



IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S152 of 1994

B e t w e e n -

ROBERT FYFE REID

Applicant

and

SYDNEY CITY COUNCIL

Respondent

Application for special leave to
appeal

MASON CJ
GAUDRON J
McHUGH J

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY ON THURSDAY, 8 DECEMBER 1994, AT 2.16 PM

Copyright in the High Court of Australia

MR D.M. BENNETT, QC: If it please the Court, I appear for the applicant. (instructed by Freehill Hollingdale & Page)

5 MR R.J. BUCHANAN, QC: May it please the Court, I appear with my learned friend, MR P.M. KITE, for the respondent. (instructed by Blake Dawson Waldron).

MASON CJ: Yes. Mr Bennett.

10

MR BENNETT: If it please the Court, the grounds for this application may be distilled into four steps. The first step is that the subject judgment determined the meaning of the expression "employed in the service of the Crown" in section 4(1)(e) of the GREAT Act. That meaning had been considered and determined in two recent unanimous decisions of the Court of Appeal which considered the precise provision. The subject decision is inconsistent with those decisions.

20

The second step is that in considering and determining the meaning it gave, the court below did not consider those previous decisions or advert to them. The third step is that, having regard to the provisions of the *Local Government Act 1993*, and the *City of Sydney Act 1988*, if the Court of Appeal had followed the two previous decisions it would have, in our submission, dismissed the appeal against the tribunal below, which was in favour of the applicant. The fourth step is that, in our submission, the criteria in section 35(a) are fulfilled.

30

Now, if I turn to the first of those propositions: in 1993, in *Mounsey v Findlay*, the Court of Appeal had to consider the expression, "employed in the service of the Crown". The judgment of Mr Justice Clarke was agreed with by the two other presiding judges. At page 5, His Honour quoted and followed a previous decision of the Court of Appeal in *Holly v Director of Public Prosecutions*, there quoted a judgment of Mr Justice Mahoney, which in 1988 was the judgment of the court with which the two other members agreed. The court was definitely constituted.

35

40

45

In the passage to which I refer at paragraph C to E, Mr Justice Mahoney referred to three classes of persons who may be in the service of the Crown. The first, which is not relevant for present purposes, is:

persons who act in the service of the Crown
directly and as such -

5 The second category, and this is one upon which we rely
and upon which the tribunal based its decision, is:

persons who act in the service of the Crown by
acting for bodies which, though separate entities,
10 'represent the Crown' in the sense in which that
term is used in constitutional law -

and the third category, and we rely upon this as an
alternative, is:

15 persons acting in the service of the Crown in the
sense that they perform functions of government
but do so as employees of corporations which, in
that sense, do not represent the Crown.

20

Now, the decision of the - - -

GAUDRON J: But, surely, that is all in the context of
ministerial government, is it not - or central
25 government - not with Mr Justice Mahoney's statement?

MR BENNETT: Yes, Your Honour. It was in the context
of considering employees in area health services.

30 **GAUDRON J:** Yes.

MR BENNETT: And it was a decision which
fundamentally turned on the extent of ministerial
control. In the present case, we submit that the
35 conglomeration of matters, which I will come to, the
effect of them is that Sydney City Council represents
the Crown in the same sense, and that was the basis of
the tribunal's decision. But, I will come to that,
perhaps, if I may, as to why we submit that in a
40 moment. The second step of our argument here today is
that the Court of Criminal Appeal did not refer to or
consider these determinations in *Holly* or in *Mounsey*,
rather, it based its decision upon an inference that it
drew extrinsic circumstances that local government
45 employees were intended by government to be excluded
from the operation of the Act.

McHUGH J: I do not follow why you say the court did not refer to *Mounsey v Findlay*. Did not the learned President refer to what Justice Clarke said in *Mounsey v Findlay*? I do not think it was the reference at page 5 - - -

MR BENNETT: No. The answer to that, Your Honour, is that *Mounsey v Findlay* was referred to by the learned President for the purpose of comparing the factual situation in that case with the factual situation in the instant case, that is, he compared degrees of ministerial control. He did not refer to it when determining, as he said was the central part of the issue before the court, the meaning to be given to the phrase.

McHUGH J: But what about at the bottom of 45 - 46? He says, at line 45:

The holding of the Court is found in the reasons of Clarke JA, *ibid* pp 3ff. His Honour started with the principle.....that a statutory corporation, subject to control by the Executive Government, is to be -

et cetera, et cetera?

MR BENNETT: That is referring to the question of whether the court with the *Area Health Services Act* represented the Crown. The question which was for determination in the case and which on this appeal turns is what the meaning to be given to "employed in the service of the Crown", which is a different point from that to which the purpose for which the learned President referred to the judgment of Mr Justice Clarke.

The Court of Appeal, without referring to those precedents, made a decision that the local government employees were intended to be excluded by reference to extrinsic circumstances. I will come to those in a minute. Those circumstances were firstly that the *GREAT Act* was intended to implement a Bowen Committee Report in 1978, and the Court of Appeal had the terms of reference of the Bowen Committee, which excluded local government employees. As well, as Your Honours will have seen, the learned President referred to the fact that since the *GREAT Act* would affect potentially

40,000 employees of local government at that time, the minister would certainly have mentioned it if he had intended to include them.

5 The court also said that they were intended to be excluded from the previous Act: the *Crown Employees Appeal Board Act*. That had a definition provision in it which was very similar to the definition provision which was included in the *GREAT Act*.

10 **McHUGH J:** When the *GREAT Act* came into force in 1980, section 99 of the 1919 *Local Government Act* dealt with questions of dismissal of local government employees, did it not? Was that not the provision which dealt with reinstatement of local government employees?

15 **MR BENNETT:** I would have to refer to that section, Your Honour. There was no reference made to that in the judgments or at the hearing below.

20 **McHUGH J:** I know there is no reference in the judgment.

25 **MR BENNETT:** Or at the hearing below. The point for which I was referring to the previous Act, the *Crown Employees Appeal Board Act*, is that the very words "employed in service of the Crown" appeared in that Act as well and, in our submission, the strength of any inference one can draw from the fact that no particular point is made of their reinclusion, is weakened by that.

30 **GAUDRON J:** Had they received judicial interpretation in the *Crown Employees Appeal* - - -

35 **MR BENNETT:** Not so far as we are aware. It was said at the court below, Your Honour, that it was not thought that they included local government employees, but that was an assertion of the bar table which was accepted, but there was no particular basis for it so far as I am aware, but whatever it was, that was the basis on which everyone proceeded. But certainly the two cases where it had been considered were those two which we have referred to: *Mounsey* and *Holly*.

40 Now, we submit that if the court had followed *Mounsey* and *Holly*, that there are two bases upon which the Court of Appeal should have dismissed the appeal.

5 Firstly, we submit that, as the tribunal found, the
conglomeration of circumstances is such that,
effectively, the Sydney City Council now represents the
Crown. Why? We say firstly, section 8 of the *Local
Government Act 1993* provides a charter for councils.
That charter, the first paragraph of that provision is
a bullet point which says that the Council has the
following charter - page 6, Your Honour:

10 to provide directly or on behalf of other levels
of government -

effectively -

15 services and facilities for the community.

The functions of the City Council include inalienable
functions of the Crown. They include: levying of
rates; imposition of taxes. They include the
20 maintenance of order, and there is a useful collection
of the functions in regard to the maintenance of order
on page 17 of the Act, under section 23 - it is not
part of the Act, but it is put there for convenience
and it is convenient if I may refer to it now, "What
25 are a council's functions?", and there, in that table
on page 17, "A council exercises functions under" -
there are the "revenue functions" and "enforcement
functions", and they include, "Proceedings for breaches
of Act" and "Prosecution of offences" and the Acts are
30 set out in the previous pages, 15 and 16. They include
some important Acts: *Clean Air Act; Environmental
Planning and Assessment Act; Food Act; and Public
Health Act*. We say that the Council's functions in
regard to those matters are inalienable functions of
35 the Crown and maintenance of order.

As well as those inalienable functions of the
Crown, we submit that the *City of Sydney Act* has an
important impact. This impact was not, we submit,
40 accepted by the Court of Appeal, but the effect of the
City of Sydney Act is this: it takes the
responsibility of the City of Sydney for planning and
major development control out of the hands of the City
of Sydney and effectively places it under ministerial
45 control, through the imposition of a committee which
the minister controls. It also permits the minister to
take any matter out of the control of that committee
and deal with it himself.

McHUGH J: But can I just put this to you? When the *GREAT Act* was passed in 1980, the *Local Government Act* - unless my recollection is wrong - still contained
5 section 99, which was a complete code about the termination of employees, including specifically the Sydney County Council employees.

Now, no argument was opened in 1980, I would have
10 thought, that local government employees were covered by the *GREAT Act*, because section 99 of the *Local Government Act* said that when a council proposed to terminate the employment of any person, they shall
15 either order an inquiry under the section, or suspend him, and once he was given notice of suspension he had a right of application. I cannot remember where the case finished, but there was a real argument as to whether that was a code which excluded the jurisdiction
20 of the Industrial Commission, I think, and I forget where it went, but certainly until the passing of this Act in 1993, I would have thought if 99 remained in the Act it was impossible to argue that the *GREAT Act* covered local government employees. Now, what has
25 happened to change the meaning of the *GREAT Act*?

MR BENNETT: In our submission, Your Honour, the effect of the 1993 Act which, if there was any
comparable provision to the one that Your Honour has
30 mentioned, we certainly have not found it, the question remains: can the employee fall within one of those three categories determined by the Court of Appeal in the two cases we have mentioned to represent "employed
in the service of the Crown".

McHUGH J: But did the old section 99 of the *Local Government Act* continue right up until the enactment of
35 the *GREAT Act* and past, do you know?

MR BENNETT: I cannot answer that, Your Honour. I am
40 afraid I cannot, not at the moment, and I do not have a copy of the former Act here.

McHUGH J: You see, if the *GREAT Act* was not intended
45 to apply to the *Local Government Act* prior to 1993, to local government employees, then there is nothing that has been done to the *GREAT Act*, is there, that would change that? "In the service of the Crown" just did not include local government employees.

MR BENNETT: If the section to which Your Honour refers was removed from the *Local Government Act* against the background of the 1988 decision in *Holly*,
5 then it would be open to contend that that change was made in order that, should the circumstances apply, and an employee fall within the classes mentioned in *Holly*, then that was what Parliament intended.

McHUGH J: Yes, well I understand how you put it. You would say that the words, "In the service of the Crown" are always wide enough to cover local government employees. It may be because of the terms of the 1919 *Local Government Act*. They were taken out by the terms
10 of that Act, but once that Act was repealed the general words operated.
15

MR BENNETT: Yes, Your Honour, and particularly against the background of the existence of the decision in *Holly*.
20

I have referred to functions relevant to the question whether the City Council represents the Crown. We recognise that the judicial trend now, for reasons
25 that are well discussed, is that the question of ministerial control is important, and we have included tables A and B, in the brief summary of our argument, and there was a summary given by the President in the subject judgment. Our submission is that the net
30 effect of those is that this ministerial control is virtually from cradle to death, and it is a very powerful degree of control, indeed. The learned President acknowledged the strength of that argument, at page 51, at the foot of the page, at line 35. He
35 said, "At first this argument held me, but I have decided not to accept it because of the conclusion that the *GREAT Act* was not intended to cover local government employees."

40 So we would submit, as Mr Justice Clarke said in *Mounsey*, at page 6, opposite line F, if the body represents the Crown, then employment is strong, if not a conclusive indication that the employee is employed
45 in the service of the Crown. We would submit that that applies whether the court held that the Sydney City Council is wholly representing the Crown or, alternatively, whether only as to some of its functions, and as to those inalienable functions or

5 other governmental functions, such as the one we have mentioned with regard to control of development and planning, which are wholly under the minister's control, and that, as the evidence before the tribunal established, is said by the Sydney City Council to be its most important public function.

10 So, on that basis, we would submit there are strong grounds to contend, as the tribunal held, that Sydney City Council represents the Crown wholly, in part; the employment of itself brings the employee within the expression, "employed in the service of the Crown". Alternatively, we submit that the third class applies that is in *Mounsey*, that is, if the Sydney City Council does not represent the Crown, the nature of the functions of the applicant in his employment are such that he generally supports the Sydney City Council and that those functions necessarily support the inalienable functions and the governmental functions. 15 That - my last sentence - was accepted by the learned President below. The last paragraph of his judgment says local government employees have, in effect, many government functions, and recognise the strength - or the link with governmental functions of local 20 government employees, in that last paragraph, but, he said, "This is a matter, having regard to our decision as to the intention of Parliament to exclude, that it is a matter that Parliament should remedy."

30 **MASON CJ:** A very long sentence, Mr Bennett.

MR BENNETT: Yes, I had to sort of cut out a few commas, Your Honour. Thank you very much. If it please the Court.

35 **MASON CJ:** The Court need not trouble you, Mr Buchanan.

40 The Court is not persuaded that the proposed appeal enjoys sufficient prospects of success to warrant the grant of special leave. The application is therefore refused.

45 **MR BUCHANAN:** We apply for costs, if the Court pleases.

MASON CJ: You do not oppose that, Mr Bennett?

MR BENNETT: No, Your Honour.

MASON CJ: The application is refused with costs.

5 The Court will now adjourn until 9.30 AM tomorrow.

10 AT 2.40 PM THE MATTER WAS ADJOURNED SINE DIE