford him natural justice meant that his removal from his statutory appointment was invalid. This also amounted to a wrongful termination, by repudiation, of his contract of employment. Contracts of employment are not, for policy reasons, usually subject to an order for specific performance, therefore he was entitled to damages. Alternatively, as Callinan J would have it, there was no removal from office or termination, and Mr Jarratt remained in office and was entitled to be paid his emoluments. That, however, was not how Mr Jarratt pleaded his case, and it would seem, on the authority of *Lucy v The Commonwealth*⁴ at 245 per Isaacs J, that if a former employee has done anything inconsistent with still holding office, such as accepting retirement benefits, or an offer of other employment (which Mr Jarratt had done, at least on a consultancy basis) a finding of continued employment would not be possible.

The ability to display the necessary coolness under pressure, let the flawed procedure germinate and mature into a combined public and private law remedy sounding in damages, and then attack the actual result after the event, rather than launch a pre-emptive strike, is likely in cases such as these, to bear much larger and tastier fruit for a plaintiff.

Mr Barratt's case may well have been one of premature litigation.

From the respondents' perspective there is also a salutary reminder of the importance of affording natural justice in these two cases as well. Without being cynical, and acquiescing in the view that as long as you go through the empty formality of affording procedural fairness then as a decision maker you have met the highest standards of good administration, it is well to note how the actions of the two employers (albeit only at the behest of the Federal Court in the case of the Commonwealth in *Barratt*) affected the outcome: where natural justice was given, and the officer nevertheless terminated, no damages were awarded. Where it was not, and the employer insisted erroneously that it need not be, substantial damages flowed from the resultant contractual effects of the wrongful dismissal. Simpson J at first instance summarised the position of the NSW Police Commissioner as follows:

The position adopted by the defendants is stark and brutally simple. Conceding that nothing that could be classified as procedural fairness had been afforded to the plaintiff in respect of the process of his removal, the defendants contend that they were under no obligation to afford procedural fairness to him; that, pursuant to the relevant legislation, the plaintiff could be removed from office at any time, without explanation, justification or excuse; that the decision to remove him could be made

capriciously, unfairly, whimsically, in bad faith, for good reason or bad or no reason at all; and that such a decision is nevertheless unassailable. Unpalatable though that argument may seem, the defendants were able to support it by reference to a considerable body of respectable authority. The principle on which they rely is that Crown employees hold their offices during and at the pleasure of the Crown and that they may therefore be dismissed at the will – and indeed on the whim – of the Crown.

Perhaps if Mr Jarratt had been given more time, he too would have launched a pre-emptive administrative law strike against the Commissioner for Police. Had he done so and been successful, and had he been afforded an opportunity to present his case and done so, but nevertheless been subsequently validly removed from office he would not have been entitled to the damages he was ultimately awarded.

What these two cases tell us is that if appealing to the ideals of good administration is not a sufficient carrot, then perhaps liability in the form of a large damages claim is a big enough stick to ensure that natural justice, proper process, hearing the other side, becomes the accepted norm, rather than the judicially ordered exception, in public sector termination of employment decision making.

Endnotes

- 1 [2005] HCA 50
- 2 [2000] FCA 190
- 3 [1970] Ch 345 at 402
- 4 (1923) 33 CLR 229