Fitzgerald v Muldoon and Others

Supreme Court Wellington
31 May; 1, 2, 3, 11 June 1976
Wild CJ

Constitutional law – The Crown in relation to the executive – The ministry and cabinet – Public announcement by Prime Minister in course of official duties suspending provisions of a statute was made "by regall authority" illegally – Bill of Rights (1688), s 1.

The plaintiff employed by the Education Department sought a declaration against the Prime Minister that a press statement made by the latter on 15 December 1975 announcing the abolition of the superannuation scheme established pursuant to the New Zealand Superannuation Act 1974 was illegal, a mandatory injunction requiring the withdrawal of the announcement, and an injunction restraining him from continuing to instruct the Superannuation Board from taking any action to enforce payment of contributions under that Act. Somewhat similar declarations and injunctions were sought against the Attorney-General for alleged failure of the Crown to make contributions, and against the Controller and Auditor-General relating to the alleged failures of the Superannuation Board.

The learned Chief Justice held that on the proven facts the Prime Minister had not given instructions to the Superannuation Board and the State Services Co-ordinating Committee and various branches of the state services, but that these bodies had acted on the announcement. The plaintiff's contention was that the Prime Minister's announcement constituted the exercise of a pretended power of suspending laws and was illegal under and by virtue of s 1 of the Bill of Rights (1688).

Held, declaring that the announcement was illegal and adjourning all other matter in issue for six months:

1 The sovereignty of Parliament is such that it has the right to make and unmake laws and no person or body is recognised as having the right to override or set aside the legislation of Parliament (see p 622 line 35).

2 The public announcement by the Prime Minister made in the course of his official duties as Prime Minister was made "by regall authority" within the meaning of that expression where it occurs in s 1 of the Bill of Rights (1688) (see p 622 line 48).

Note
Refer 2 Abridgement 571.

Action
This was an action seeking a declaration that an announcement by the Prime Minister and the actions of persons acting thereon were illegal, and mandatory injunctions.

G P Barton and *G F Ellis* for the plaintiff.
Solicitor-General R C Savage Q C and *D P Neazor* for the first, third and fourth defendants.
I L McKay for the second defendants.

Cur adv vult

WILD C J. This case relates to the scheme established by the New Zealand Superannuation Act 1974 which was passed in the second session of the 37th Parliament of New Zealand and which received the royal assent on 26 August 1974. That Act is described in its long title as "An Act to establish a New Zealand earnings related superannuation fund, and to provide comprehensive coverage of superannuation benefits". Broadly speaking, and subject to various limitations as to ages, residence, alternative schemes and other matters, contributions to the superannuation fund so established are required to be made at the prescribed rate by employees on their earnings as from 1 April 1975, with a matching contribution by employers. The employer is required to deduct the amount of the employee's contribution from the gross earnings of the employee. Payments are to be made to the Commissioner of Inland Revenue as agent for the New Zealand Superannuation Board. Where an employer fails to make any contribution deduction in accordance with his obligations the amount is to constitute a debt payable by the employer to the New Zealand Superannuation Corporation The board is required to establish an account for each contributor. The basic character of the scheme is that it is compulsory.

At the end of its session in 1975 Parliament was prorogued with a view to the holding of the triennial general election. One of the election policies advocated by the political party that had been in opposition was the abolition of the New Zealand Superannuation Scheme established by the New Zealand Superannuation Act 1974 and the refunding of all contributions to employees. The general election was held on 29 November 1975 and the political party that had been in opposition was successful. It duly became the government and on 12 December 1975 its leader was sworn in as Prime Minister. On 15 December the Prime Minister, who was also Minister of Finance, issued to the press the following statement:

"For Immediate Release
Monday, 15 December 1975

PRESS STATEMENT BY THE HON R D MULDOON, MINISTER OF FINANCE

"The Prime Minister, Hon R D Muldoon, today issued a statement on the future of the New Zealand Superannuation scheme. This was to give effect to National's election policy to abolish the scheme and refund all contributions to employees.

"Mr Muldoon said that early in the next Parliamentary session legislation would be introduced to carry out the government's election promises relating to the New Zealand Superannuation Scheme. In particular the compulsory element in the law would be removed with retrospective effect.

"The compulsory requirement for employee deductions to the New Zealand scheme will cease for pay periods ending after this date. Mr Muldoon said that he recognised that because of arrangements made for payment of wages and salaries in advance through computer systems or

by other means, deductions would in some cases continue for limited periods. All deductions and contributions, including any which may be made from now until 31 March 1976, will be returned to employees through the income tax refund system or could be transferred to another scheme.

"Similarly the compulsory requirement for employer contributions will cease as from today in respect of salaries or wages paid from now on.

"Mr Muldoon said that employees who wish to receive a refund of their own and their employer's contributions could elect to do so when they completed their tax returns after 31 March 1976. The Prime Minister expected that some contributors and their employers would wish to continue their membership of a superannuation scheme and if so their contributions will be transferred to the National Scheme of the National Provident Fund or some other scheme.

"Mr Muldoon said that the board of the Superannuation Corporation had decided that, until legislation is passed, it would not take action to enforce the payment of deductions and contributions in respect of pay periods after the date of this announcement. Mr Muldoon went on to say that when legislation was introduced it would also provide that all persons who have relied on his statement, and acted in accordance with it, would be excused from any penal provisions of the Act. A similar provision would be made to protect officers of the Superannuation Corporation.

"The Prime Minister emphasised that his statement did not apply to those who belonged to other schemes. These are governed by a trust deed or some similar instrument and often membership could be part of an employee's conditions of employment. Mr Muldoon advised members to discuss the matter with their employers or the trustees of the scheme".

On 23 December the Prime Minister and Minister of Finance issued the following further statement:

"PRESS STATEMENT

HON R D MULDOON
PRIME MINISTER AND
MINISTER OF FINANCE

23 December 1975

"SUPERANNUATION CONTRIBUTIONS AFTER DECEMBER 15

"Regardless of what any union groups might represent or how some employers might see the position, no employees would receive the benefit of employer contributions made to the New Zealand Superannuation Fund after December 15, said the Prime Minister and Minister of Finance, Mr Muldoon, today.

"Mr Muldoon said the government had already made it clear that the superannuation scheme finished on December 15 and the compulsory requirement for employee deductions and employer contributions ceased for pay periods ending after that date. Empowering legislation, with retrospective effect, would be introduced early in the 1976 Parliamentary session.

" 'I am advised that no court action to compel employers to continue deductions would succeed but if a successful court action

were taken the legislation to be introduced would provide that further subscriptions by employers would be returned to them.

" 'Private schemes are entirely a matter between employee members and their employers or the trustees of such schemes' ".

In an affidavit filed at the initiation of this action the plaintiff deposed that since 3 June 1975 he has been an employee of the Crown pursuant to the State Services Act 1952, having been employed first in the Ministry of Defence and latterly in the Department of Education. He says that because he had attained the age of 25 years before becoming an employee of the Crown he was not required to become a contributor to the Government Superannuation Fund (under the Superannuation Act 1956), and that he was not a contributor to any alternative scheme as referred to in the New Zealand Superannuation Act 1974. He says that on becoming an employee of the Crown he commenced, as required by law, and that he has continued to make contributions to the fund on his earnings at the prescribed rate of one percent amounting to $2.08 for each fortnightly standard pay period. He says that up to the pay period ending on 24 December 1975 the Crown as his employer deducted from the gross amount of his contributory earnings the amount of his employee's contributions and paid that into the fund together with the amount of the employer's contribution.

The plaintiff has issued these proceedings against the Prime Minister as first defendant, the chairman and the eight other members of the Superannuation Board as second defendants, the Attorney-General (sued in respect of the Treasury and the Department of Education) as third defendant, and the Controller and Auditor-General as fourth defendant.

The basic allegation he makes is that on 15 December 1975 the Prime Minister without lawful authority, justification, or excuse:

(a) announced publicly that all contributions to the fund should cease;

(b) instructed government departments that contributions to the fund were to cease at the earliest possible date; and

(c) instructed the Superannuation Board not to take any action pursuant to the Act to enforce the payment of deductions and contributions in respect of salaries and wages for pay periods ending after 15 December 1975.

He pleads that that announcement and those instructions constituted the exercise of a pretended power of suspending of laws (namely, the enactments in ss 40, 43 and 52 of the Act relating respectively to the deduction of employee's contributions, the making of employer's contributions, and the consequences of failure of an employer to make contribution deductions), and were accordingly illegal by virtue of s 1 of the Bill of Rights (1688) (Eng). He alleges that as a direct result of the Prime Minister's announcement and instructions no contribution deductions have been made by the Crown from the contributory earnings of the plaintiff from and including the fortnightly pay period ending on 7 January 1976, no employer's contribution has been made in respect of those earnings, and no action has been taken by the Superannuation Board to recover those amounts or any penalties for default. He says that in consequence he has sustained loss and has been required in accordance with s 42 of the Act to furnish a return to the Commissioner of Inland Revenue and to pay to him as agent an amount equal to the deductions that should have been made.

Against the Prime Minister as first defendant the plaintiff seeks a declaration that his announcement and instruction of 15 December 1975 constitute the exercise of a pretended power of suspending of laws or of the execution thereof and are accordingly illegal by virtue of s 1 of the Bill of Rights; a mandatory injunction requiring the withdrawal of the

announcement and instruction, and an injunction restraining the Prime Minister from continuing to instruct the Superannuation Board to refrain from taking any action to enforce payment of contribution deductions and employer's contributions pursuant to the Act. Against the Attorney-General the plaintiff seeks similar declarations relating to the alleged failure of the Crown to make contribution deductions and employers' contributions in respect of the plaintiff's earnings. Against the Controller and Auditor-General he seeks declarations relating to the alleged failures of the Superannuation Board, and a declaration that the Controller and Auditor-General is entitled to call on its members to show cause why they should not be surcharged.

The plaintiff himself did not give evidence at the hearing of this action. His counsel called on subpoena Sir Arnold Nordmeyer, Chairman of the Superannuation Board, and the Secretary to the Treasury, and the Controller and Auditor-General. The Solicitor-General called Mr Kelly, an assistant commissioner of the State Services Commission having responsibility for the industrial relations division, and the chief accountant of the Inland Revenue Department. Counsel for the Superannuation Board called the general manager of the corporation. In addition a number of documents were put before the court by agreement.

The evidence of Sir Arnold Nordmeyer was that on Friday, 12 December 1975, he received from the Prime Minister a letter enclosing a draft of a press statement that he proposed to issue outlining the action that the government intended to take in relation to the New Zealand Superannuation Scheme, and inviting comment. In consequence a special meeting of the board was called for the first available date, Monday, 15 December. All members were in attendance at that meeting. The chairman produced the draft press statement he had received from the Prime Minister. Some alterations were suggested by the chairman or other members of the board, and were noted by the chairman on his copy which he produced in evidence. The board resolved:

> "(a) That, in view of the Prime Minister's assurance [that] legislation would be introduced validating the board's action and protecting officers of the corporation, action would not be taken to enforce the payment of deductions and contributions in respect of salaries and wages for pay periods ending after the date of the Prime Minister's announcement of the board's decision.
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> "(b) That the Officials Committee be advised that the board agrees with the proposed press statement on the future of the New Zealand Superannuation Scheme subject to suggested changes being made for clarification. (Copy of final press statement attached).
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> "(c) That the attention of the Officials Committee be drawn to the fact that it will be necessary to decide at an early date plans for the continuation of superannuation contributions where it is not intended to take a refund and arrangements made for their transfer to a similar National Provident scheme or alternative private scheme.
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> "(d) That the Prime Minister be advised urgently by the chairman of the board's decision under (a) (b) and (c) above".

Following the meeting Sir Arnold as chairman immediately wrote the Prime Minister a letter conveying the resolution in para (a) and mentioning the point in para (c).

A comparison of the draft sent by the Prime Minister to Sir Arnold Nordmeyer with the statement as released by the Prime Minister on 15 December (set out earlier in this judgment) shows some minor differences. It appears from an examination of Sir Arnold's annotated copy that some changes were made after the draft was considered by the Superannuation

Board. It was not suggested in argument that any of these changes were material to the question before the court.

Asked by counsel for the plaintiff whether the Prime Minister's assurance referred to in para (a) was given to the Superannuation Board, Sir Arnold said that it was given in the form of the draft press statement. He said that before he first saw that draft there had been no communication whatever to him from the Prime Minister. Nor, apart from the letter of 12 December, did he receive any communication from the Prime Minister. In this connection it is significant that a sentence in the original draft sent to Sir Arnold, recording that the Prime Minister's "general approach had been discussed with the board of the corporation who supported his statement in so far as it involved the corporation", was deleted and does not appear in the statement as released.

Sir Arnold said that neither he nor any other member of the Superannuation Board regarded the Prime Minister's letter of 12 December as an instruction. They regarded it rather as a request which the board was free to agree to or decline. He said that he had no reason to doubt the Prime Minister's intention to introduce legislation to carry out the government's policy to abolish the scheme with retrospective operation. He and the other members of the board believed that tha government's majority in Parliament was adequate to enable it to carry out that policy. It was for that reason that he thought it proper that the board should accede to the request it had received.

In the light of Sir Arnold's evidence Mr Barton conceded, and I think very properly, that the allegation of an instruction by the Prime Minister to the Superannuation Board was not justified. He contended, however, that on the material before it the board had relied on the Prime Minister's statement.

The manner in which action was taken within the state services to cease making deductions of employee's contributions to the scheme was described by Mr Kelly. He said that he first became aware of the Prime Minister's statement when he read it as published in the Wellington morning newspaper of 16 December. On reading it he caused a meeting of the State Services Co-ordinating Committee to be called immediately. That committee is a statutory body established under s 7 of the State Services Remuneration and Conditions of Employment Act 1969. Section 8 of that Act declares that that committee:

> "... shall be the principal adviser to the Minister [of State Services] on personnel matters affecting the State services, and shall be the official negotiating body with the service organisations on all personnel matters which in the opinion of the Committee significantly affect more than one employing authority".

Mr Kelly said that to his knowledge there had been no previous consultation with the State Services Commission by the Prime Minister or any other minister. Nor had any direction been received from the Prime Minister or any other minister. His purpose in calling the meeting was to consider whether state employing authorities should cease deductions to the superannuation scheme. A copy of the minutes of the meeting of the committee held at 3.30 pm on 16 December was placed before the court. It records that that meeting was attended by officers from the State Services Commission, the Treasury, and the Departments of Education, Railways, Defence, Health and the Post Office. In attendance were representatives of the Superannuation Corporation, the Department of Inland Revenue and the Broadcasting Council of New Zealand. The minutes record that the chairman read out paragraphs three to six of the Prime Minister's press statement, and

said that the purpose of the meeting was to survey the situation and ensure that where possible consistent instructions should be given so that the cessation of contributions and deductions might be co-ordinated. A tentative consensus was reached that deductions would cease as early as possible according to particular pay systems. Mr Kelly left the meeting to inform the Chairman of the State Services Commission of that consensus. The chairman confirmed the decision subject to the Minister of State Services and the Combined State Service Organisations being advised.

In cross-examination by counsel for the plaintiff Mr Kelly did not agree that he treated the announcement of the Prime Minister as a pronouncement which had to be carried out. He said the decision was made by the State Services Co-ordinating Committee which had to decide whether it would implement the statement. Referring to a circular subsequently sent by the State Services Commission to permanent heads, which spoke of a direction by the Prime Minister in his statement of 15 December, Mr Kelly said there was no direction other than from the State Services Co-ordinating Committee.

The chief accountant of the Department of Inland Revenue described the method by which his department collected the moneys payable to the fund. Deductions for employee's contributions and employer's contributions were paid to the department monthly with the amounts due for PAYE deductions on employee's earnings. These payments were made as a gross sum without any information as to the details of individual contributions. Employers were required to submit to the department by 15 May a reconciliation statement showing the gross amount paid as wages during the year ended 31 March, with a detailed statement of PAYE deductions, and employee's and employer's contributions to the superannuation fund. To this reconciliation statement would be attached a copy of the tax code declaration for every employee. In the department the reconciliation statement would be checked with the computer record of payments received, and with the separate tax code declarations. Only when this checking was completed would the department be able to pass to the Superannuation Board the information necessary for the establishment of the accounts of individual contributors to the scheme. It was expected to be from September to November 1976 that the information as to employees generally would first become available to the board.

The general manager of the corporation confirmed this evidence and said that, except in the case of some employees who have died or become entitled to receive the benefit of the scheme, and except in the case of some self-employed persons, the board has no information relating to individual employees. It has none relating to the plaintiff.

The evidence was that the total contributions received by the corporation while the scheme was operating amounted to approximately $4 million per month. That would have doubled with the increase from one to two percent in the prescribed rate of contribution from 1 April 1976.

If the scheme were reinstated immediately it would take six weeks before its operation became effective in the state services. The recovery of arrears of contributions would take a much longer time. If the scheme were reinstated and then later abolished it would be from April to August 1977 before the Department of Inland Revenue could arrange to refund contributions received during the present financial year.

I come now to consider the basic allegation of the plaintiff on which this action is founded. It asserts a breach of s 1 of the Bill of Rights (1688) (Eng) the material part of which, as printed in *6 Halsbury's Statutes of England* (3rd ed) 490, is in these words:

"That the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall".

It is a graphic illustration of the depth of our legal heritage and the strength of our constitutional law that a statute passed by the English Parliament nearly three centuries ago to extirpate the abuses of the Stuart Kings should be available on the other side of the earth to a citizen of this country which was then virtually unknown in Europe and on which no Englishman was to set foot for almost another hundred years. And yet it is not disputed that the Bill of Rights is part of our law. The fact that no modern instance of its application was cited in argument may be due to the fact that it is rarely that a litigant takes up such a cause as the present, or it may be because governments usually follow established constitutional procedures. But it is not a reason for declining to apply the Bill of Rights where it is invoked and a litigant makes out his case.

I have already said that Mr Barton concedes that the allegation of an instruction by the Prime Minister to the members of the Superannuation Board cannot be sustained. In my view it is positively disproved by the evidence of Sir Arnold Nordmeyer. I find, too, that there was no instruction to any government department or to any arm of the state services.

That leaves for consideration the Prime Minister's public announcement as evidenced by his press statement of 15 December. No criticism was made by Mr Barton, nor could be, of the opening two paragraphs of that statement, which were no more than an indication of the new government's legislative intentions. The first sentence of the third paragraph, however, and the fourth paragraph, amount together to an unequivocal pronouncement that the compulsory requirement for employee deductions and employer contributions were to cease as stated. That was reiterated in unmistakable terms in the second paragraph of the statement made on 23 December. The Act of Parliament in force required that those deductions and contributions must be made, yet here was the Prime Minister announcing that they need not be made. I am bound to hold that in so doing he was purporting to suspend the law without consent of Parliament. Parliament had made the law. Therefore the law could be amended or suspended only by Parliament or with the authority of Parliament.

> "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" (*Dicey's Law of the Constitution* (10th ed) 39).

The question whether "the pretended power of suspending" was "by regall authority" within the meaning of s 1 of the Bill of Rights is, I think, to be determined by reference to the powers of the Prime Minister and the position occupied by him, which are of fundamental importance in our system of government. He is the Prime Minister, the leader of the government elected to office, the chief of the executive government. He had lately received his commission by royal authority, taken the oaths of office, and entered on his duties. In my opinion his public announcement of 15 December, made as it was in the course of his official duties as Prime Minister, must therefore be regarded as made " by regall authority" within the meaning of s 1. The authority accorded it by the officials concerned is abundantly evident from the resolution of the Superannuation Board, and the decision of the State Services Co-ordinating Committee and the various branches of the state services. While I reject the allegation that the Prime

Minister gave instructions to these officials I think it is perfectly clear that they acted because of his public announcement of 15 December. Had it not been made they would have continued as before.

I am unable to accept the Solicitor-General's submission that there was no breach of s 1 because there was no assertion in the press statement that the operation of the New Zealand Superannuation Act 1974 was being lawfully suspended. In my view it was implicit in the statement, coming as it did from the Prime Minister, that what was being done was lawful and had legal effect.

The plaintiff's right to sue was questioned by Mr McKay, though not by the Solicitor-General who appeared for the Attorney-General who was sued in respect of the Department of Education in which the plaintiff is employed. It is true that the New Zealand Superannuation Act 1974 does not declare that it binds the Crown, but I am in no doubt, having regard to the definitions of "employer" and "person" in s 2 and the terms of s 43, that the Crown is liable for employer's contributions in respect of the contributory earnings of an employee of a government department. I find it established on the evidence that from and including the pay period ending on 11 February 1976 no employer's contributions were paid in respect of the plaintiff's employment with the Department of Education. To that extent he has a direct interest and he has suffered loss which, though small, is of monetary value. In all the circumstances of this case I think he is entitled to sue.

For the reasons given I must conclude that the Prime Minister's public announcement of 15 December was illegal as being in breach of s 1 of the Bill of Rights, and that the plaintiff is entitled to a declaration to that effect.

The other claims for injunctions against the Prime Minister, for declarations and mandamus against the members of the Superannuation Board, and for declarations against the Attorney-General and the Controller and Auditor-General, are all matters within the discretion of the court. There can be no doubt as to the government's intention to introduce the legislation indicated in the Prime Minister's public announcement. There can be little doubt that that legislation will be enacted. The evidence is that Parliament is summoned to assemble on 22 June. In that situation, and in the light of the facts earlier mentioned, it would be an altogether unwarranted step to require the machinery of the New Zealand Superannuation Act 1974 now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months.

In my opinion, the law and the authority of Parliament will be vindicated by the making of the declaration I have indicated, and the appropriate course is to adjourn all other matters in issue for six months from this date.

Judgment accordingly.

Solicitors for the plaintiff: *Jeffries & Murphy* (Wellington).

Solicitors for the defendants: *Crown Law Office* (Wellington); *Swan, Davies, McKay & Co* (Wellington).