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SYDNEY CITY COUNCIL V REID

Court of Appeal: Kirby P, Meagher JA and Powell JA
18 August, 21 September 1994

Local Government -- Staff, officers and servants -- Employment of -- Nature of employment -- Not employed "in service of the Crown" -- Local Government Act 1993 -- Government and Related Employees Appeal Tribunal Act 1980, ss 4(1)(e), 20.

Public Service -- Employees and servants of Crown -- Who are -- Employees of local government authorities are not -- Local Government Act 1993 -- Government and Related Employees Appeal Tribunal Act 1980, ss 4(1)(e), 20.

Public Service -- Government and Related Employees Tribunal -- Jurisdiction -- Application to employee "in the service of the Crown" -- Does not apply to employees of local government authorities -- Local Government Act 1993 -- Government and Related Employees Appeal Tribunal Act 1980, ss 4(1)(e), 20.

The *Government and Related Employees Appeal Tribunal Act* 1980, s 20, provides for a right of appeal for government and related employees against employment appointments. "Employee" is defined, inter alia, in s 4(1)(e) as meaning:

> "(e) a person ... who is employed in the service of the Crown but not in the Public Service or by an employing authority."

Held: An employee of a local government authority constituted under the *Local Government Act* 1993 is not within the meaning of the *Government and Related Employees Appeal Tribunal Act* 1980, s 4(1)(e), employed "in the service

of the Crown" and has no rights of appeal in respect of employment under s 20 of the *Government and Related Employees Appeal Tribunal Act*. (519B-520E,521B, D)

Mounsey v Findlay (1993) 32 NSWLR 1, distinguished.

Note:

A Digest -- LOCAL GOVERNMENT (3rd ed) [23-28]; (2nd ed) [48-53]; PUBLIC SERVICE (2nd ed) [2], [81]; (3rd ed) [2], [54]

CASES CITED

The following cases are cited in the judgments:
Baldestowe v Brown (1990) 19 NSWLR 459.
Bolton, Re; Ex parte Beane (1987) 162 CLR 514.
Church of Scientology Inc v Woodward (1982) 154 CLR 25.
Clisdell v Commissioner of Police (1993) 31 NSWLR 555.
Cole v Director-General of Department of Youth and Community Services (1986) 7 NSWLR 541.
Coomber v Justices of the County of Berkshire (1883) 9 App Cas 61.
Corrective Services, Director-General of the Department of v Mitchelson (1992) 26 NSWLR 648.
Maritime Services Board v Murray (1993) 52 IR 455.

Mayor, Alderman and Citizens of the City of Launceston v Hydro-Electric Commission (1959) 100 CLR 654.
Mersey Docks and Harbour Board Trustees v Cameron (1865) 11 HLC 443; 11 ER 1405.
Metropolitan Water Sewerage and Drainage Board v Histon [1982] 2 NSWLR 720.
Mounsey v Findlay (1993) 32 NSWLR 1.
North Sydney Municipal Council v Housing Commission of New South Wales (1948) 48 SR (NSW) 281; 65 WN (NSW) 128.
Pearson v Assessment Committee of the Holborn Union [1893] 1 QB 389.
Prospect County Council (t/as Prospect Electricity) v Blue Mountains City Council (1992) 28 NSWLR 301.
Public Service Association (SA) v Federated Clerks' Union, South Australian Branch (1991) 173 CLR 132.
Public Service Board of New South Wales v Osmond (1986) 159 CLR 656.
Saraswati v The Queen (1991) 172 CLR 1.
Tamlin v Hannaford [1950] 1 KB 18.
Taylor v Town and Country Planning Board [1974] VR 173.
Townsville Hospitals Board v Townsville City Council (1982) 149 CLR 282.

Wijesuriya v Director-General of the Department of Conservation and Land Management (Court of Appeal, 27 June 1994, unreported).
Wynyard Investments Pty Ltd v Commissioner for Railways (NSW) (1955) 93 CLR 376.

The following additional cases were cited in argument and submissions:
Accident Compensation Tribunal, Registrar of the v Federal Commissioner of Taxation (1993) 178 CLR 145.
Attorney-General v Brown [1920] 1 KB 773.
Holly v Director of Public Works (1988) 14 NSWLR 140.
Imperial Paint Manufacturers Pty Ltd v Hanson; Housing Commission (NSW) Garnishee (1955) 72 WN (NSW) 127.
Patterson and James v Public Service Board of NSW [1984] 1 NSWLR 237.
Superannuation Fund Investment Trust v Commissioner of Stamps (SA) (1979) 145 CLR 330.

APPEAL

This was an appeal from a decision of the chairman of the Government and Related Employees Appeal Tribunal, given under s 31(1) of the *Government and Related Employees Appeal Tribunal Act* 1980.

P M Kite, for the appellant.

D M Bennett QC (solicitor), for the respondent.

Cur adv vult

21 September 1994

KIRBY P. This appeal presents an important question. It is whether local government employees are "in the service of the Crown" and, for that reason, entitled to challenge contested appointments under the provisions of the *Government and Related Employees Appeal Tribunal Act* 1980 (GREAT Act) A threshold question is raised as to whether, having regard to certain privative provisions in the *Local Government Act* 1993, parliament expressly, or by implication, excluded from external review, employment decisions of the kind here in question.

The Tribunal upholds an employee's entitlement to appeal:

Mr Robert Reid lodged an appeal with the Tribunal purporting to challenge decisions of the Sydney City Council to appoint certain persons to senior positions with the Council. The Council objected to the competence of the Tribunal to hear Mr Reid's appeal. That objection was heard by the chairman of the Tribunal (Mr R P J Noonan) sitting alone: see GREAT Act, s 31(1).

The chairman found that the Council, in July 1993, decided to create five positions of divisional administrative manager. Those positions were advertised in August 1993. Mr Reid applied for each of them. He was unsuccessful. When the appointments of the successful candidates were approved by the general manager of the Council and by the Lord Mayor in September 1993, Mr Reid purported to lodge appeals to the Tribunal. He relied upon s 20 of the GREAT Act. That section permits an "employee" (as defined) to appeal to the Tribunal against a decision of the "employer" to appoint another "employee" to fill a vacant office, where the challenging "employee" asserts that he or she is "more entitled to be appointed" than the appointee.

By its objection, the Council took two points. They were:

(1) that s 340(5) of the *Local Government Act* prevented the appellant from bringing his purported appeal to the Tribunal; and

(2) that the appellant was not an "employee" within the meaning of the GREAT Act and so had no right of appeal to the Tribunal under s 20.

As noted by the chairman, other points were raised during the hearing with which the decision in the present appeal is not concerned. Both parties wished to have a ruling on the matter of general importance presented by Mr Reid's appeal to the Tribunal.

The chairman first rejected the argument that s 340(5) of the *Local Government Act* excluded, by its terms, an appeal to the Tribunal. He then went on to decide that Mr Reid was an "employee" because, relevantly, he fell within that definition of "employee" found in s 4(1)(e) of the GREAT Act. That paragraph extends, relevantly, to "a person ... who is employed in the service of the Crown" but who is not otherwise within the Public Service or a defined employing authority. The chairman reached his conclusion by relying upon the decision of this Court in *Mounsey v Findlay* (1993) 32 NSWLR 1. In this way, he came to the result that the objection to the

general competence of the Tribunal was over-ruled. For reasons with which this Court has not been concerned, he struck out appeals against certain of the appointments. However, he upheld the Tribunal's jurisdiction to hear and determine, on the merits, Mr Reid's appeal No 756/93 against the appointment of Mr Gary Wylie to the position of administration manager (corporate and business services).

The Council has appealed to this Court against the chairman's decision. There was no dispute that the decision was one of the Tribunal "on a question of law" and thus that an appeal lay within s 54 of the GREAT Act: see*Metropolitan Water Sewerage and Drainage Board v Histon* [1982] 2 NSWLR 720; *Maritime Services Board v Murray* (1993) 52 IR 455 at 459.

The appeal has been brought to this Court at an interlocutory stage in the proceedings before the Tribunal and against a ruling which is not the final disposal of the proceeding. Nevertheless, an appeal lies. No argument was

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put to the contrary: see *Baldestowe v Brown* 19 (1990) NSWLR 459 at 466; *Director-General of the Department of Corrective Services v Mitchelson* (1992) 26 NSWLR 648 at 659.

When the appeal was called on, a notice of contention was offered for Mr Reid. It put in issue a subordinate decision of the Tribunal that the position for which Mr Reid claimed greater entitlement was not a "senior staff position" within *Local Government Act* and so was not, in any event, caught by the privative provisions relied upon. The Council opposed the filing of this notice of contention upon the ground that it was out of time or raised a mere matter of fact. The Court gave leave for the filing of the notice of contention. In the view which I take of the privative provisions relied upon, it is unnecessary to determine the admissibility of the point raised in the notice of contention.

The privative provisions is inapplicable:

It is convenient first to deal with the simpler of the two points raised by the Council. It contends that the privative terms of s 340(5) of the *Local Government Act* exclude, by their provision, an appeal such as Mr Reid has brought to the Tribunal, assuming that he would otherwise be an "employee" and entitled to appeal.

Section 340(5) of the *Local Government Act* provides:

> "(5) No proceedings for an order in the nature of prohibition,

> certiorari or mandamus or for a declaration or injunction or for any other relief, lie in respect of the appointment of or failure to appoint a person to the position of general manager or to another senior staff position, the entitlement or non-entitlement of a person to be so appointed or the validity or invalidity of any such appointment."

The subsection appears in a section of the Act, the heading of which is "Industrial arbitration excluded". By s 340(1) a definition is provided of, relevantly,"senior staff member". That definition is, in terms, elaborated by the "Dictionary" which is appended at the back of the *Local Government Act*. The Act is an experiment in "plain English drafting". It contains some novel approaches to the expression of the legislative will. The definition of "senior staff" in the "Dictionary" reads: "senior staff of a council means the general manager of the council and holders of all other positions identified in the council's organisation structure as senior staff positions."

The "organisation structure" is provided for in Schedule 7 to *Local Government Act*, Pt 6. By cl 34, there appearing, the "organisation structure" of a council "means its organisation structure determined under Pt 1 of Chapter 11".

Provision is made elsewhere within Pt 6 for the determination by a council of its organisation structure. For my purposes, I shall assume (although this was contested by the notice of contention) that the challenged appointee was employed as a "senior staff member".

Section 340 of the *Local Government Act* then proceeds, in various ways, to exclude external review of the employment decisions affecting, relevantly, such"senior staff members". I have already set out s 340(5) which is the provision principally relied upon. But that subsection must be understood in the context of the other privative provisions:

> "(2) The employment of the general manager or another senior staff

> member, or any matter, question or dispute relating to any such employment, is not an industrial matter for the purposes of the Industrial Relations Act 1991.
>
> (3) Subsection (2) applies whether or not any person has been appointed to the vacant position of general manager or another vacant senior staff position.
>
> (4) No award, agreement, contract, determination or order made or taken to have been made or continued in force under the Industrial

> Relations Act 1991, whether made before or after the commencement of this section, has effect in relation to the employment of senior staff members."

These provisions of the *Local Government Act* seem, clearly enough, designed to take "senior staff members" out of the purview of the industrial relations system. This represents a change in the past legal position of such employees. The *Local Government (State) Award*, cl 5(xii) ("Executive Band"), previously provided for the regulation of employment conditions of persons who were henceforth to be severed and treated as "senior staff members". It may be inferred that the general object of the exclusion of such persons from the industrial relations system was to further the assimilation of senior staff of local government authorities to positions akin to the private sector, with added incentives for productivity but diminished entitlements to the tenure and award protections previously enjoyed.

None of the foregoing exclusions from the industrial arbitration system explicitly touches the purported appeal to the Tribunal here in question. But it was urged by the Council that the exclusion in s 340(5) was to be read as simply another instance of the clear legislative intention to limit external interference in the appointment, removal and remuneration (or other employment conditions) of, relevantly, senior staff members.

In that context, the Council urged that the phrase "or for any other relief" ins 340(5) of the *Local Government Act* was to be given a suitably wide meaning so as to embrace the "relief" sought by Mr Reid before the Tribunal. Only by doing this, was it argued, could the legislative purpose of excluding external interference in such decisions be secured. The meaning of the words "proceedings" and "relief" was sufficiently wide to include proceedings before the Tribunal for relief of the kind claimed by Mr Reid.

The Council pointed to the analogy to be found in the *Public Service Act* 1979, s 65A(6), and the *Public Sector Management Act* 1988, s 27(3). From these provisions and the general strategy of isolating and excluding senior staff with managerial responsibility, the Court would infer a legislative intention to give the words "any other relief" the widest possible ambit. It was argued that the "relief" referred to should not be confined to relief in the courts. This could be inferred because s 340(5) appeared in the section which clearly excluded relief in the Industrial Relations Commission, which is not a court: see *Industrial Arbitration Act* 1940, s 14 and *Industrial Relations Act* 1991, s 315.

For a number of reasons, I would not accede to these arguments:

1. It has been repeatedly said that the GREAT Act affords beneficial entitlements of employment. The Act should not be narrowly construed. Nor should its beneficial provisions be diminished or excluded except by clear enactment indicating a plain legislative purpose to do so: see *Cole v Director-General of the Department of Youth and Community Services* (1986) 7 NSWLR 541 at 543; *Director-General of the Department of Corrective Services v Mitchelson* (at 654, 656f); *Wijesuriya v Director-General of the Department of Conservation and Land Management* (Court of Appeal, 27 June 1994, unreported);

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2. One of the apparent objectives of the *Local Government Act*, stated in s 7(a) is to: "... provide the legal framework for an effective, efficient, environmentally responsible and open system of local government in New South Wales." See also s 8(1). Except by express provision, clear in its purpose, it should not be assumed that the privative terms of s 340(5) were intended to expel appeals, if otherwise provided for, to the Tribunal. Such appeals provide a means for ensuring external, open and public scrutiny of decisions of local government authorities. They therefore contribute to the more"open system of government" envisaged by the *Local Government Act* as one of its purposes;

3. The *Local Government Act* was, as I have stated, drafted in a somewhat unorthodox way. It was designed to be understood more readily by people unversed in the sophisticated techniques of statutory construction. In such circumstances, it is open to argument that, had parliament intended to exclude appeals to the Tribunal, it would have expressly so provided, as it did in the provisions excluding access to the bodies established to provide industrial relations relief. I accept that it has not, until now, been considered that the GREAT Act extended to local government employees. To that extent, arguments of their "exclusion" and of "legislative intention" cannot be taken too far. The members of the legislature probably, subjectively at least, shared the general assumption held by others (including local government authorities themselves) that such employees were outside the purview of the GREAT Tribunal. Nevertheless, in approaching the new Act and trying to ascertain the purpose and scope of the privative provision in s 340(5), it must be acknowledged that there are few indications in the subsection that it was intended to extend to such a unique body as the GREAT Tribunal;

4. A general principle adopted by courts in approaching the construction

of privative provisions has been that the exclusion of beneficial relief, otherwise provided for by law, must be clearly stated. It is true that this principle has been applied most clearly in relation to the attempted exclusion of relief in the superior courts of record. An approach involving strict construction of privative provisions of this kind can be justified as defensive of the rule of law which the superior courts of record uphold: see *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 55f; *Public Service Association (SA) v Federated Clerks' Union, South Australian Branch* (1991) 173 CLR 132 at 160;

5. The courts assume that parliament, unless it makes its purpose clear, did not intend to deprive citizens of access to the courts -- particularly to grant relief against excess of jurisdiction or to require the lawful exercise of jurisdiction. Whilst this attitude to privative clauses does not have the same force to support an argument that relief, otherwise permitted by law, in a subordinate tribunal, should not be excluded without clear language, it is still a consideration which may be taken into account in attempting to give

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meaning to language such as that found in s 340(5) of the *Local Government Act*; and

6. It would be erroneous to give the words "or for any other relief" a completely open-ended meaning. The "other relief" is relief of the kind elsewhere provided for in s 340(5) of the *Local Government Act*. That takes the mind to a search for the common factor which exists between the relief specified. The words "any other relief" must then be given a meaning consonant with at least the general character of the relief specified. What is the general character of relief granted in "proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction"? The answer is that such relief is given only in judicial proceedings and then (with the rarest of statutory exceptions) before superior courts of record. An appeal right to the GREAT Tribunal is not "any other relief" of that character. It is a specific statutory right, admittedly in"proceedings" and for "orders" but not of the historical and declaratory nature of the "relief" particularised in the opening words of s 340(5) of the *Local Government Act*. In *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, Wilson J (at 673f) considered the meaning of s 65A(6) of the *Public Service Act* 1979. That subsection contains a formula similar to that in s 340(5) of the *Local Government Act*. Wilson J described it (at 674) as "a most unusual privative clause" which excluded "judicial review even for jurisdictional error". His Honour appears to have considered (at 675) that it was confined to "proceedings by way of judicial review",

although his remarks were not expressly addressed to the issue now before us. They are not part of the holding in *Public Service Board of New South Wales v Osmond*.

For the foregoing reasons, and conformably with the general approach of the courts to the construction of privative provisions, I would hold that the words"any other relief" mean relief of the same character as that in proceedings of the kind expressly listed in the opening words of the subsection. The common feature of such proceedings is that they are judicial in character and, probably, brought in superior courts of record. For such purposes, the Tribunal is not judicial in character. Clearly, it is not a superior court of record. An appeal to the Tribunal is thus not proceedings "for any other relief" within the privative clause.

Having reached this conclusion, it is unnecessary for me to explore the alternative, factual, basis upon which Mr Reid sought to avoid the application of s 340 of the *Local Government Act*, if it otherwise applied. In essence, he argued that the "organisation structure" of the Council, creating the"senior staff positions" in question, was itself adopted (if at all) prior to the commencement of the new *Local Government Act* and was thus ineffective for the purposes of that Act. The Tribunal rejected this argument. It was not suggested that, for reasons of jurisdiction or otherwise, this Court was obliged to decide the point if, for other reasons, the privative provision was inapplicable: cf *Clisdell v Commissioner of Police* (1993) 31 NSWLR 555 at 559. I will therefore pass directly to the main point in the appeal. It is one of considerable importance, potentially affecting (so it was said) all local government authorities and some forty thousand local government em-
ployees in the State. Any remedies which a person interested may have to challenge the lawfulness of the appointments to positions in the

"organisation structure" of the Council would have to be tested in other proceedings. Not in an appeal to the Tribunal.

The statutory definition of government employment:

It was common ground that Mr Reid was not employed in the Public Service of the State. Nor was he employed in one of the specified "employing authorities" defined in s 4(1) of the Act and collected in Schedule 4 to the GREAT Act. It was also conceded that local government employees have not, until now, been considered generally to be within the jurisdiction of the Tribunal. Nor were they considered to be within the jurisdiction of its predecessor, established by the *Crown Employees Appeal Board Act* 1944.

But the argument of Mr Reid, which succeeded before the Tribunal, is that he is an "employee" within the definition in s 4(1)(e) of the GREAT Act, in that he was "employed in the service of the Crown". That might not have been the subjective intention of the minister or of the members, as the Bill was enacted by parliament. But, it was held by the Tribunal, it is the objective purpose of parliament, as derived from the language of the statute. The fidelity of courts must be to the purpose of parliament. But the search for that purpose is necessarily addressed to the "text of the law". Where there is disharmony between that text and the apparent wishes of the minister or even among the legislators, this is "unfortunate". Yet:

> "However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law."

See*Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518: see also *Saraswati v The Queen* (1991) 172 CLR 1 at 22. As Meagher JA has repeatedly said in other cases, the Court is not permitted to "mangle the language" of the statute in order to confirm the subjective wishes of ministers and their officials or the general presuppositions of legislators and citizens.

The question thus becomes whether Mr Reid is "employed in the service of the Crown but not in the Public Service or by an employing authority". If he is, then he is an "employee" within the GREAT Act. The Council is an "employer" within s 4(1)(e)(ii) of that Act. And the present appeal to the Tribunal was rightly held to be competent.

By reference to the decision of this Court in *Mounsey*, the chairman of the Tribunal found that Mr Reid was such an "employee". This the Council contests.

The phrase "in the service of the Crown" is an ancient one upon which there is much authority. Courts in this country, and in England, have stressed the need to find the meaning of the phrase in the particular context in which it appears. Members of a volunteer corps, offering their services to the Queen through the Lieutenant of a county of England were held to be "in the service of the Crown in the same way as soldiers of the regular army are" for the purpose of legislation exempting their premises from rates: see *Pearson v Assessment Committee of the Holborn Union* [1893] 1 QB 389 at 394. The scope of the "service of the Crown" has not stood still. It has an historical origin in the rights, privileges and immunities deriving from the peculiar position of the sovereign in England in medieval times. But this

historical inheritance has been adapted, over the centuries -- first in England and later in countries such as Australia -- to the necessities of modern

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government: see *Mersey Docks and Harbour Board Trustees v Cameron* (1865) 11 HLC 443 at 505, 508; 11 ER 1405 at 1429, 1430. With the "constitutionalisation" of the English monarchy in the sixteenth and seventeenth centuries, the features of Crown service (including the peculiar privileges which attached to it) "no longer enure for the advantage of the Monarch but for the government of the State": see *Taylor v Town and Country Planning Board* [1974] VR 173 at 177.

In the last-mentioned case, Crockett J (at 177-178) described the historical process with which all are familiar:

> "... [g]overnments in the past century have increasingly entered into new and wider fields of activity. Communications and transport have become the concern, often the monopoly, of government, as too has the production, distribution and sale of essential forms of energy. Industries and commercial undertakings in some instances have been nationalized, whilst in many others their products have been compulsorily made the subject of publicly operated marketing agencies. The retention of a rule giving special immunities to the Crown when public organizations and private enterprise operate side by side would seem difficult to justify. Indeed, in a number of ways in many areas privileges have been statutorily circumscribed, if not completely abolished, but the doctrine in its remnant form remains capable of working injustice ...
>
> It has ... been established that only those agencies of the central government which have a close connexion with the Crown may rely upon its privileges. For the past century, the courts in England and the dominions have often been called upon to determine what constitutes a close connexion in the relevant sense. Not surprisingly, the authorities reveal a persistent narrowing of the ambit of the doctrine. Equally unsurprisingly, the commentators have just as persistently complained that the courts have not gone far enough."

From *Taylor* and other like cases, various indications can be derived to assist courts to draw the boundary between "service of the Crown" and activity which, although connected with a public and statutory enterprise, is not to be so regarded:

(1) Incorporation, with the power granted by parliament to carry on public functions, has often been taken as an indication that the statutory corporation in question is distinct from the Crown, "unless Parliament has,

by express provision, given it to the character of a servant of the Crown": see *The Mayor, Aldermen and Citizens of the City of Launceston v Hydro-electric Commission* (1959) 100 CLR 654 at 662. This principle has been held to apply with particular force to commercial corporations which are taken to act on their own behalf: see *Tamlin v Hannaford* [1950] 1 KB 18 at 25;

(2) Consideration will be given to the intimacy of the connection of the body with the modern manifestation of the Crown in government, that is, the Executive Council or the ministers. This requires identifying "the primary and inalienable functions of government" which are protected by the shield of the Crown: *Coomber v Justices of the County of Berkshire* (1883) 9 App Cas 61 at 74; *Taylor* (at 179);

(3) To the extent that the body in question is engaged in commercial activities or "*quasi*-commercial" functions such as the generation and sale of electrical energy, there is a tendency to regard it as being outside the core

features of the "service of the Crown". Commercial activities were neither historically nor of necessity conceived to be part of the activities of the Crown as such; and

(4) The answer in each case is to be found by examining the body in question, studying the statute establishing it and considering whether its purposes, functions and the degree of governmental control, bring it into the embrace of Crown service or put it outside that notion: see *Taylor* (at 181). It is always then possible for the legislature expressly to bring the service in question into the ambit of "the service of the Crown" or "government employment". It can do so, as it did in the present Act, by the express provisions in s 4 which extended the GREAT Act to certain designated "employing authorities" listed in Schedule 4 to the Act. But it can also do so by a general expression such as the one upon which Mr Reid relied. This includes among the employees entitled to the benefits of the Act "a person ... who is employed in the service of the Crown" but who is not otherwise within the definition of "employee" and is not, as such, a member of the Public Service of the State or employed by a designated employing authority. This broadly expressed "catch-all", as the last defined category of "employees" entitled to the protection of the Act, must be given meaning. But what is that meaning?

In *Mounsey*, this Court had before it an appeal against a decision of the GREAT Tribunal that an employee of an area health service within the meaning of the *Area Health Services Act* 1986, was "employed in the service

of the Crown". The suggested "employer" challenged the jurisdiction of the Tribunal. This Court upheld its decision and thus the Tribunal's jurisdiction. The holding of the Court is found in the reasons of Clarke JA (ibid at 3ff). His Honour started with the principle, derived from *Prospect County Council (t/as Prospect Electricity) v Blue Mountains City Council* (1992) 28 NSWLR 301 at 319 that a statutory corporation, subject to control by the Executive Government, is to be regarded as a servant or agent of the Crown: see also *North Sydney Municipal Council v Housing Commission of New South Wales* (1948) 48 SR (NSW) 281 at 284; 65 WN (NSW) 128 at 129; *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376 at 383 and *Hogg, Liability of the Crown* (1971) at 207f. In *Mounsey*, this principle took Clarke JA to express the approach he would take. He said (at 7): "... the degree of control both direct and indirect, exercised by the executive government, and the nature of the functions of the relevant employer are obviously most relevant."

For the purpose of examining the "degree of control" of the Executive Government and of elucidating the "nature of the functions" of the relevant employer, his Honour proceeded to scrutinise painstakingly the terms of the *Area Health Services Act* 1986. He concluded that the persons actually employing the employees in question would, either directly or indirectly, be under"total Ministerial control". Their conditions of employment were regulated by a servant or agent of the Crown. Therefore, although under the direct control of employees of a corporation which did not represent the Crown (as such), they were held to be under the "indirect control of a Minister of the Crown in so far as he has virtually total control of their employer". The area health services were thus not truly independent statutory bodies. They carried out "functions in which government has

traditionally been involved, both directly and indirectly". Their employees were therefore to be considered "employed in the service of the Crown".

It was this approach which led the Tribunal to reach its conclusion in relation to the employees of a local government authority, such as the appellant Council. The question presented by this appeal is whether the analogy is good and whether *Mounsey* requires, or permits, the conclusion which the Tribunal has reached.

The Council's arguments:

The Council mounted a strong argument to distinguish *Mounsey* and to assert that its employees are not employed "in the service of the Crown":

1. The Council, like all local government authorities, is an independent statutory corporation, created by parliament as an expression of its will and not a remnant of the Crown's historical functions: see the *Local Government Act*, Chapter 9, Pt 2, Div 1. Although not recognised, as such, under the Australian Constitution, local authorities are part of the system of government contemplated and required by the *Constitution Act* 1902, s 51. Neither under the *Constitution Act* 1902 nor under the *Local Government Act* is express provision made to constitute councils to be agents or representatives of the Crown, as such. On the contrary, by s 359 of the *Local Government Act*, it has been thought necessary expressly to enable councils to act as agents of the Crown. This suggests (so it was put) that ordinarily, local government authorities are separate, as such, from the Crown;

2. The GREAT Act was based upon a *Report of the Committee of Inquiry into the Appeal Rights of Government and Quasi-Governmental Employees in Promotion and Disciplinary Matters, April 1978* (1979), Sydney, Government Printer (the Bowen Report). The terms of reference of that inquiry are set out in the notice published in the *Government Gazette of the State of New South Wales*, No 165 of 24 December 1976, 5727. The committee's reference was extremely wide. However, it concluded with the following exclusion (at 5728): "... but may not consider the inclusion of persons employed under or pursuant to the *Local Government Act* 1919 ...". In these circumstances, it was unsurprising that no specific provision was made in the Act for local government employees, nor that local authorities did not join the list of "employing authorities" specifically annexed to the Act;

3. The *Parliamentary Debates* were placed before the Court to help elucidate the suggested ambiguity in the definition of "employee". It is clear that no mention was made either by the Premier (Mr Wran) or by the minister introducing the GREAT Bill into the Legislative Council, of the exceptional step of embracing employees of local authorities established by the*Local Government Act* 1919. Had it been the purpose of the Bill to extend coverage to such employees by the definition of "employee" in s 4(1)(e), it might have been expected that the ministers would at least have referred to such a radical step. In particular, because the terms of reference of the foundational inquiry had expressly excluded it: see *New South Wales Parliamentary Debates* (Legislative Assembly), 20 February 1980, 4547; *New South Wales Parliamentary Debates* (Legislative Council), 25 March 1980, 5728;

4. Whilst in respect of local government authorities, ministerial oversight undoubtedly exists, it falls far short (so it was put) of the "total ministerial

control" which was established in *Mounsey* to exist in respect of area health services. On the contrary, save for a limited number of express powers of the minister to intervene, local government is, and should remain, independent of the interference of ministers (and thus of the Crown in its modern manifestation). It was designed to operate through statutory corporations having an extremely high measure of independence in their ordinary operation, reflecting the democratic will of those qualified to elect the governing bodies. It would be a contradiction to the democratic nature of local government to assert that it was simply a manifestation of the Executive Government and the Crown; and

5. Although it might be conceded that some of the functions performed by a local government authority are "governmental" (as the very title of the *Local Government Act* suggests), this did not decide whether its employees are to be regarded as employed "in the service of the Crown". Answering the general character of the functions of local government, and determining that those functions are, unsurprisingly, "governmental", does not decide the nature of the "service" of local government employees: see *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 at 288. That characterisation can only be determined when the organisation, history and statutory powers of local government authorities are carefully scrutinised.

The employee's argument: large ministerial control:

For Mr Reid it was put that he qualified upon both limbs of the holding in *Mounsey*. An analysis of the *Local Government Act* demonstrated a high level of ministerial (that is, Crown) control over local government authorities and their employees. As well, the nature of the functions of such authorities was traditionally governmental activity. As such, it was part of the government and control of the lives of citizens and others. It was therefore close to the central functions of government which had devolved from the sovereign's prerogative. This rendered it entirely natural to regard the employees of local government as being "employed in the service of the Crown".

The most powerful argument mounted for Mr Reid was found in the list of provisions of the *Local Government Act* giving the minister, that is, the Executive Government or Crown, significant powers over many aspects of local government.

Thus, in the establishment of local government areas and cities, the decision is reserved to the Executive: see the *Local Government Act*, s 204 and s 206. It is the Executive which names an area or renames an area

(s 207). Although established as a body corporate, local authorities include no corporators. The Executive constitutes the Remuneration Tribunal which determines the remuneration and fees for mayors, councillors and members of county councils and that body reports to the minister (s 235). The determination of the Tribunal as to remuneration cannot be challenged (s 246).

Large powers are retained to the minister in certain specified circumstances to exercise the functions of a council (s 154). Where an order is given by the minister and is inconsistent with an order of the council, the latter is void and the minister's order prevails (s 155). Power is reserved to a council's auditor to make interim reports to the minister on the finances of a

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council (s 421). The council is obliged to make comprehensive annual reports to the minister and to other nominated persons (s 428). The minister enjoys wide powers of inquiry and investigation into councils, their works and activities under Chapter 13, Pt 5 of the *Local Government Act*. Thus the minister has power under the Act to require the Council to give effect to recommendations after specified departmental investigations (s 434). Specific powers are given to the Minister for Public Works to inquire into water, sewerage and drainage works and facilities (s 66(1)). Limits are imposed on the powers of councils to invest. Specifically, they are confined to investing in trustee securities or to forms of investment authorised by the minister (s 625).

The funding of local government is reserved to the minister, advised by a Grants Commission (s 615). The minister may make grants of State moneys to councils (s 620). The minister may limit or restrict council borrowings (s 624). The minister may also control council rates, income and waste management charges.

Power is reserved to the Governor to dissolve the whole or part of a local government area (s 212). The Executive Government is empowered to declare all civic offices vacant after ministerial inquiry and recommendation (s 255). It may appoint an administrator (s 256). With or without inquiry, the Executive Government may declare a council to be non-functioning. It may appoint administrators or councillors (s 257).

There are many other provisions of the *Local Government Act* which are relevant to various forms of ministerial intervention into local government. In various ways, these provisions derogate from the full autonomy of local government authorities and their governing councils. The provisions were

collected in a most detailed examination of the Act conducted by the respondent. I do not repeat all of them. But I have taken all of them into account.

The respondent relied further upon the special statute governing it: see *City of Sydney Act* 1988. It was not suggested that the statute altered the general argument, common to the present appellant as to all local government authorities. There are some particular provisions of the *City of Sydney Act* 1988 which were relied upon. These include s 25 by which the minister is empowered to appoint the day for the first election for the City of Sydney after 1988. There are also a number of provisions (ss 33, 34, 38, 39, 40 and 41) by which the minister has certain functions in respect of the Planning Committee of the City of Sydney. However, these particular provisions do not derogate from, nor do they significantly add to, the general arguments raised by reference to the *Local Government Act*. In that sense, employment by the appellant Council cannot be distinguished from the general position of employment by local government authorities throughout the State under the *Local Government Act*.

The foregoing and other comparisons of the powers of ministers to make orders represented the central point made for Mr Reid. Although local government authorities, and their councils, enjoy a high measure of self-government, there is also a high measure of power, afforded to ministers (that is, the Crown) to intervene and to require the will of the minister (that is, the Crown) to be obeyed. According to the submission for Mr Reid, this analysis of the legislation demonstrated the same "degree of control, both

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direct and indirect, exercised by the Executive Government" as was shown in *Mounsey*. Moreover, the governmental nature of the functions of local government was (even more than the provision of medical services) a traditional and conventional function of government so as to render the employees of local government relevantly as employed "in the service of the Crown".

I pay tribute to the thoroughness of the analysis of the legislation conducted by the respondent to support the decision of the Tribunal. For a time the argument held me. But in the end, I have come to the view that the better opinion is that employees of local government authorities are not, within the meaning of the GREAT Act, employed "in the service of the Crown". I must explain why.

Local government employees are not "in the service of the Crown":

The function of the Court in resolving a problem such as the present, is to give effect to the purpose of parliament. Although statutes can misfire, courts should be wary of adopting a construction of a statute which, fairly clearly, was not intended when the statute was enacted. I have no doubt that parliament did not intend, as a matter of subjective purpose, that local government employees should be embraced within the GREAT Act. Whilst it is true that the Premier and the minister emphasised the importance of the reform achieved by the Act and the widening of the categories of persons brought within its protection, they did so in the context of legislation which was substantially intended to give effect to the Bowen Committee Report to which the Premier referred in the opening paragraph of his Second Reading Speech: see loc cit at 4548.

I found it impossible to believe that, had it been parliament's purpose that forty thousand local government employees were to be brought within the GREAT Act, the ministers would not have referred to this fact. I find it difficult to accept that, had that been the intention of the legislature, it would not have been expressed more clearly than by the side wind of the last paragraph of the definition of "employee". If that paragraph can be given such a large power to embrace forty thousand local government employees, such a view would render most of the earlier paragraphs of the definition virtually otiose. The large meaning of "in the service of the Crown" would embrace all governmental service, however remote and independent the employing body might be.

That this was not the object of the Act is made tolerably clear by the felt need to include the specified employing authorities in a schedule to the Act. Local government authorities are, and should be, independent of the Executive Government to the highest degree possible. That view is consonant with their place in the *Constitution Act* 1902 (Cth). It is also consistent with the highly particularised list of powers of ministerial interference in the *Local Government Act*. Those powers do not reach down to the kind of ministerial control of employees which was found to exist in respect of area health services in *Mounsey*. On the contrary, local authorities and their councils are guaranteed a very high measure of independence and self control by the *Local Government Act*. Nowhere more so than in respect of any "senior staff" who are to have a high level of personal managerial responsibility.

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Whilst local government is indeed a form of government, it is also a creature of statute. Out of recognition of the imperatives of democratic self-government, the statutory provisions have enacted the creation of largely

independent corporations accountable (in the ordinary course) not to the minister (that is, the Crown), but to the people who elect them. In this sense, the high measure of independence of statutory corporations, by which local government is ordinarily carried out, is inconsistent with viewing their employees as servants of the Crown. The exceptional powers of ministerial intervention remain that: exceptions. For the purpose of characterisation of the nature of the service, it is more appropriate to catalogue it as being "in the service of local government authorities" and not "in the service of the Crown".

This view also coincides with what must be deemed to have been the view of the drafter in making express provision for other highly independent statutory corporations and adding them expressly to the list in Schedule 4 to the GREAT Act. If local government employees are to be regarded as "in the service of the Crown", so, almost certainly, would be all of the employees of all of the employing authorities for whom express provision was made in s 4 and Schedule 4 of the GREAT Act. It would render Schedule 4 unnecessary.

I do not say that local government employees should not be within the ambit of the GREAT Act. In a very real sense, they are government employees. They carry on many activities which are governmental in character. They do so under legislation of the State Parliament. But from the beginning of this form of statutory review, both under the *Crown Employees Appeal Board Act* 1944 and under the GREAT Act, local government employees have been excluded. As the terms of reference for the Bowen Committee suggest, this has been a deliberate decision of succeeding governments and parliaments. That decision can be unmade. But in the end I have concluded that it should be unmade by parliament, not by the court, reading into an admittedly ambiguous provision an operation which fairly clearly was not intended.

Conclusions and orders:

The result is that the Council's appeal to this Court must succeed. I would propose the following orders:

1. Appeal allowed;

2. Set aside the decision of the Government and Related Employees Appeal Tribunal in appeal No 756 of 1993, by which the Tribunal held that it had jurisdiction to hear and determine the appeal;

3. In lieu thereof:

(a) *declare* that the Government and Related Employees Appeal Tribunal does not have jurisdiction to hear and determine appeal No 756 of 1993;

(b) *order* that the purported appeal by the respondent to the Tribunal in appeal No 756 of 1993 be struck out for want of jurisdiction;

4. Order that the respondent pay the appellant's costs of the appeal; and

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5. Reserve liberty to the parties to apply to the Tribunal or to this Court for any further or other relief, provided such application is made within twenty-eight days of these orders.

MEAGHER JA. In this matter I have had the benefit of reading in draft the judgment of the President. I agree both with his Honour's reasons and with the orders he proposes. The issue with which the appeal is concerned is whether an employee of a local council can be said to be "in the service of the Crown". Manifestly he cannot. Even the learned solicitor who argued the case for the respondent, Mr D M Bennett QC, did not advance so farouche a submission that a municipal council was the Crown, or an arm of the Crown, or an emanation of the Crown, or an agent of the Crown. The aldermen of a council are elected by popular suffrage, not appointed by the Crown. They neither ask for, nor, in general, receive, any assistance from the Crown in the discharge of their daily tasks. The extent to which the Crown can interfere with their activities is slight, and the extent to which it does is minimal. In what sense, then can it be said that an employee is "in the service of the Crown"? Because, as Mr Bennett said -- and said more than once-- local government councils exercise what a political scientist might call"governmental functions": for example, they might build roads, or conduct schools, or run hospitals. But, as is obvious enough, so can and do many private persons and bodies. This suggested discrimen is inadequate.

POWELL JA. I have read, in draft, the judgment which has been prepared by Kirby P. I agree with his Honour's conclusion that an employee of a local council is not to be regarded as being a person "in the service of the Crown", and with his reasons for so concluding.

As that conclusion is sufficient for the disposition of this appeal, I would wish to reserve, for another day, the question of the construction proper to be given to a privative clause, such as s 340(5) of the *Local Government Act* 1993 when appearing in a context such as is provided by Pt 2 of Chapter 11 of the *Local Government Act*. I must, however, say that I consider decidedly odd the suggestion that although proposed appointments to senior staff positions are to be advertised, State-wide, so that persons appointed to such positions may well not come from within a council's service; although those appointed to such positions are to hold those positions pursuant to fixed term contracts; although such questions as the appointment to, removal from office, the termination of employment, and the terms and conditions of employment, of a member of the senior staff are not to constitute "an industrial matter" for the purposes of the *Industrial Relations Act* 1991, and although a council's decision to appoint a person to a senior staff position is not to be subject to judicial review, nonetheless, if an employee of a council were to be regarded as being "in the service of the Crown", a decision to appoint a person to a senior staff position would be subject to challenge, and liable to be over-ruled, upon a form of administrative review.

I agree with orders proposed by Kirby P for the disposition of this appeal.

Appeal allowed

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Solicitors for the appellant: *Blake Dawson Waldron*.

Solicitors for the respondent: *Freehill Hollingdale & Page*.

N J HAXTON,
Barrister.