[HIGH COURT OF AUSTRALIA.]

McVICAR . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMISSIONER FOR RAILWAYS (N.S.W.) . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 19.

MELBOURNE, *Oct.* 3.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

Railways—Employees—Dismissal at pleasure—Right of Commissioner—Failure to become financial member of industrial union—Government Railways Act 1912-1950 (*N.S.W.*) (*No.* 30 *of* 1912—*No.* 19 *of* 1950), *ss.* 70 (1), 78, 104.

An officer employed under the *Government Railways Act* 1912-1950 (N.S.W.) is, by ss. 70 (1) and 78 of that Act, not entitled to the continuance of his employment beyond the duration of the Commissioner's pleasure, and he cannot recover damages if the Commissioner, acting honestly, dismisses him.

The Commissioner is not precluded by s. 104 from using his right to dismiss an officer for failing to comply with an instruction that he should become a financial member of an industrial union of employees recognized by the State Industrial Court or by the Commonwealth Court of Conciliation and Arbitration.

Price v. *Rhondda Urban District Council* (1923) 2 Ch. 372; *Short* v. *Poole Corporation* (1926) Ch. 66; and *Fennell* v. *East Ham Corporation* (1926) Ch. 641, considered.

Decision of the Supreme Court of New South Wales (Full Court), affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales the plaintiff, Errol Roy McVicar, claimed from the defendant, the Commissioner for Railways (N.S.W.), the sum of £5,000 for wrongful dismissal from his employment.

The plaintiff alleged in his declaration that he had entered into the service of the Commissioner upon terms that he would well

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and truly and faithfully serve the Commissioner as a permanent officer for wages and reward until such time as the plaintiff resigned or retired from the service, and that the Commissioner would not dismiss him unjustly or capriciously or without good and sufficient cause, and although he served from January 1919 until 27th September 1948 truly and faithfully and was always ready and willing to continue in that service until determined in accordance with that arrangement, the Commissioner, in breach of the said term, dismissed him unjustly, capriciously and without good and sufficient cause, as a result of which he was deprived of wages, profits and advantages, and the right to participate in the superannuation fund for the Commissioner's employees and he lost other benefits accruing to him for his said service.

In a second count the plaintiff claimed wages alleged to be due to him between 29th September 1948 and 3rd January 1949.

The Commissioner denied the allegations and pleaded that at all material times the plaintiff was an officer appointed within the meaning of the *Government Railways Act* 1912, as amended, and held office only during the pleasure of the Commissioner and that the Commissioner without assigning any reason therefor duly and lawfully removed the plaintiff from his employment under the authority of the Act. The Commissioner further pleaded that before the alleged breach the plaintiff misconducted himself in the service by wilfully disobeying the reasonable orders of the Commissioner, and to the second count the Commissioner pleaded never indebted.

The evidence for the plaintiff showed that he had been employed in the railway service of New South Wales since 11th February 1919, and that after six months' service he began to contribute, and thereafter continued to contribute, to the superannuation fund. He also became a member of the Australian Railways Union and continued as such member until he resigned from that union in 1939. In January 1939, upon its registration as a trade union, he became, and at all material times was, a member of an association known as the Railway Operating Employees' Union, which was a trade union registered under the *Trade Unions Act* 1881-1936, but was not an industrial union recognized by the State Industrial Commission or the Commonwealth Court of Conciliation and Arbitration.

In September 1941 a notice was issued by the Commissioner to railway employees in the following terms:—"In pursuance of a decision by Cabinet, the Commissioner for Railways has directed that all Railway Employees be notified that they must

not only be prepared, before the 6th October next, to satisfy an authorized officer that they have become members of an Industrial Union recognized by the State Industrial Court or the Commonwealth Arbitration Court as directed by notice issued to the staff on 11th July, 1941, but each employee must remain a financial member of such a Union ".

On 5th December 1947 a further notice was issued on behalf of the Commissioner to railway employees, which, after reciting the notice issued in September 1941, proceeded as follows:— " Representations have been made by a number of unions that this instruction is not being carried out and a number of employees are either non-members or are unfinancial.

Employees must be prepared, before 31st January, 1948, to satisfy an authorized officer that they are financial members of an industrial union recognized by the State Industrial Court or the Commonwealth Arbitration Court, failing which they will be stood down from duty.

It is also reported that a number of employees claim that they have complied with the abovementioned instructions in being financial members of an organization known as the Railway Operating Employees' Union, but membership of this Organization does not comply with the requirements, as it is not recognized by the State Industrial Court or the Commonwealth Arbitration Court."

The plaintiff refused to comply with this requirement and he was " informed that by minute of 27 September 1948 he is removed from the service ". The removal was effected by the Chief Staff Superintendent in pursuance of powers to remove officers from the service under s. 78 of the *Government Railways Act* 1912, as amended, delegated to him by the Commissioner.

The trial judge, *Maxwell* J., directed a verdict for the Commissioner on the ground that there was not any evidence fit to be left to the jury that the action of the Commissioner in dismissing the plaintiff was capricious or based upon irrelevant considerations not proper to be taken into account in deciding whether the plaintiff's employment should be terminated.

An application by the plaintiff that the verdict for the defendant be set aside and a new trial ordered, was dismissed by the Full Court of the Supreme Court (*Street* C.J., *Owen* and *Herron* JJ.).

From that decision the plaintiff appealed to the High Court.

The relevant statutory provisions sufficiently appear in the judgments hereunder.

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G. B. Thomas (with him *H. R. Hudson*), for the appellant. The Commissioner did not exercise his discretion at all. He was a mere automaton giving effect to the decision of others, that is, " in pursuance of a decision by the Cabinet ". The purported exercise of his discretion was ultra vires. The matter was not within his powers, and his decision was reached upon reasons and in circumstances which affected its validity. Apart from the discretion under s. 78 of the *Government Railways Act* 1912 (N.S.W.), as amended, the action and notice of the Commissioner deprived the appellant of statutory rights under that Act. In certain circumstances instructions might properly be given relative to joining unions or associations, but the instruction or order now under consideration should not have been given to the appellant. Section 102 (e) indicates the scope of the Commissioner's powers over his employees. There is not any power under the Act by which the Commissioner can compel any employee to contribute to any fund as a condition of his continuing in the Commissioner's employment. The Commissioner's power under s. 78 to dismiss is a discretionary power. It must be exercised for the purposes of the Act and reasonably ; it must not be influenced by extraneous or irrelevant considerations, and must be the act of the person in whom the discretion is vested—not an automaton. Although the Commissioner is not bound to give reasons, the court can inquire into the reasons when given, as in this case, or when implied. The court can inquire into the general exercise of the discretion at all times, and will give relief if the Commissioner has not exercised his discretion properly. The Commissioner has admitted that the only reason for the appellant's dismissal was the latter's non-compliance with the notice, and the only reason given in support of the notice was that the action of the Commissioner in dismissing the appellant was to placate other employees who threatened strikes and other illegal activities. A person in whom a discretion is vested by any Act cannot transcend the limit of authority so conferred upon him (*Short* v. *Poole Corporation* (1)). The court can consider dismissal and the reasons therefor even if the appointment was " during pleasure only ", and the Commissioner " may remove any officer " (*Stepto* v. *Railway Commissioners for New South Wales* (2)). The Commissioner has no power to require any employee, as a condition of his employment, to join any social group or organization, or to pay any money into any particular fund or movement. If, in exercising a discretion, a person

(1) (1926) Ch. 66, at pp. 67, 82, 85, 87-90.

(2) (1925) 42 W.N. (N.S.W.) 181.

takes into consideration matters which are not proper for the guidance of his discretion, then he has not exercised his discretion at all (*R.* v. *Board of Education* (1)). Such extraneous considerations in this case are : (i) directions from Cabinet ; (ii) threats by other employees of violence and other illegal activities, such as strikes and industrial upheavals ; (iii) settlement of inter-union disputes by favouring one union as against another ; and (iv) interfering in the internal affairs of unions and forcing members to obey union rules. The notices and dismissal were ultra vires the powers of the Commissioner under the Act. Nowhere in s. 102 is he empowered to give orders to his employees unconnected with their duties as employees under the Act. On the contrary, s. 104 limits his powers under s. 102. No order of his can compel an employee to forego his civil rights under any statute, including the *Government Railways Act* itself. To require an employee to forego his rights under the *Trade Unions Act* 1881-1936 is a violation of s. 104. To require him to join a union opposed to the principles of the union registered under the *Trade Unions Act* of which he is a member, is to compel him to forego his rights under that Act. It is manifest that an employee cannot belong to two opposing unions. Under the *Government Railways Act* 1912-1950, an employee has a right to permanent employment until he is (i) dismissed for misconduct, or (ii) unfit for work, or (iii) retires by reason of age, and to receive superannuation benefits. There is not any compulsory unionism under the law. The appellant had a right to continue in his employment without being a member of any union or association and without contributing to any special fund or association, and also had a right to superannuation benefits. The Commissioner has no power to compel his employees to remain " financial " in the union of their choice. That is an internal matter quite outside the powers of the Commissioner. The notice was " partial and unequal in its operation as between different classes " (*Kruse* v. *Johnson* (2) ; *Short* v. *Poole Corporation* (3)). The matter should have been left to the jury.

B. C. Fuller K.C. (with him *R. Chambers*), for the respondent. The action of the Commissioner was a proper exercise of the discretionary power conferred upon him by the *Government Railways Act* 1912-1950, and was valid. The fact that the appellant, with the other members of the Railway Operating Employees' Union,

(1) (1910) 2 K.B. 165, at pp. 178, 179.
(2) (1898) 2 Q.B. 91, at p. 99.
(3) (1926) Ch., at p. 87.

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was sharing in the benefits obtained by recognized industrial unions without contributing to those unions, was the cause of much industrial unrest among the Commissioner's employees. Not only was the Commissioner's action justified, it was his duty to cure that unrest by any means within the powers conferred upon him.

G. B. Thomas, in reply.

Cur. adv. vult.

Oct. 3.

The following written judgments were delivered :—

DIXON, WILLIAMS, FULLAGAR and KITTO JJ. This is an appeal from an order of the Supreme Court of New South Wales dismissing an application by a plaintiff to set aside a verdict for the defendant and to order a new trial. The verdict was directed by the judge who presided at the trial. The action is for wrongful dismissal. The defendant, the respondent in the appeal, is the Commissioner for Railways and the plaintiff, the appellant, was an officer of the railway service.

Section 70 (1) of the *Government Railways Act* 1912-1950 requires the Commissioner to appoint or employ such officers to assist in the execution of the Act as he thinks necessary, and provides that every officer so appointed shall hold office during pleasure only. Section 78 provides that the Commissioner may remove any officer. The appellant was removed from office because he would not comply with an instruction or requirement that he should become a financial member of an industrial union of employees recognized by the State Industrial Court or by the Commonwealth Arbitration Court. His action is founded upon the view that it was not competent to the Commissioner to terminate his service for such a reason and that in any event the Commissioner did not act on his own discretion but under the direction of the government without exercising any judgment of his own.

The facts are brief. The appellant was a guard, class 1, in the railway service. He was a member of the Railway Operating Employees' Union, a union registered under the *Trade Unions Act* 1881-1936 (N.S.W.), but not under the *Industrial Arbitration Act* 1940-1950 (N.S.W.) or the *Commonwealth Conciliation and Arbitration Act* 1903-1950. He was eligible for membership of the Australian Railways Union or of the National Railwaymen of Australia, unions registered under one or other or both of these Acts.

In 1941 the Commissioner issued a notice or notices that all railway employees must become members of an industrial union recognized by the State Industrial Court or the Commonwealth Arbitration Court and that before a specified date they must satisfy an authorized officer that they had done so. Further, each officer must remain a financial member of such union. On 5th December 1947, a notice to the staff was issued by the Commissioner which recited the earlier notice and said that representations had been made by a number of unions which complained that the instruction had not been carried out. The notice then renewed the direction and stated that failing compliance an officer would be stood down from duty. The notice ended with an intimation that membership of the Railway Operating Employees' Union did not amount to a compliance with the instructions because it was not recognized by the State Industrial Court or the Commonwealth Arbitration Court. Apparently a statement concerning membership was contained in a card filled in by employees and returned to the staff superintendent. The card completed by the appellant showed that he was a member of the Railway Operating Employees' Union only. By a memorandum from the staff superintendent he was informed that membership of that union did not comply with the instructions and that within seven days he must produce evidence that he had become a financial member of a bona-fide union and that if he did not do so he would be removed from the service. To this he replied by a letter of remonstrance expressing his determination, even at the cost of his years of service, to maintain his membership of the one union and to refuse to comply with the requirement that he should join another. A minute was then made, under a delegation from the Commissioner, to the effect that the appellant was removed from the service, and he was so informed. On the following day he nevertheless attended for duty but instructions had been already received by his particular depot to the effect that he had been removed from the service and he was accordingly told that he was out of the service and could not be put on duty.

The appellant's declaration alleged a contract on the part of the respondent Commissioner not to dismiss the appellant unjustly, capriciously, or without good and sufficient cause. The contract, however, is based upon the statute, which in any case must control the terms of service. Section 70 (1), which provides that the appointment of officers shall be at pleasure, says nothing about the Commissioner not dismissing unjustly or capriciously or without good and sufficient cause nor does s. 78, which provides that the

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Commissioner may remove any officer. But the appellant says that the Commissioner is a statutory corporation sole who cannot act outside his powers or pursue any of them for objects beyond the purposes for which he was incorporated. The appellant contends that the purpose of constraining him to join a union of a particular description is outside the scope of the Commissioner's statutory power or capacity, that it forms an ultra vires object so that the purported removal of him from office is void and cannot be considered the act of the Commissioner. Upon this footing the case for the appellant is that the refusal to allow him to perform his duties and receive his remuneration as an officer of the railway service was without justification and amounted to a wrongful dismissal: see *Williamson* v. *Commonwealth* (1); *Lucy* v. *Commonwealth* (2). Section 70 (1) and s. 78 govern the tenure of an officer of the railway service. Whether the terms of his employment be treated as statutory or as contractual or partly the one and partly the other, these sections state what as between him and the Commissioner is the officer's right to continue in the employment of the Commissioner. From the mere inspection of the provisions it would appear to be only too clear that against the Commissioner the officer has no such right. His employment is determinable at the Commissioner's pleasure. As the action from which the appeal arises is an action of wrongful dismissal, that is to say, an action to enforce, by the recovery of damages, a right to the continuance of his employment, it is hard to see why the fact that the employment is determinable at pleasure does not afford the respondent Commissioner an absolute answer to the action. Nor is it easy to see in principle what help the appellant can obtain from the doctrine of ultra vires. The act complained of is the dismissal of the appellant from his employment. How can that be ultra vires? It is the very thing that s. 78 authorizes the Commissioner to do. Section 70 (1) confers upon the Commissioner the right to exercise the power at his pleasure. How can the reasons or motives place beyond power the doing of the very act itself which is expressly authorized? In principle the answer must be, only if the power to do the act is dependent on the reasons or motives. On a reading of ss. 70 (1) and 78 it is indeed difficult to find in them any indication of an intention that the right or power to dismiss should depend upon the reasons or motives for its exercise and thus open up an inquiry into what lay behind the removal of an officer. The context of the provisions gives no support for the suggestion that such an intention should

(1) (1907) 5 C.L.R. 174. (2) (1923) 33 C.L.R. 229.

be implied. The railway service is a government service and it is evident that the purpose of ss. 70 (1) and 78 was to invest the railway Commissioner with the same power of dismissing servants at pleasure as belongs to the Crown. There can be no inquiry into the grounds upon which a servant of the Crown who holds at pleasure is removed from office.

The appellant, however, relies upon what was said in *Price* v. *Rhondda Urban Council* (1); *Short* v. *Poole Corporation* (2); and *Fennell* v. *East Ham Corporation* (3). In none of these cases does the actual decision support the appellant's position. What he relies upon is the manner in which the law was stated in the course of the reasons which the learned judges who decided them gave for arriving at conclusions adverse to the plaintiffs in those cases.

In *Short's Case* (2), which was decided by the Court of Appeal, the defendant corporation was the local education authority for the purposes of elementary education, so constituted by s. 3 of the *Education Act* 1921 of the United Kingdom. The Act required it to maintain and keep efficient all public elementary schools within their area: s. 17. Section 148 (1) of the Act provided that a local education authority might appoint necessary officers including teachers to hold office during the pleasure of the authority and might remove any of those officers. The defendant corporation had adopted a report from a committee to the effect that it was inadvisable to retain married women as teachers in the public elementary schools unless in any particular case some sufficient reason existed. The grounds of this report were, first that the committee considered that the duty of a married woman is to look after domestic concerns, and that it was impossible for her to do this and at the same time to act as a teacher satisfactorily, and, secondly, that it was unfair to the large number of unmarried teachers who were then seeking situations that positions should be occupied by married women whose husbands were presumably capable of maintaining them. The defendant corporation proceeded to put into effect the policy they had adopted. The plaintiff was a female teacher who had married. She had received a notice terminating her engagement at the expiration of a month. She brought the action and sought a declaration that the notice was invalid and inoperative and an injunction restraining the defendant corporation from acting on the notice or attempting to enforce it. In her statement of claim

(1) (1923) 2 Ch. 372.
(2) (1926) Ch. 66.
(3) (1926) Ch. 641.

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she alleged that in attempting to dismiss her the corporation was acting in pursuance of motives alien and irrelevant to the discharge of their duties as an education authority. The Court of Appeal, reversing the decision of *Romer* J., held that the reasons and purposes of the corporation were not irrelevant to or outside its functions. But their Lordships accepted a view of the law which may appear to make the termination of the employment wrongful if the reasons or ulterior purposes by which the corporation was animated were irrelevant to its functions. A clear statement of the principles which the Court of Appeal was prepared to accept is contained in the reasons given by *Warrington* L.J. and it will be enough to set out what his Lordship said. The passage is as follows :—" In the case of an individual employer under a contract with an employee, such as existed in the present case, the motives of the employer in giving the notice would be wholly immaterial, and provided the notice in itself complied with the terms of the contract the employment would be duly determined by it. Is the position of a public body, such as the defendants in the present case, in any, and, if so, in what respect different from that of an individual ? In my opinion it is different only in this, that being established by statute for certain limited purposes, no act purporting to be that of the public body can have any operation as such, if the individuals purporting to exercise the functions of the public body have, in performing the act in question, transcended the limits of the authority conferred upon it. If they have done so, and this fact is proved affirmatively by the person who complains of their action and seeks to have it declared invalid and inoperative, then, and then only, has the Court, in my opinion, jurisdiction to interfere. Thus no public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be that of the body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative. It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any act which would be held ultra vires under this head, though performed bona fide. To look for one example germane to the present case, I suppose that if the defendants were to dismiss a teacher because she had red hair, or for some equally frivolous and foolish reason, the Court would declare the attempted dismissal to be void. My view then is that the only

case in which the Court can interfere with an act of a public body which is, on the face of it, regular and within its powers, is when it is proved to be in fact ultra vires, and that the references in the judgments in the several cases cited in argument to bad faith, corruption, alien and irrelevant motives, collateral and indirect objects, and so forth, are merely intended when properly understood as examples of matters which, if proved to exist, might establish the ultra vires character of the act in question " (1). Now it may at once be said with reference to this passage that it is of course undeniable that if the act purporting to dismiss the employee is ultra vires of the corporation, then it is not the act of the corporation and must be inoperative. *Ex hypothesi* it could not in itself be a dismissal, wrongful or otherwise, because it is not the act of the corporation; but it might be followed by a *de facto* exclusion from the duties and emoluments of the office, which would amount to a dismissal. The point of difficulty, however, lies in the use of the motives or reasons actuating the dismissal of employees holding at pleasure in order to remove the dismissal from the power of the corporation and place it in the category of an ultra vires act. Considered from the point of view of the rights of the employee, whether statutory or contractual, it is only by an implication limiting the grounds on which the pleasure governing the termination of the employment must depend that the employee can have any title to complain that his removal from office is wrongful. Considered from the point of view of statutory powers of a public corporation, two steps are necessary before the dismissal can be treated as ultra vires. One is to treat the right or authority to terminate an employment at pleasure as a corporate power as distinguished from a right arising out of the terms of employment. The next step is to find in the context in which the power is given a sufficient indication that the power depends upon the grounds or reasons upon which its exercise is based.

In the case of a local education authority deriving its powers with reference to a " provided school " from the *Education Act* 1921, the Court of Appeal appears to have been prepared to treat the right or authority to dismiss a teacher as a question of corporate power and to treat such corporate power as depending upon, that is to say, limited to, grounds or reasons susceptible of definition. The subject matter of the statute had a character and indeed a history of its own, and in the context their Lordships did not doubt the validity of the legal foundation upon which the plaintiff

(1) (1926) Ch., at pp. 90, 91.

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attempted to build her case. But it by no means follows that we should discover in the *Government Railways Act* 1912-1950 (N.S.W.) the same foundation for the present appellant to build his case upon. Moreover, it must be remembered that the Court of Appeal had before them not an action for wrongful dismissal, but a suit directly challenging the validity of the course taken by the corporation as a policy or plan of action and seeking a declaration of right and an injunction, on the ground that the policy or plan was irrelevant to the corporate purposes of the body and ultra vires. It is true that the injunction sought was to restrain the enforcement of the notice to the plaintiff, but that notice was the outcome of the plan or policy impugned. The validity of the course proposed as within the powers of the corporation, and therefore as its act, was the question under consideration, not the question whether a *de facto* dismissal of the plaintiff would be actionable although the plaintiff held only at pleasure.

Fennell v. *East Ham Corporation* (1) is a decision of *Lawrence* J. in an action heard before, but decided after, *Short's Case* (2) had been decided by the Court of Appeal. Again, the relief sought consisted in declarations of right and injunctions based on ultra vires. There were three plaintiffs, married women complaining that a local education authority had decided upon a policy of terminating the engagement of married teachers and had given them notice of dismissal accordingly. They were treated as entitled under their engagements to a month's notice and such a notice was given. They claimed a declaration that the notices terminating their engagements were invalid and inoperative and that their contracts for service were subsisting, and an injunction restraining the defendants from enforcing the notices. *Lawrence* J. held the reasons or purposes actuating the corporation were not irrelevant and outside its powers and dismissed the action. But his Lordship, in so deciding, applied the general principle enunciated in *Short's Case* (2) and, in addition, made the following comment upon the decision in that case :—" In my opinion, this decision, by which, of course, this Court is bound, disposes of the following three points taken by Mr. Upjohn on behalf of the defendants—namely, first, that this action is not maintainable, on the ground that it is, in substance, one for the specific performance of a contract of service ; secondly, that the Court will not, where one party to a contract is exercising his contractual rights, inquire into the motives for the exercise of those rights, and, thirdly, that the plaintiffs are not competent parties to set up an alleged abuse

(1) (1926) Ch. 641. (2) (1926) Ch. 66.

by the defendants of their statutory powers, but that, in such a case, the action ought to be brought by the Attorney-General on behalf of the public concerned" (1). No doubt, as to the second at least of these propositions, *Lawrence* J. meant, not that it was wrong, but that it was inapplicable. The case stands in exactly the same position as the decision of the Court of Appeal in *Short's Case* (2).

In *Richardson* v. *Abertillery Urban District Council* (3) an action was brought by a teacher for an injunction restraining his dismissal by a local education authority in pursuance of a financial policy which he said was ultra vires. *Eve* J. said :—" What was asked would, in fact, be granting an injunction as a step to specific performance of a contract of service, which the court never did. But it was said that this was not a contract between a servant and an individual employer but between a servant and a public body, and that the law was not the same in the case of such a contract of employment. To what extent did it differ ? " (4). His Lordship then quoted part of the passage, already set out, from the judgment of *Warrington* L.J. in *Short's Case* (2) and, without further comment, proceeded to hold that the facts did not bring the case within it. It is perhaps not fanciful to discern in the approach of *Eve* J. to the case a disinclination to regard very seriously the possibility of an actual dismissal of an officer holding at pleasure amounting to an ultra vires act, still less to a breach of contract. It is to be noticed that it was upon a dictum of *Eve* J. that *Romer* J. relied for his decision in *Short's Case* (2), which the Court of Appeal reversed. That dictum occurs in *Price* v. *Rhondda Urban Council* (5). But the dictum is no more than a statement that it was unnecessary to deal with arguments that an education authority in engaging and dismissing teachers acted in a fiduciary capacity because in his Lordship's opinion " it is sufficient to point out that this body, being a statutory body entrusted with statutory powers, can only exercise those powers for the purpose and with the object of giving effect to the statutory duties imposed upon it " (5). His Lordship proceeded to say that it must be assumed that the body acted in good faith unless the contrary were proved and he decided that the body acted honestly within its powers. This dictum, however, appears to have sown the seeds of the supposed doctrine which the present appellant asserts as establishing his case.

(1) (1926) Ch., at p. 652.
(2) (1926) Ch. 66.
(3) (1928) 138 L.T. 688.
(4) (1928) 138 L.T., at p. 690.
(5) (1923) 2 Ch., at p. 389.

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One matter to which it seems desirable to draw attention is that the New South Wales Railways Commissioner is a corporation sole. See s. 4 of Act No. 31 of 1932. He is not a public body. A corporation sole has two capacities, that of the natural person and that of the corporation. But it may well be doubted whether the cases in question apply to a public administrative officer whose office happens to be incorporated. Doctrines of ultra vires are less readily applied in such a case than to a corporate public body. The Supreme Court decided this case on the ground that the facts did not bring it within the application of any of the propositions enunciated in *Short's Case* (1), even supposing that they applied to the Commissioner for Railways in removing an officer and governed his liability for wrongful dismissal. To dispose of the appeal it would be enough to say that this view seems wholly correct. But a decision limited to this ground might appear to imply that the Commissioner's right to dismiss is subject to limitations sufficiently defined to afford a standard of relevancy and that tried by that standard the reasons which induced the respondent Commissioner to dismiss the appellant are relevant. The truth is, however, that it is not possible to find any definite limitations upon the Commissioner's right to dismiss. An officer of the railway service is removable at pleasure and he cannot recover damages if the Commissioner, acting honestly, dismisses him, for the simple reason that he holds at pleasure and is not entitled to the continuance of his employment beyond the duration of the Commissioner's pleasure.

It was said, however, that the dismissal was not really the act of the Commissioner, who acted only automatically on the instructions of the government. This argument is difficult to understand, for if the Commissioner accepted the instructions of the government that would make it his act and a sufficient termination of the employment. But the facts do not establish that the Commissioner in dismissing the appellant was surrendering his own judgment to the extent of becoming a mere automaton.

Finally the appellant contends that under s. 104 of the *Government Railways Act* 1912-1950 the Commissioner was precluded from using his right to dismiss an officer for the purpose of forcing him to join a union. Section 104 provides that the Commissioner shall not have power to compel officers to forgo any civil rights to which any Act of Parliament entitles them. The appellant claims that he has a civil right to belong to the Railways Operating Employees' Union to the exclusion of any other union and a civil

(1) (1926) Ch. 66.

right to the benefits arising out of his employment under the *Government Railways Act*. A short answer to the latter claim is that no such rights can be paramount over s. 70 (1) and s. 78, to which the rights and incidents of the employment are subject. Section 104 protects only rights to which an Act of Parliament entitles the officer. It is difficult to see how the civil right claimed, to remain a member of the one union and to refuse to join another, can be said to be a right to which a statute entitles the appellant. He says that the *Trade Union Act* 1881-1936 confers the right. An inspection of the Act will show that it does not do so. Nor does the *Industrial Arbitration Act* 1940-1950. No such right can be discovered in the *Government Railways Act* 1912-1950.

Briefly the result of the foregoing is that the appellant's employment in the railway service gives him no right which enables him to complain in a court of law that he has been dismissed because he would not join a union other than that of which he is a member.

The appeal should be dismissed with costs.

WEBB J. The appellant was dismissed for not joining a union registered under either the New South Wales or the Commonwealth Industrial Arbitration Acts. He was a member of a trade union registered under another New South Wales statute. He had over thirty years' service and had become a guard class I. No fault was found with his work. It was unlikely that the Commissioner would have taken the initiative in removing such a man from the service; and he did not do so. The dismissal resulted from a general direction given by the Cabinet. In calling the attention of railways officers to this direction the Commissioner did not indicate either his approval or his disapproval of it. The direction was first brought to the notice of railway officers in September 1941. The appellant disregarded it, but was not dismissed. It was again brought to their notice by the Commissioner in December 1947. The appellant still disregarded it, and was dismissed in September 1948. Had there been nothing more than this in evidence it might have been difficult, if not impossible, for the jury to conclude that the dismissal of the appellant was simply the result of outside pressure, and was not for the purposes of the *Government Railways Act*, or otherwise in the interests of the service. The mere communication of Cabinet's direction to railway officers in 1941 and 1947 would not, I think, have been necessarily inconsistent with the Commissioner's adoption of the direction as a proper measure for the efficient working of the railways. However, in March 1948, that is between the date of the second

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publication of the direction and the date of the appellant's dismissal, the Chief Railway Superintendent, through whom the Commissioner subsequently acted in removing the appellant from the service, informed the secretary of the appellant's union that, in this matter of requiring officers to join certain unions, pressure was being brought to bear on him; that he was being pushed; and that he was trying to pacify those fellows who were pushing him. It was not contended, or suggested, that this evidence was inadmissible. If the jury believed it then, assuming an action for wrongful dismissal to lie, they could, I think, have properly found, more particularly in view of the attitude of the Cabinet, that the appellant's dismissal was really dictated by persons outside the railway service, and that he was dismissed to placate those persons and not in the interests of the service, or otherwise in pursuance of the *Government Railways Act*. The question whether statements of the Chief Railway Superintendent as to outside pressure were made on behalf of and bound the Commissioner, having regard to the occasion on which and to the circumstances under which they were made was, I think, one of mixed law and fact for the jury to decide after a proper direction. It is true that the Chief Railway Superintendent referred to pressure on himself, but it is, I think, beyond question that on the particular occasion he was acting on behalf of the Commissioner; he was putting the Commissioner's case as well as hearing that of McVicar and other employees in the same situation.

Then the question arises whether an action for wrongful dismissal could properly be brought. In *Ryder* v. *Foley* (1) *Griffith* C.J. said :—" I do not know any instance in which a person who holds office during pleasure could bring an action for wrongful dismissal. The foundation of the wrongful dismissal is the wrongful refusal to retain him in the service, but the service is terminable at pleasure. How can the exercise of that pleasure be wrongful ? "

However, because a railway officer holds office during pleasure (s. 70 (1) of the *Government Railways Act* (N.S.W.)) and may be removed by the Commissioner (s. 78), it does not follow that he may validly be dismissed for any reason whatever. The Commissioner is not obliged to give his reasons for dismissing an officer; but if he gives reasons they are, I think, examinable to see whether the dismissal was within power. If it was not within power, then the dismissed officer may apply for a declaration that the dismissal was invalid, and for an injunction restraining the Commissioner from acting on it. *Short* v. *Poole Corporation* (2).

(1) (1906) 4 C.L.R. 422, at p. 436. (2) (1926) Ch. 66.

In *R.* v. *Bishop of London* (1) an Act of Parliament provided that no person should be received as a lecturer in a certain chapel unless first approved and licensed by the archbishop or bishop. Lord *Ellenborough* C.J. said: "If indeed it had appeared that the bishop had exercised his jurisdiction partially or erroneously; if he had assigned a reason for his refusal to license which had no application, and was manifestly bad, the Court would interfere."

In *R.* v. *Bailiffs of Ipswich* (2) the Corporation of Ipswich had dismissed Mr. Sergeant Whittaker from being their recorder. They gave as their reason that he had been guilty of a misdemeanour. It was contended on his behalf that his office was a freehold. *Holt* C.J. said: "that if he had been an officer ad libitum, the corporation ought to have returned that, and relied upon it, and it would have been a good return; but they could not take advantage of that, when they had returned a cause, if the cause were not sufficient; for it appeared that they had not gone upon their power, and determined their will, but put him out for a misdemeanour".

In *Hayman* v. *Governors of Rugby School* (3) *Malins* V.C., referring to this passage, said:—"It is plain, therefore, that Lord Chief Justice *Holt* considered that if he had merely returned that he held office at their pleasure, and that they had exercised their pleasure by dismissing him, the matter could have been no further inquired into, but as they had dismissed him for a misdemeanour, it was competent for the Court to inquire into the sufficiency of the reasons that induced them to dismiss him."

Earlier in his judgment, *Malins* V.C. said:—"I think the clear result of the numerous authorities cited on both sides in the argument of this case is that all arbitrary powers, such as the power of dismissal by exercising their pleasure, which is given to this governing body, may be exercised without assigning any reason, provided they are fairly and honestly exercised, which they will always be presumed to have been until the contrary is shown, and that the burthen of shewing the contrary lies upon those who object to the manner in which the power has been exercised. No reasons need be given, but if they are given, the Court will look at their sufficiency" (4).

It would seem, then, that where a corporation exercises a power to dismiss at pleasure the validity of the dismissal depends on the dismissal being within the powers of the corporation. Such a

(1) (1811) 13 East 419, at pp. 422, 423 [104 E.R. 433, at p. 435].
(2) (1706) Ld. Raym. 1232, at p. 1240 [92 E.R. 313, at p. 318].
(3) (1874) L.R. 18 Eq. 28, at p. 69.
(4) (1874) L.R. 18 Eq., at pp. 68, 69.

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question of power could not occur in the case of an individual employer. Dismissal by an individual employer, though it may be a breach of the contract with the employee and wrongful, is still effective; but a dismissal by a corporation, having no power to dismiss for the reason given by the corporation, is not effective. But is the position different if the dismissal is followed up, as the evidence might suggest was the case here, by excluding the employee from the department and preventing him from doing the work by which he could earn his salary? In *Williamson* v. *The Commonwealth* (1) *Higgins* J. said: "It has been urged for the defendant that, if the dismissal was illegal, it was only a dismissal or pretended dismissal by the Governor-General in Council, and not by the defendant (see par. 2 statement of claim and defence). But this is, in my opinion, a curious misconception of the basis on which the Courts grant relief in cases of wrongful dismissal. I need not examine the logical puzzles which the position might suggest—a man dismissed by one who had no power to dismiss is not dismissed, &c. Nor is it necessary to enter into an elaborate examination of the legal and constitutional position of the Governor-General, and the responsibility of the Commonwealth for his acts. In my opinion, the plaintiff has proved the statements in par. 2, that the defendant—the Commonwealth—has refused and still refuses to allow him any longer to discharge his duties. If there were nothing else, the letter of the Acting Deputy Postmaster-General of 5th July shows that the Department adopted and acted on the Governor-General's order of dismissal, excluded the plaintiff from the Department, and prevented him from doing the work by which he could earn his salary."

However, there was no power to dismiss at pleasure in the last-mentioned case (2), or in *Lucy* v. *The Commonwealth* (3).

I think that, in the present state of the authorities, it would be too venturesome to hold that the "logical puzzle" that arises in cases like this should be solved in favour of an action for wrongful dismissal.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellant, *L. C. Abigail.*

Solicitor for the respondent, *Percy J. Thorn*, Solicitor for Railways (N.S.W.)

J. B.

(1) (1907) 5 C.L.R. 174, at p. 182.
(2) (1907) 5 C.L.R. 174.
(3) (1923) 33 C.L.R. 229.