HIGH COURT OF AUSTRALIA

FRENCH CJ

MICHAEL PRIESTLEY PLAINTIFF

AND

ANNWYN GODWIN, PARLIAMENTARY SERVICE MERIT PROTECTION COMMISSIONER & ORS DEFENDANTS

Priestley v Godwin [2008] HCA 59
17 December 2008
C7/2008

ORDER

1. The application is dismissed.

2. The plaintiff is to pay the first to third defendants' costs of the application.

Representation

The plaintiff appeared in person

Mr G R Kennett for the first, second and third defendants (instructed by Australian Government Solicitor)

Submitting appearance for the fourth and fifth defendants

CATCHWORDS

Priestley v Godwin

Administrative law – Practice and procedure – Prerogative writs – Proceedings collateral to application under s 13(1) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) – Application by respondent for summary dismissal – Application for judge's recusal – Allegations of bias – Validity of s 31A of the *Federal Court of Australia Act* 1976 (Cth) – Validity of O 20 r 5 of the Federal Court Rules.

Federal Court of Australia Act 1976 (Cth), s 31A.
Federal Court Rules, O 20 r 5.

FRENCH CJ.

Introduction

1 On 14 July 2008 the plaintiff, Michael Priestley, an employee of the Department of Parliamentary Services, filed an application in this Court for an order to show cause why prohibition should not issue against two judges of the Federal Court of Australia to prevent them from further hearing proceedings which he had commenced in that Court on 3 January 2008. Other relief sought included certiorari to quash decisions of the judges declining to disqualify themselves from hearing the case and a declaration that motions filed in that Court were "invalid".

2 In the Federal Court Mr Priestley sought orders requiring provision of reasons for decisions made by the Parliamentary Service Merit Protection Commissioner ("the Merit Protection Commissioner") and by the Speaker of the House of Representatives and the President of the Senate ("the Presiding Officers"). The decisions were said to relate to Mr Priestley's endeavours to obtain review of an action relating to his employment.

3 Mr Priestley wants his application to show cause to be referred to the Full Court of this Court. For the reasons that follow I regard the application as devoid of merit. It will be dismissed with costs.

Federal Court proceedings – background

4 On 3 January 2008 Mr Priestley commenced two proceedings in the Australian Capital Territory Registry of the Federal Court. In ACD 1 of 2008 he named as respondent the Merit Protection Commissioner. The office of Merit Protection Commissioner is created by s 47 of the *Parliamentary Service Act* 1999 (Cth). In ACD 2 of 2008, he named as respondents the Presiding Officers of the House of Representatives and the Senate. In the first proceeding he sought an order that the Merit Protection Commissioner provide a statement of reasons pursuant to s 13(1) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act") for decisions of the Acting Parliamentary Service Merit Protection Commissioner dated 17 October 2007 and disclosure of the evidence or other material on which findings on material questions of fact were based. The second application sought similar orders in relation to a decision of the Presiding Officers said to have been made on 10 May 2007.

5 The background to these proceedings, as recounted by Mr Priestley, was set out in his two affidavits filed in this Court on 14 July 2008. He described himself as a parliamentary service employee in the Department of Parliamentary Services. He had sought review under s 33 of the *Parliamentary Service Act* of "an employment matter". He did not say in his affidavit what that matter was and it is not material for present purposes. Nor did he indicate the date at which he

sought that review. The then Secretary of that Department refused his request for a review. He then applied to the Merit Protection Commissioner for a review of that refusal. The Merit Protection Commissioner said he was unable to review the Secretary's action and advised Mr Priestley that the review had to be referred to the Presiding Officers.

6 Mr Priestley said that he referred the review to the Presiding Officers and requested that they also review the actions of the Merit Protection Commissioner in disclosing to the Secretary his application for a review of the Secretary's actions. This disclosure, he claimed, was in breach of the *Privacy Act* 1988 (Cth) and Parliamentary Service Determination 2003/2.

7 On 10 May 2007, according to Mr Priestley, the Presiding Officers referred the conduct of the Secretary and the Merit Protection Commissioner to the Parliamentary Service Commissioner. The office of Parliamentary Service Commissioner is established by s 39 of the *Parliamentary Service Act.*

8 According to Mr Priestley his requests for statements of reasons under s 13 of the ADJR Act arose from the decision of the Presiding Officers to refer the matter to the Parliamentary Service Commissioner and disclosure of information in the referral letter by the Parliamentary Service Commissioner to the Merit Protection Commissioner. Mr Priestley said in his affidavit that his requests for reasons were refused. At the date of swearing his affidavit there had been no review of the employment matter.

9 This background sets out Mr Priestley's account of the genesis of the proceedings in the Federal Court. It does not involve an acceptance of that account as complete or accurate.

Federal Court proceedings – history

10 The two Federal Court proceedings came before Stone J for directions on 6 February 2008. At that hearing counsel for the respondents applied for an extension of time to file an application to strike out the proceedings and a notice of objection to the competency of the applications. Minutes of proposed orders, copies of which had been sent to Mr Priestley the day before, were handed up in court. Item 1 of each minute read as follows:

> "If the Respondent intends to make an application to have the application and statement of claim (or any part thereof) struck out, that the objection or application to be made by notice of motion to be filed and served on or before 13 February 2008 (the Notice of Motion)."

Her Honour said she would allow the extension of time and then said:

> "I think there's a simpler way to do it … and that is, in relation to order 1, that any objection to competency be made by way of notice of motion filed and served no later than 13 February 2008."

This represented the addition of a new element to the proposed order 1, namely the grant of leave to file an objection to competency in each matter. Her Honour listed the motions in each matter for hearing on 31 March 2008.

11 Later that day Mr Priestley was sent minutes of the orders by the Australian Government Solicitor ("AGS") at his request. Two minutes of orders in slightly different terms were sent, but both related to ACD 1. The provision of two different versions appears to have been inadvertent. One version simply reflected the words said in court by Stone J in relation to order 1, referring only to the objection to competency. The other version used the wording from the original minute of proposed orders, but referred to an objection to competency in addition to an application to strike out the proceedings. The following day a further email was sent from AGS attaching a minute of orders in ACD 2.

12 Notices of motion were filed and served seeking orders for dismissal of the applications under s 31A of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). The grounds upon which dismissal was sought were that there was no "decision" to which the ADJR Act applied for the purposes of s 13 of that Act and that even if there were, Mr Priestley was not a person aggrieved by such decision.

13 Mr Priestley telephoned counsel who had appeared before her Honour and asked on what authority the motions had been served. He was told they were served pursuant to the Court's orders made on 6 February 2008. He disputed that the orders relied upon were made on 6 February. Counsel referred him to the Federal Court e-Court website where the orders appeared. Mr Priestley asked counsel if she or the AGS solicitor had approached the Court to change the orders after the hearing. She rejected the suggestion and he said he accepted her assurance.

14 Mr Priestley subsequently sent an email to the Court listing what he described as "[i]rregularities of procedure and in the making and recording of the Orders". He drew attention to a difference between the short minutes sent to him by AGS and the Court orders and alleged that they were not the same as the orders entered on the Court e-Court website.

15 In a response to this email, the Associate to Stone J enclosed a copy of the minute of proposed orders which had been amended by Stone J. The unamended text of that minute is identical to one of the two minutes given to Mr Priestley on 6 February 2008, referring to both a strikeout application and an objection to competency. Her Honour made two amendments by hand. The first replaced the words in order 4 "a date to be determined by the Court" with the date which her

Honour had determined, namely 31 March 2008. The second amendment made a grammatical change to the first words of order 1: it replaced the words "If the Respondent intends to object" with "Any objections". The amended version of the minute was signed by Stone J and dated 6 February 2008.

16 It is difficult to understand the basis of Mr Priestley's complaint. The terms of the orders as extracted accurately reflect the orders made by Stone J in court on 6 February 2008. How the amendment alleged could have affected the proceedings to his disadvantage does not appear. Although the minute of proposed orders given to Mr Priestley prior to the directions hearing did not refer to an objection to competency, he was heard on that point in court. He objected to any extension of time for the respondents to make an objection to competency out of time, and Stone J considered his objection. Her Honour nevertheless considered that an extension was appropriate and made orders accordingly. Mr Priestley's allegations in this respect are baseless. I have also referred to an affidavit which he sought to file prior to the hearing in this Court, but which had been rejected for filing and which he handed up at the hearing. The affidavit was not read in evidence. It is by way of elaboration of his allegations in relation to the making of the orders. I do not consider that it would advance the matter beyond the material already properly filed and so I do not accept it as evidence.

17 The respondents' motions were listed for hearing on 31 March 2008. They were listed before Gyles J. Mr Priestley applied for an adjournment contending that s 31A of the Federal Court Act was beyond the legislative power of the Commonwealth. Gyles J adjourned the hearing and directed that Mr Priestley file and serve notices under s 78B of the *Judiciary Act* 1903 (Cth) on or before 28 April 2008. The matter was adjourned to 12 May 2008.

18 A notice under s 78B was filed in the Federal Court on 9 April 2008. The constitutional questions said to be raised were whether s 31A of the Federal Court Act and O 20 r 5 of the Federal Court Rules were invalid as:

(a) an impermissible intrusion by the Parliament into the judicial power of the Commonwealth which Ch III of the Constitution vests exclusively in the High Court of Australia and in such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction; and/or

(b) a contravention of the obligations of the Commonwealth contained in Art 14.1 of the International Covenant on Civil and Political Rights made under s 51(xxix) of the Constitution to make laws with respect to external affairs.

19 On 18 April 2008 Mr Priestley wrote to Stone J asking that she disqualify herself from hearing "the above cases". The reasons he gave were the alleged "irregularities" in the making of directions on 6 February 2008 and subsequent

irregularities in the filing of the notices of motion. He also filed written submissions in court. Notwithstanding his contentions about these matters and alleged "abuse of the court's process" her Honour allowed the applications to proceed. Mr Priestley also alleged in his letter an association between her Honour and the former Secretary of the Department of Parliamentary Services, Ms Penfold, which would affect her Honour's impartiality. Her Honour's Associate responded that any application to her Honour to disqualify herself should be made in open court.

20 On 12 May 2008 Stone J heard Mr Priestley's application for her to disqualify herself from the hearing of the matters. She refused his application and stated she would publish her reasons later. Mr Priestley then made what he called a secondary application namely that her Honour had participated as a judge of the Federal Court in the making of O 20 r 5 the validity of which was under challenge and that there was therefore a reasonable apprehension of bias on her part.

21 On 4 June 2008 her Honour published her reasons for refusing Mr Priestley's application for her to disqualify herself[1]. She made consequential directions requiring that he file and serve any further submissions on the validity of s 31A by 2 June 2008 with submissions by the respondents to be filed and served by 20 June 2008. The "constitutional issue" was to be listed for hearing on a date to be determined by the Court.

22 The matters were then listed for hearing before Bennett J on 16 July 2008 in Canberra. Her Honour's Associate gave Mr Priestley notice of the hearing by letter dated 11 June 2008. On 14 July 2008 Mr Priestley wrote to her Honour's chambers asking that the hearing be adjourned as he had commenced these proceedings.

23 On 16 July 2008, Bennett J refused Mr Priestley's application for an adjournment[2]. She also refused what were described as three applications for her to disqualify herself though it seems that they were really the one application on three bases. The first application was based on reasonable apprehension of bias because of her participation in making O 20 r 5 and her previous application of s 31A in a judgment. The second application invoked *Ebner v Official Trustee in Bankruptcy*[3]. In essence Mr Priestley alleged that in refusing his first application her Honour had failed to apply *Ebner*. The third application for disqualification

---

1 *Priestley v Godwin* [2008] FCA 835.

2 *Priestley v Godwin* [2008] FCA 1179.

3 (2000) 205 CLR 337; [2000] HCA 63.

was again related to O 20 r 5 and her Honour's alleged failure to disclose her involvement in making it. The fourth application referred to the *Human Rights Act* 2004 (ACT) and its guarantee of an independent judiciary which Mr Priestley claimed applied to the Federal Court via s 79 of the *Judiciary Act*. Her Honour reserved her decision on that point. However, she proceeded to hear the constitutional issue related to s 31A and O 20 r 5 of the Federal Court Rules. On 25 September 2008 her Honour gave judgment dismissing the fourth disqualification application[4].

24 On 16 October 2008 Bennett J delivered judgment finding against Mr Priestley's contention that s 31A of the Federal Court Act and O 20 r 5 of the Federal Court Rules were invalid[5]. Her Honour made a declaration that neither was invalid and ordered that Mr Priestley pay the respondents' costs incurred after 31 March 2008. This left open for determination the respondents' motions for summary dismissal of the Federal Court proceedings.

The proceedings in this Court

25 The proceedings in this Court were commenced on 14 July 2008 by an application to show cause why:

(a) prohibition should not issue against Stone and Bennett JJ to prevent them from further hearing the proceedings in the Federal Court; and

(b) certiorari should not issue to quash the orders made by Stone J on 12 May 2008 dismissing the application for her to disqualify herself from hearing the Federal Court proceedings.

Both Stone and Bennett JJ filed submitting appearances.

26 On 16 October 2008 these proceedings came before Kirby J. Kirby J made orders requiring any amended application to show cause to be filed and served by 11 November 2008. The costs of the hearing on 16 October 2008 were to be costs in the proceedings to be determined.

27 On 11 November 2008 an amended application to show cause was filed by Mr Priestley. In relation to the first, second and third defendants he claimed orders that the notices of motion filed in the Federal Court on 13 February 2008 were "invalid". He did so on the ground that the motions were filed for the real purpose of preventing him from exercising a right to review actions in relation to

---

4 *Priestley v Godwin (No 2)* [2008] FCA 1453.

5 *Priestley v Godwin (No 3)* [2008] FCA 1529.

conduct of the former Secretary of the Department of Parliamentary Services concerning an employment related matter and not for the purpose of seeking orders to strike out the applications. The further grounds related to the orders made by Stone J on 6 February 2008 and the amendment which he alleged was made to the orders after the court rose.

28 Mr Priestley also sought a writ of prohibition to prevent Stone J from further hearing the Federal Court proceedings and certiorari to quash her orders of 12 May 2008 when she refused his application for her to disqualify herself. The grounds for prohibition were alleged bias and the various orders that she had made adversely to Mr Priestley on 6 February 2008. The grounds for certiorari included bias and error of law and the contention that the decision by her Honour not to disqualify herself was based on "no evidence".

29 Prohibition was sought against Bennett J on grounds including alleged bias by reason of her friendship with Stone J (referred to in a supporting affidavit) and her involvement in making O 20 r 5 which was under challenge. Her judgment about s 31A was referred to. Certiorari was sought in respect of her Honour's decisions given on 16 July 2008 and 25 September 2008. The grounds included bias, alleged breach of the *Human Rights Act*, error of law, abuse of process and want of jurisdiction, among other things. Certiorari was sought in respect of the decision of 16 October 2008 on grounds of bias and error of law in relation to the question whether s 31A of the Federal Court Act and O 20 r 5 of the Federal Court Rules were invalid.

The merits of the application

30 The procedural history and the grounds for relief in Mr Priestley's application for an order to show cause have been set out so that the background and nature of this litigation can better be appreciated. It is collateral to the substantive relief claimed by Mr Priestley in the Federal Court, namely orders for the provision to him of reasons for decisions, to which he says he is entitled under the ADJR Act. The question whether those orders can and should be made has not yet been heard. The proceedings seem to have been diverted in part by the respondents' resort to summary dismissal motions invoking s 31A. The facts relevant to Mr Priestley's claim to be entitled to reasons for the decisions of which he claims would appear to have been within a narrow compass. The resolution of those proceedings would appear largely to turn on questions of law. So much was accepted by counsel for the first to third defendants. There was no apparent saving in time or expense arising out of the resort to s 31A.

31 The allegations of bias relied upon to ground prohibition and certiorari against Stone and Bennett JJ are not tenable. Apart from the baseless allegations arising out of the directions given by Stone J on 6 February 2008, they turn on the proposition that O 20 r 5 was under challenge and that as judges who

participated in the making of the Rules, Stone and Bennett JJ could not pass upon its validity.

32 Order 20 r 5 was made following the enactment of s 31A of the Federal Court Act which, inter alia, authorised the Court to give judgment for one party against another where the first party is defending a proceeding brought by the second and the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding. Order 20 r 5 in effect contracted the bases upon which a proceeding could be dismissed summarily under that Rule to the "frivolous or vexatious" and "abuse of process" grounds omitting the previous reference in the Rules to proceedings which fail to disclose a reasonable cause of action. That omission was supplied by s 31A with its "no reasonable prospect of success" test.

33 As the validity of s 31A has not been put in play directly in these proceedings, I will not make any further comment upon it. Whatever the position with that section however, there is no tenable basis for the attack on the validity of O 20 r 5. The contraction of the grounds for summary dismissal in O 20 r 5 does not depend upon the validity of s 31A. It was plainly, in that respect, within the rule-making power of the judges of the Federal Court.

34 Mr Priestley wants his application for an order to show cause to be referred to a Full Court. In my opinion none of the grounds in the application show any basis upon which an order to show cause could properly be made. To refer the application to a Full Court would be to refer to the Full Court an application which is untenable.

35 The relief claimed in respect of the motions for summary dismissal filed in the Federal Court is in the form of declarations that those motions were invalid. Such relief is meaningless. The relief sought by way of prohibition against Stone J turns upon baseless allegations of bias because of orders that she made which Mr Priestley wrongly sees as disadvantageous to him. To the extent that the prohibition claimed against Stone and Bennett JJ turned upon their involvement in making O 20 r 5, the challenge to the validity of that Rule is unmeritorious. The question of bias in that connection is therefore moot.

36 As to the claim for certiorari in respect of Bennett J's decision going to the validity of s 31A, it is sufficient to say that there is an appeal process in the Federal Court and that process has not been invoked. Moreover, neither the motions to dismiss the proceedings nor the substantive proceedings themselves have been heard in the Federal Court. Mr Priestley should have no encouragement to engage in further futile collateral litigation. All parties, in my opinion, should consider whether they should proceed directly to have the applications for substantive relief heard and determined in the Federal Court. It is questionable, but a matter for the respondents, whether there is anything to be gained by persisting with their motions.

37 For the preceding reasons the amended application for an order to show cause filed by the plaintiff on 11 November 2008 will be dismissed with costs.

38 The first to third defendants filed submissions seeking an order for indemnity costs in the event that Mr Priestley's application was dismissed. I decline to make that order. Mr Priestley's application was misconceived but was in part a product of a process of collateral attack on his Federal Court applications the utility of which has not been demonstrated and which appears to have distracted the parties from an early resolution of the substantive proceedings in that Court.