

IN THE SUPREME COURT
OF WESTERN AUSTRALIA

No.1978 of 1977

THE FULL COURT

CORAM: BURT C.J., WICKHAM J., SMITH J.

In re Writ of Prohibition
against DIXON, the
Parliamentary Commissioner

Ex parte PRINCE and
OLIVER

REASONS FOR JUDGMENT

BURT C.J.

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

Heard: 11th April, 1978

Delivered: 9 May 1978

THE FULL COURT

CORAM: BURT C.J., WICKHAM J., SMITH J.

No. 1978 of 1977

IN THE MATTER OF an application
for a Writ of Prohibition
against OLIVER FRANCIS DIXON the
Parliamentary Commissioner for
Administrative Investigations.

Ex parte BRIAN EDWARD PRINCE
and BRIAN THOMAS OLIVER

Applicants

Mr. P. L. Seaman, with him Mr. P. M. Nisbet, appeared for
the applicants.

Mr. G. A. Kennedy, Q.C., with him Mr. C.K.S. Merriam, for
the respondent.

BURT C.J.

This is the return of an order nisi for a writ of
prohibition prohibiting the Parliamentary Commissioner for
Administrative Investigations from -

- "1. Proceeding further to investigate the complaint of
David James George Finlay, and
2. Publishing any report on the said complaint either
absolutely or, alternatively, in so far as such
investigation and report may touch upon or relate to
the circumstances surrounding the dismissal of the
said David James George Finlay from his employment
with the City of Stirling. "

The order nisi was granted on a number of grounds but
certain of them having been abandoned in argument before us it
is only necessary to consider the following, they being that -

"(a) The applicants" (who were witnesses called before the
Commissioner to give evidence and who gave evidence in
an investigation by the Commissioner of a complaint made
by Finlay relative to some decision made or act done
by the City of Stirling) "have never been provided with
a copy of the complaint of the said David James George
Finlay.

(b) The applicants were actively or passively dissuaded from appearing at such investigation with counsel.

(c) The Parliamentary Commissioner having indicated in writing to the applicants that he intends to make findings adverse to their character they have been prejudiced by their lack of legal representation,"

and, this being a ground added at the hearing, that -

"(d) Having regard to the circumstances appearing from the affidavits filed on behalf of the applicants herein there is reasonable ground for suspicion that the Parliamentary Commissioner :

(i) has pre-judged the conduct of the applicants or has a prejudiced mind in relation thereto;

(ii) may not bring to the consideration of the conduct of the applicants a fair and unprejudiced mind. "

The grounds abandoned were the only grounds capable of sustaining an order in the terms of the second limb of the order sought in para. 2 above and hence the making of an order in those terms need not be further considered.

The Parliamentary Commissioner for Administrative Investigations, hereafter called "the Commissioner", is a statutory office created by the Parliamentary Commissioner Act (No. 64 of 1971). That Act by its long title is "An Act to provide for the appointment of a Parliamentary Commissioner for Administrative Investigations for the investigation of administrative action taken by or on behalf of certain government departments and other authorities and for incidental purposes" and consistently with the title the Commissioner is appointed "for the purpose of conducting investigations in accordance with this Act". Section 5(1). Before entering upon the exercise of the duties of the office the Commissioner is required to take an oath that "he will not, except in accordance with this Act, divulge any information received by him under this Act". Section 8(1). As the name of the office would imply the Commissioner is ultimately responsible to and in the exercise of his functions he is subject to "the guidance" of the Parliament. He can only be removed from office "by the Governor on addresses from both Houses of Parliament". Section 10

Rules of Parliament may be made for the guidance of the Commissioner in the exercise of his functions and "subject to this Act the functions of the Commissioner shall be exercised in accordance with the Rules of Parliament made under this Act".

Section 12(2). The Act applies to government departments and to other authorities, which includes local authorities, specified in the Third Schedule to the Act and to "any other government departments or other authorities to which this Act is declared to apply by Rules of Parliament", - s. 13. By s. 14(1): "Subject to this Act, the Commissioner shall investigate any decision or recommendation made, or any act done or omitted, that relates to a matter of administration and affects any person or body of persons in his or its personal capacity in or by any government department or other authority to which this Act applies in the exercise of any power or function". Either House of Parliament or any committee of either of those Houses or a joint committee of both Houses of Parliament may refer to the Commissioner for investigation and report any matter which that House or committee considers should be investigated by him, - s. 15(1). Otherwise any investigation which the Commissioner is authorised to conduct may be conducted either on his own motion or on a complaint made in accordance with s. 17 of the Act. By s. 17(1) the complaint must be in writing and, subject to exceptions which do not for present purposes matter, a "complaint shall not be entertained under this Act unless it is made by the person aggrieved himself". By s. 19(1): "Before investigating under this Act any action taken by or on behalf of a government department or other authority the Commissioner shall notify the principal officer thereof and the responsible Minister in writing of his intention so to do, specifying the action in respect of which the investigation is to be conducted". Every investigation shall be conducted in private. - Section 19(2). By s. 19(3): "Subject to any Rules of Parliament made under this Act, the Commissioner is not required to hold any hearing for the purposes of an investigation, and he may obtain information from such persons and in such manner, and make such inquiries as he thinks fit

S.19(3)

Any person who is concerned or involved in the investigation may be represented by counsel or otherwise". By s. 20 of the Act, all the provisions of the Royal Commissions Act, 1968 "have effect as if they were enacted in this Act". Subject to exceptions not here relevant "a person is not compelled for the purposes of an investigation under this Act to give any evidence or produce any document that he could not be compelled to give or produce in proceedings before a Court". Section 20(3). Section 25 of the Act, which controls the Commissioner's duty to report, is a key section and should be reproduced. It is in these terms:

"25. (1) Where, as a result of an investigation conducted under this Act (not being an investigation conducted pursuant to section 15), the Commissioner is of the opinion that the action to which the investigation relates -

- (a) appears to have been taken contrary to law;
- (b) was unreasonable, unjust, oppressive, or improperly discriminatory;
- (c) was in accordance with a rule of law or a provision of an enactment or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;
- (d) was taken in the exercise of a power or discretion, and was so taken for an improper purpose or on irrelevant grounds, or on the taking into account of irrelevant considerations;
- (e) was a decision that was made in the exercise of a power or discretion and the reasons for the decision were not, but should have been, given;
- (f) was based wholly or partly on a mistake of law or fact; or
- (g) was wrong,

he shall, as in the circumstances of the case he thinks fit, carry out the duties imposed on him by subsection (2) of this section.

(2) Where in such a case as is referred to in subsection (1) of this section the Commissioner is of the opinion -

- (a) that the subject matter of the investigation should be referred to the appropriate authority for further consideration;
- (b) that action can be, and should be, taken to rectify, or mitigate or alter the effects of, the action to which the investigation relates;
- (c) that any practice in accordance with which the action was taken should be varied;
- (d) that any law in accordance with which, or on the basis of which, the action was taken should be reconsidered;

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(e) that reasons should be given for the action;
or

(f) that any other steps should be taken,

the Commissioner shall report his opinion, and his reasons therefor, to the principal officer of the appropriate authority, and may make such recommendations as he thinks fit.

(3) Where the Commissioner makes any report or recommendations to the principal officer of an authority under subsection (2) of this section, he shall send a copy thereof to the responsible Minister.

(4) If under subsection (2) of this section the Commissioner makes recommendations to the principal officer of an authority he may request that officer to notify him, within a specified time, of the steps that have been or are proposed to be taken to give effect to the recommendations, or, if no such steps have been, or are proposed to be taken, the reasons therefor.

(5) Where it appears to the Commissioner that no steps that seem to him to be appropriate have been taken within a reasonable time of his making any report or recommendations under subsection (2) of this section, the Commissioner, after considering the comments (if any) made by or on behalf of the principal officer to whom the report or recommendations were made, may, if he thinks fit, send to the Premier of the State a copy of the report and the recommendations together with a copy of any such comments.

(6) Where a copy of any report, recommendations, or comments has been sent to the Premier of the State under subsection (5) of this section, the Commissioner may lay before each House of Parliament such report on the matters to which they relate as he thinks fit.

(7) The Commissioner shall not in any report under this Act make any comment defamatory of or adverse to any person unless that person has been given an opportunity of being heard in the matter and his defence is fairly set forth in the report. "

Related to the Commissioner's obligation to report reference should be made to s. 19(7) which is in these terms:

"19. (7) If, during or after an investigation, the Commissioner is of opinion that there is evidence of any breach of duty or misconduct on the part of any member, officer, or employee of any government department or authority to which this Act applies -

(a) he shall report that matter to the principal officer thereof; and

(b) he shall furnish a copy of the report to the Minister charged with the administration of that department or the enactment by which the authority is constituted. "

By s. 29(1): "Where, in the course of an investigation under this Act, the question arises as to whether the Commissioner has jurisdiction to conduct the investigation, the Commissioner, or the party the subject of the investigation, may make an application to the Supreme Court for a determination of that

question, and, on the application, the Court may make such order as it considers proper".

Finally, by s. 30(3): "Notwithstanding anything in the foregoing provisions of this section, no prerogative writ shall be issued compelling the Commissioner to carry out any investigation, and no proceedings shall be brought against the Commissioner whereby the issue of such a writ is sought".

Upon this application it is conceded that the investigation to which it relates is one which the Commissioner has jurisdiction to conduct, that is to say, it is admitted that he has jurisdiction to enter upon the inquiry. The general submission, however, is that he should be prohibited from proceeding further because in the conduct of the inquiry he has violated the principles of natural justice for the reasons indicated in the grounds set out earlier in these reasons.

The threshold question then is whether in such a case the applicants, being witnesses called before the Commissioner to give evidence and who gave evidence before him, have any standing to obtain a writ of prohibition and associated with that question - indeed I do not think they are in truth two entirely separate questions - whether the power given to the Commissioner to investigate and to report in so far as the exercise of it affect or may affect the rights of the applicants is conditioned so that if exercised without regard to natural justice appropriate to the circumstances the power is exceeded or denied. The answer to those questions must in the end be based upon the provisions of the statute and from implications which arise from them. The questions are questions of construction. See Salemi v. Minister for Immigration and Ethnic Affairs (No. 2), (1977) 14 A.L.R. 1, at pp. 4 and 5 per Barwick C.J.

The Commissioner's function is to investigate matters within his jurisdiction and if he should reach one or other of the opinions mentioned in s. 25(1) of the Act, then to report his opinion and his reasons for it to the principal officer of the appropriate authority and to make such recommendations as he think

fit. In the discharge of those functions and subject to Rules of Parliament he is the master of his own procedure. Nothing that he does affects the rights of the applicants nor does it affect any matter which may condition the rights of the applicants. More specifically, nothing which he does, (subject to one qualification,) the existence of which depends upon the meaning given to "rights"; affects the rights of persons appearing before him as witnesses.

It is important for present purposes to observe that the Commissioner is enjoined from making any report containing any comment defamatory of or adverse to any person unless that person has been given an opportunity of being heard in the matter and his defence is fairly set forth in the report. If a report containing such comment can be said to affect the "rights" of the person to whom the comment relates, this being the "one qualification" mentioned in the preceding paragraph of these reasons, then the procedure to follow in such a case, and the case in hand is such a case, is expressly prescribed by the statute leaving no room to import other requirements by way of implication.

Generally in my opinion the functions of the Commissioner can be likened to those of a Royal Commissioner and I think that the reasoning of Stephen J. in R. v. Collins, ex p. A.C.T.U.-Solo Enterprises Pty. Ltd., (1976) 50 A.L.J.R. 471, to be directly applicable.

For these reasons the question formulated earlier in these reasons and if there be two questions then each of them should be answered in the negative and accordingly the order nisi should be discharged.

I would not, however, like to leave the case it being thought that the Commissioner has in the instant case acted unfairly. The complaint made that "the applicants have never been provided with a copy of the complaint of Finlay" is without substance. The Commissioner is not required to show the complaint

to people who are brought before him to give evidence, and it may well be that the secrecy provisions to be found within the Act prevent him from doing so.

The complaint made, if true in fact, that "the applicants were actively or passively dissuaded from appearing at such investigation with counsel" goes, on the applicants' evidence, no further than a complaint that an officer of the Commissioner expressed the view that he did not think that legal representation would be necessary. But it was a matter for the applicants. They were at that time being legally advised and it was their decision to appear without counsel. The facts put forward by the applicants, if accepted, do not show that the Commissioner denied the right given by s. 19(3) of the Act.

One cannot assume prejudice from facts asserted in ground (c). By the writing there referred to the Commissioner was doing what s. 25(7) of the Act required him to do and by that writing he stated "in the simplest possible language that if you wish to appear before me you are entitled to be represented by counsel". The invitation to appear was not taken up.

This leaves remaining the ground added at the hearing. The basis for that ground is that the Commissioner has revealed to them that the evidence which he has taken in the inquiry is such as to "entitle" him to make comments referable to each of the applicants "which in the ordinary sense of the word might be defamatory of you or at least adverse to you", and this being so and again in accordance with s. 25(7) of the Act the Commissioner was giving to each applicant an opportunity to be heard. It is absurd to say that once the Commissioner is in that position he discloses bias and for that reason he loses his jurisdiction to continue with the inquiry or to make a report.

The application is, I think, misconceived and without merit and the order nisi should be discharged.

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(Applicants)

WICKHAM J.

Interpreting the evidence before us in a manner as favourable as possible to the case of the applicants, I am unable to find sufficient evidence to enable the conclusion to be drawn that the Commissioner was in breach of any of the rules of natural justice in any of the ways which the applicants suggested or at all. On the contrary, the proper conclusion to be drawn is that the Commissioner's conduct of the enquiry and performance of his other statutory duties was entirely fair.

Being of that opinion, the order nisi should be discharged and it is unnecessary to pursue any other questions. I have read the reasons of the Chief Justice touching upon a number of other matters and as I have not considered those matters, I neither agree nor disagree with what his Honour has said.