

## **Barratt v Howard**

**Federal Court of Australia, Full Court, 10 March 2000**

**[2000] FCA 190**

***Administrative law—termination of a Secretary to the Department of Defence—whether Secretary entitled to procedural fairness—whether fault on the part of the Secretary must be demonstrated—legitimate expectation***

In July and August 1999 procedures were initiated under the *Public Service Act 1922* ('the Act') by the Secretary to the Department of the Prime Minister and Cabinet (Mr Moore-Wilton) leading to the termination of the appointment of Mr Barratt as Secretary to the Department of Defence. It was common ground that the termination of Mr Barratt's appointment was not related to incompetence or misconduct. Mr Barratt had been appointed in 1997 for a five year term. On 21 January 1999 Mr Moore told Mr Moore-Wilton he had concerns about Mr Barratt's management of the Department, which Mr Moore-Wilton repeated to Mr Barratt. Mr Moore had also expressed some disappointment to Mr Barratt. In the months that followed, Mr Moore complained about Mr Barratt several times to Mr Moore-Wilton, but he only expressed dissatisfaction to Mr Barratt on one occasion between January and June.

On 28 June 1999, Mr Moore told Mr Moore-Wilton that he was considering appointing a new Secretary. A few weeks later Mr Moore-Wilton indicated to Mr Barratt that it was likely his appointment as Secretary would be terminated in August. On 28 July 1999, Mr Barratt filed an application to prevent Mr Moore-Wilton from giving a report to the Prime Minister recommending termination of his appointment. Alternative relief was sought to restrain action being taken until Mr Barratt was afforded procedural fairness, and also an order that the Prime Minister be restrained from recommending the termination of his position "except for cause shown".

Hely J found that there was no legislative intent in the Act to exclude natural justice, and that Mr Barratt was entitled to be told the grounds upon which a recommendation was proposed, and to be heard. His Honour did not decide the alternative issue whether Mr Barratt had a legitimate expectation that he would be given procedural fairness. As to whether termination could only be for cause shown, his Honour accepted that policy or political considerations could be factors. Therefore, it was not necessary that there be a cause such as fundamental fault on the part of the Secretary.

Following this, Mr Moore-Wilton wrote to Mr Barratt on 20 August indicating his intention to advise the Prime Minister to recommend termination on the grounds that Mr Moore had lost confidence in Mr Barratt, and that this was detrimental to the public interest because it was prejudicial to the effective and efficient administration of the Department. Mr Barratt wrote back asking for more specific detail as to the grounds, but did not receive such detail. Mr Barratt then filed a second application, on 25 August 1999, seeking a declaration that, in the circumstances, procedural fairness required that prior to Mr Moore-Wilton reporting to Mr Howard, he was

entitled to a statement of the grounds upon which Mr Moore had no trust and confidence in him.

On 26 August 1999, Hely J dismissed the application with costs, saying that since the report was to be based on the fact that Mr Moore had, for whatever reason, lost confidence in Mr Barratt with detriment to the Department, the reasons for the loss of confidence were not a factor in the decision making process and therefore Mr Barratt was not entitled to be told these reasons. Hely J also held that the reasons identified by Mr Moore-Wilton for his report on termination was capable of being responded to in terms of accuracy and sufficiency.

Mr Barratt filed an appeal. The Full Federal Court noted that the chief object of the Act, as set out in section 6, was to constitute a public service for the efficient, equitable and proper conduct, in accordance with sound management practices (including personnel management practices), of the public administration of the Australian Government. The procedures for terminating the appointment of a Secretary (report to Prime Minister, recommendation to Governor-General) were set out in section 37.

The issues in the appeal were whether Mr Barratt had a legitimate expectation that he would be afforded procedural fairness, and that his appointment would not be terminated without valid reasons; and whether the appointment could be terminated without cause shown. Also, whether Mr Barratt was entitled, as a matter of procedural fairness, to be informed of the grounds upon which Mr Moore had lost confidence in him.

The Court agreed that procedural fairness was required, but in relation to the argument of legitimate expectation, the Court considered that it was based upon a misconception that sought to elevate the concept to the level of a substantive administrative estoppel. The Court noted that if a decision maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the person affected be given notice and an opportunity to present a case against the taking of such a course. However, the decision maker is not compelled to act in accordance with the legitimate expectation.

The Court also rejected the argument that the section 37 power to terminate could only be exercised for cause constituted by some fault or incapacity. The Court agreed that some positive grounds for termination were required, but that political and policy considerations may be factors. The Court was of the opinion that the grounds advanced were not based on purely subjective considerations without foundation, since Mr Moore-Wilton had referred to a detriment to the public interest caused by the loss of confidence. The Court dismissed both appeals, with costs.