PUBLIC SERVICE BOARD OF NEW SOUTH WALES . . . . APPELLANT;
DEFENDANT,

AND

OSMOND . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A.
1985-1986.

CANBERRA,
1985,
Nov. 7.

1986,
Feb. 21.

Gibbs C.J.,
Wilson,
Brennan,
Deane and
Dawson JJ.

Administrative Law — Decision — Reasons for decision — Duty to provide — Whether implied — Public service — Application for promotion — Appeal by unsuccessful applicant to Public Service Board — No duty to give reasons for dismissing appeal — Relevance of statutory changes in administrative practice in other jurisdictions — Public Service Act 1979 (*N.S.W.*), *ss.* 58, 65A(6), 116.

The Public Service Board of New South Wales appealed against a decision of the Court of Appeal Division of the Supreme Court requiring it to give reasons for dismissing an appeal made to it by an unsuccessful applicant for promotion in the Public Service. The statute under which the appeal was brought required the Board to consider the appeal and the grounds thereof and any further evidence in relation thereto which the Board deemed necessary for the proper determination of the appeal and stated that the decision of the Board should be final.

Held, that no general rule of the common law or principle of natural justice requires reasons to be given for administrative decisions, even those made in exercise of a statutory discretion and liable adversely to affect the interests, or defeat the legitimate or reasonable expectations, of others.

Sharp v. Wakefield, [1891] A.C. 173, at p. 183; *Minister of National Revenue v. Wrights' Canadian Ropes Ltd.*, [1947] A.C. 109, at p. 123; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997, at pp. 1032-1033, 1049, 1050-1054, 1061-1062; *Reg. v. Gaming Board; Ex parte Benaim*, [1970] 2 Q.B. 417, at pp. 430-431; and *Payne v. Lord Harris*, [1981] 1 W.L.R. 754, at pp. 764, 765; [1981] 2 All E.R. 842, at pp. 850-851, applied.

Breen v. Amalgamated Engineering Union, [1971] 2 Q.B. 175, at pp. 190-191; *Norton Tool Co. Ltd. v. Tewson*, [1973] 1 W.L.R. 45, at p. 49; [1973] 1 All E.R. 183, at p. 187; *Alexander Machinery Ltd. v. Crabtree*, [1974] I.C.R. 120, at p. 122; and *Reg. v. Immigration Appeal Tribunal; Ex parte Khan (Mahmud)*, [1983] Q.B. 790, at p. 794, explained.

Per curiam. (1) While the giving of reasons may ordinarily be an incident of the judicial process, there is no justification for regarding rules that govern the exercise of judicial functions as necessarily applicable to administrative functions. The suggested principle that a body exercising discretionary administrative powers must give reasons to enable affected

persons to seek judicial review would undermine the established rule that reasons do not form part of the record, for the purposes of certiorari, unless the tribunal chooses to incorporate them.

R. v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw, [1952] 1 K.B. 338, at p. 352, applied.

(2) When the rules of the common law of Australia are unclear, assistance may be gained by considering decisions of other jurisdictions, but, when clear and settled, they ought not to be disturbed. Likewise, the common law of New South Wales cannot be modified judicially to make it accord with some statutory change in another jurisdiction. Any change in this area of the law, even if beneficial, is to be decided by the legislature not by the courts.

Miliangos v. Frank (Textiles) Ltd., [1976] A.C. 443, at p. 480, applied.

Decision of the Supreme Court of New South Wales (Court of Appeal: *Osmond v. Public Service Board of N.S.W.*, [1984] 3 N.S.W.L.R. 447, reversed.

APPEAL from the Supreme Court of New South Wales.

John William Osmond, having served for many years as an officer employed under the Public Service Acts (N.S.W.), applied for appointment by way of promotion to the vacant position of Chairman, Local Lands Boards. When another applicant was recommended for the appointment, Mr. Osmond appealed to the Public Service Board under s. 116 of the *Public Service Act* 1979. His appeal being dismissed, he requested the Board to give reasons which it refused to do. He applied by summons to the Supreme Court of New South Wales for a declaration of right and other relief. The application was dismissed by Hunt J. (1). The applicant appealed from that decision to the Court of Appeal Division (2) which held (Kirby P. and Priestley J.A., Glass J.A. dissenting) that the Board was obliged to give reasons and ordered it to do so. The Board, by special leave, appealed to the High Court.

C. A. Porter Q.C. (with him *P. Menzies*), for the appellant. Section 65A of the *Public Service Act* 1979 (N.S.W.) is privative in very wide terms, prohibiting any relief even for denial of natural justice. The legislature could hardly have done more to exclude court intervention in the area. Any permissible relief, despite s. 65A, can only be for denial of natural justice. Other relief, such as ordering the giving of reasons, is not open and could only be futile in the present case where the section itself excludes review in the nature of certiorari which would have required reasons to be examined. It would be equally futile to order reasons to be given for a Board decision which, by infringing the rules of natural justice,

(1) [1983] 1 N.S.W.L.R. 691. (2) [1984] 3 N.S.W.L.R. 447.

H. C. OF A.
1985-1986.

PUBLIC SERVICE BOARD OF N.S.W. v. OSMOND.

had become a nullity: *Calvin v. Carr* (3); *Forbes v. N.S.W. Trotting Club Ltd.* (4). While, on an appeal of law from a tribunal, failure to give reasons would be an error of law (*Pettitt v. Dunkley* (5)), an analogous extension based on natural justice would create a novel principle, upset many settled administrative decisions, and lead to the result that even the giving of insufficient reasons could invalidate a decision: *Housing Commission (N.S.W.) v. Tatmar Pastoral Co. Pty. Ltd.* (6). The giving of reasons cannot be a rule of natural justice where, as commonly happens, a decision precedes the reasons for it: *Askew v. Fields* (7). The Court would embark on a political and legislative course if it were to go beyond recognizing that reasons may be desirable to hold that reasons for an administrative decision are necessary as a matter of natural justice: *Taylor v. Public Service Board* (8); *Reg. v. Gaming Board; Ex parte Benaim* (9); *McInnes v. Onslow-Fane* (10); *Payne v. Lord Harris* (11); *Salemi v. MacKellar* [No. 2] (12). It is demonstrable that when the legislature requires reasons from a tribunal its enactment will say so: *Government and Related Employees Appeal Tribunal Act* 1980 (N.S.W.), s. 48; *Education Commission Act* 1980 (N.S.W.), s. 68; *Probation and Parole Act* 1983 (N.S.W.), s. 23(4); *Anti-Discrimination Act* 1977 (N.S.W.), s. 117.

D. M. J. Bennett Q.C. (with him *J. W. Shaw* and *S. Crawshaw*), for the respondent. The rule relating to the giving of reasons on curial appeals applies with greater force to tribunals subject to prerogative control because, without reasons, error of law on the face of the record would not normally be exposed.

[GIBBS C.J. referred to *Hockey v. Yelland* (13).]

A fortiori where there is prerogative control there is a duty to create a record. The general rule is expressed in *Pettitt v. Dunkley* (14); *Housing Commission (N.S.W.) v. Tatmar Pastoral Co. Pty. Ltd.* (15); and *Bank of Nova Scotia v. 438955 Ontario Ltd.* (16). *Bank of Nova Scotia v. Nash* (17), is distinguishable. The trend in English decisions is to establish the duty to give reasons: *Breen v.*

(3) [1980] A.C. 574, at pp. 589-590.
(4) (1979) 143 C.L.R. 242, at p. 277.
(5) [1971] 1 N.S.W.L.R. 376.
(6) [1983] 3 N.S.W.L.R. 378.
(7) (1985) 156 C.L.R. 268.
(8) [1975] 2 N.S.W.L.R. 278, at p. 291.
(9) [1970] 2 Q.B. 417.
(10) [1978] 3 All E.R. 211.
(11) [1981] 1 W.L.R. 754, at pp. 764-765; [1981] 2 All E.R. 842, at p. 851.
(12) (1977) 137 C.L.R. 396, at p. 443.
(13) (1984) 157 C.L.R. 124.
(14) [1971] 1 N.S.W.L.R. 376, at pp. 382, 384, 386.
(15) [1983] 3 N.S.W.L.R. 378, at p. 385.
(16) (1983) 41 O.R. (2d) 496.
(17) (1983) 42 O.R. (2d) 530.

Amalgamated Engineering Union (18); *Norton Tool Co. Ltd. v. Tewson* (19); *Alexander Machinery Ltd. v. Crabtree* (20); *Reg. v. Immigration Tribunal; Ex parte Khan (Mahmud)* (21). Other jurisdictions have done likewise: *De Iacovo v. Lacanale* (22); *T. Flexman Ltd. v. Franklin County Council* (23); *Siemens Engineering and Manufacturing Co. v. Union of India* (24). In keeping with the trend, reasons should be required of all administrative tribunals under obligation to comply with the rules of natural justice, of all subject to prerogative control, and in all cases where necessitated by fairness. Section 65A of the *Public Service Act* 1979 has no application where a right to relief depends on the rules of natural justice which, going to jurisdiction as they do, are not excluded by privative clauses. Nor does the section apply to appeals like the present because privative clauses should be construed strictly and, so construed, that section does not apply to appeals in general or to those under s. 116 of the same Act relating to decisions about appointments.

C. A. Porter Q.C., in reply. The adoption by Indian courts of a rule of natural justice not found in other common law countries has no application to Australia. Unless there is a statutory obligation to give reasons, *Pettitt v. Dunkley* is to be distinguished. It would be a legislative leap, rather than a development of the law within the authority of the court, to allow certiorari in effect to be fed by mandamus so as to compel all tribunals to give reasons and thus make every tribunal, whether legal or administrative, subject to a right of appeal on questions of law.

Cur. adv. vult.

The following written judgments were delivered:— 1986, Feb. 21.

GIBBS C.J. In 1982 the respondent, Mr. Osmond, who had for many years been an officer employed first under the *Public Service Act* 1902 (N.S.W.), as amended, and more recently under the *Public Service Act* 1979 (N.S.W.), as amended ("the Act"), which repealed the earlier statute, applied for appointment by way of promotion to a vacant position of Chairman, Local Lands Boards. The appropriate Department Head recommended that another applicant, Mr. Galvin, should be appointed. Both the respondent and

(18) [1971] 2 Q.B. 175, at pp. 190-191.
(19) [1973] 1 W.L.R. 45, at p. 49; [1973] 1 All E.R. 183, at p. 187.
(20) [1974] I.C.R. 120, at p. 122.
(21) [1983] 1 Q.B. 790, at p. 794.
(22) [1957] V.R. 553.
(23) [1979] 2 N.Z.L.R. 690, at p. 698.
(24) (1976) 63 A.I.R. (S.C.) 1785.

H. C. OF A. 1985-1986.

PUBLIC SERVICE BOARD OF N.S.W. v. OSMOND.

Gibbs C.J.

Mr. Galvin were eligible for appointment to the position. The respondent appealed to the appellant, the Public Service Board of New South Wales ("the Board"), under s. 116 of the Act. The appeal was heard, and the respondent was later informed orally that the Board had dismissed his appeal. The respondent requested the Board to give reasons for its decision but the Board refused to do so. The respondent then applied on summons to the Supreme Court of New South Wales for declaratory and other relief. The matter came at first instance before Hunt J. who held that the Board was not obliged to give reasons for its decision to dismiss an appeal brought pursuant to s. 116 of the Act and dismissed the respondent's summons (25). An appeal was brought by the respondent to the Court of Appeal, which by a majority (Kirby P. and Priestley J.A., Glass J.A. dissenting) declared that the Board was obliged to give reasons for its decision to dismiss the respondent's appeal and ordered the Board to perform its legal duty by giving reasons for its decision (26). The Board now appeals by special leave to this Court.

The appointment for which the respondent applied was one which was required by s. 61 of the Act to be made by the Governor on the recommendation of the appropriate Department Head. Sub-sections (1) and (2) of s. 62 provide as follows:

> "(1) In this section, 'efficiency', in relation to an officer eligible for appointment to a vacant position, means —
>
> (a) the possession by that officer of qualifications, determined by the Board in respect of that position, for the discharge of the duties of that position and his aptitude for the discharge of those duties; and
>
> (b) the merit, diligence and good conduct of that officer.
>
> (2) In deciding to make a recommendation for the appointment of an officer to a vacant position, the appropriate Department Head shall, out of the group of officers eligible for appointment to the vacant position, prefer —
>
> (a) the officer whose efficiency is, in the opinion of the Department Head, greater than that of any other officer in that group; or
>
> (b) where, in the opinion of the Department Head, there is no officer in that group entitled to preference under paragraph (a), the officer who, under section 58, is senior to any other officer in that group."

Section 58 lays down the rules by which the seniority of officers is to be determined. Section 116(1) of the Act gives a right of appeal to the Board against certain decisions or determinations of the Board or a Department Head, and it is common ground that there was a right

(25) [1983] 1 N.S.W.L.R. 691. (26) [1984] 3 N.S.W.L.R. 447.

of appeal against the determination of the Department Head in the present case. Sub-sections (2) and (3) of s. 116 provide as follows:

> "(2) The Board shall consider the appeal and the grounds thereof, and any further evidence in relation thereto which the Board may deem necessary for the proper determination of the appeal, and may allow or disallow the appeal.
>
> (3) The decision of the Board on the appeal shall be final and, if the appeal relates to a decision or determination of a Department Head, shall be deemed to be the decision or determination of the Department Head."

The practice followed by the Board of notifying its decisions orally was apparently a long-standing one. Regulation 57 of the regulations made in 1917 under the *Public Service Act* 1902 required the Board to notify the applicant and the permanent head of its decision as soon as convenient after the hearing of an appeal or reference, but did not require such notification to be in writing. Regulation 34 of the present regulations, which took effect on 22 March 1985, after the decision of the Board in the present case, now requires the Board to notify its decision in writing. However there has not been at any material time, and is not now, any statutory provision which requires the Board to give reasons for its decision on an appeal under s. 116. No appeal lay from that decision, although certain other decisions of the Board may be taken on appeal to the Government and Related Employees Appeal Tribunal established under the *Government and Related Employees Appeal Tribunal Act* 1980 (N.S.W.).

The Board contends that the proceedings brought in the Supreme Court by the respondent were barred by s. 65A(6) of the Act which provides inter alia:

> "Without affecting the *Government and Related Employees Appeal Tribunal Act*, 1980, no proceedings, whether for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, shall lie in respect of —
>
> . . .
>
> (c) the appointment or failure to appoint a person to a position in the Public Service, the entitlement or non-entitlement of a person to be so appointed or the validity or invalidity of any such appointment."

It was held by the majority in the Court of Appeal that s. 65A, on its proper construction, does not apply to appeals brought under s. 116. It was further held by the learned President that in any case the section would be ineffective to protect the actions of the Board from scrutiny by the Court if there had been (inter alia) a denial of natural justice. Having regard to the conclusion which I have reached on the principal issue in the case I need not consider these questions.

H. C. OF A. 1985-1986. PUBLIC SERVICE BOARD OF N.S.W. v. OSMOND. Gibbs C.J.

Kirby P. based his conclusion that the Board was bound to give reasons for its decision on the broad principle that the common law requires those entrusted by statute with the discretionary power to make decisions which will affect other persons to act fairly in the performance of their statutory functions. He said (27):

> "The overriding duty of public officials who are donees of statutory powers is to act justly, fairly and in accordance with their statute. Normally, this will require, where they have a power to make discretionary decisions affecting others, an obligation to state the reasons for their decisions. That obligation will exist where, to do otherwise, would render nugatory a facility, however limited, to appeal against the decision. It will also exist where the absence of stated reasons would diminish a facility to have the decision otherwise tested by judicial review to ensure that it complies with the law and to ensure that matters have been taken into account which should have been taken into account or that matters have not been taken into account which ought not to have been taken into account."

He recognized exceptions to the obligation to state reasons, e.g. where it would be otiose to do so, or where it was clear by inference or otherwise what the reasons were, or where the giving of reasons would disclose confidential information or invade privacy. However he said that the present case did not fall within any exception to the rule. Priestley J.A. expressed a more guarded view and declined to lay down any general propositions about the right to reasons where such a right is not given by statute. He held that the rules of natural justice applied to the appeal to the Board and that those rules, in the circumstances of the present case, required that reasons be given for the decision of the Board on the appeal.

With the greatest respect to the learned judges in the majority in the Court of Appeal, the conclusion which they have reached is opposed to overwhelming authority. There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons. That this is so has been recognized in the House of Lords (*Sharp v. Wakefield* (28); *Padfield v. Minister of Agriculture, Fisheries and Food* (29)) and the Privy Council (*Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* (30)); in those cases, the proposition that the common law does

(27) [1984] 3 N.S.W.L.R., at p. 467.
(28) [1891] A.C. 173, at p. 183.
(29) [1968] A.C. 997, at pp. 1032-1033, 1049, 1050-1054, 1061-1062.
(30) [1947] A.C. 109, at p. 123.

not require reasons to be given for administrative decisions seems to have been regarded as so clear as hardly to warrant discussion. More recently, in considered judgments, the Court of Appeal in England has held that neither the common law nor the rules of natural justice require reasons to be given for decisions of that kind: *Reg. v. Gaming Board; Ex parte Benaim* (31); *Payne v. Lord Harris* (32). It has similarly been held that domestic tribunals are not bound to give reasons for their decisions; see *McInnes v. Onslow-Fane* (33) and earlier authorities collected in *Pure Spring Co. Ltd. v. Minister of National Revenue* (34).

The contrary view appears to have been expressed by Lord Denning M.R. in *Breen v. Amalgamated Engineering Union* (35), but that was a dissenting judgment and if it was intended to suggest that reasons must be given for the decision of a statutory or domestic body whenever the circumstances make it fair to do so it is inconsistent with *Reg. v. Gaming Board; Ex parte Benaim*, in which the judgment of the court was written by Lord Denning M.R. himself, and with *Payne v. Lord Harris*, a decision to which Lord Denning M.R. was a party. In *Breen v. Amalgamated Engineering Union* (36) Lord Denning M.R. was discussing together three questions which, although they may be connected by the facts of a particular case, are in principle distinct — whether the statutory or domestic body should give reasons for its decision, whether the person likely to be affected by a decision should be given an opportunity to be heard before the decision is made and whether if a decision were given without reasons the court might infer that no good reason existed. Where the rules of natural justice require that a body making a decision should give the person affected an opportunity to be heard before the decision is made, the circumstances of the case will often be such that the hearing will be a fair one only if the person affected is told the case made against him. That is quite a different thing from saying that once a decision has been fairly reached the reasons for the decision must be communicated to the party affected. As the judgments in *Padfield v. Minister of Agriculture, Fisheries and Food* show, the fact that no reasons are given for a decision does not mean that it cannot be questioned; indeed, if the decision-maker does not give any reason for his decision, the court may be able to infer that he had no good

(31) [1970] 2 Q.B. 417, at pp. 430-431.
(32) [1981] 1 W.L.R. 754, at pp. 764-765; [1981] 2 All E.R. 842, at pp. 850-851.
(33) [1978] 1 W.L.R. 1520; [1978] 3 All E.R. 211.
(34) [1947] 1 D.L.R. 501, at pp. 534-535.
(35) [1971] 2 Q.B. 175.
(36) [1971] 2 Q.B., at pp. 190-191.

reason. That, again, is quite a different question from that which now concerns us.

Reference was made to *Norton Tool Co. Ltd. v. Tewson* (37) and *Alexander Machinery Ltd. v. Crabtree* (38), where Sir John Donaldson, sitting as the President of the National Industrial Relations Court, whose jurisdiction was limited to a consideration of questions of law, held that the failure of the industrial tribunal from which the appeal was brought to give reasons was an error of law. These decisions may be explained by the fact that s. 12 of the *Tribunals and Inquiries Act* 1971 (U.K.) provided (inter alia) that where any such tribunal as is specified in Schedule 1 to that Act gives any decision it shall be the duty of the tribunal to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving or notification of the decision, to state the reasons. Schedule 1 to that Act included a reference to the industrial tribunals for England and Wales established under s. 12 of the *Industrial Training Act* 1964 (U.K.) and s. 100 of the *Industrial Relations Act* 1971 (U.K.) provided that tribunals established under s. 12 of the *Industrial Training Act* 1964 shall (inter alia) exercise the jurisdiction conferred on industrial tribunals by or under the *Industrial Relations Act* 1971. The industrial tribunals whose decisions were under appeal in these two cases were exercising a jurisdiction under the *Industrial Relations Act* 1971. The two decisions of Sir John Donaldson were considered by the Court of Appeal in *Reg. v. Immigration Appeal Tribunal; Ex parte Khan (Mahmud)* (39), where Lord Lane C.J. said (40):

> "Speaking for myself, I would not go so far as to endorse the proposition set forth by Sir John Donaldson that any failure to give reasons means a denial of justice and is itself an error of law. The important matter which must be borne in mind by tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties, and they should indicate the evidence upon which they have come to their conclusions."

The immigration appeal tribunal from whose decision an appeal was brought in that case was also under a statutory obligation to give reasons for its decision: see The Immigration Appeals (Procedure) Rules 1972 (U.K.), par. 39 (*Halsbury's Statutory Instruments* (1979), vol. 2, p. 40). It would be wrong to think that any of these three cases made any departure from established principle or

(37) [1973] 1 W.L.R. 45, at p. 49; [1973] 1 All E.R. 183, at p. 187.
(38) [1974] I.C.R. 120, at p. 122.
(39) [1983] Q.B. 790.
(40) [1983] Q.B., at p. 794.

recognized the existence of a duty at common law to give reasons for administrative decisions; the obligation to give reasons depended on statute.

The view that there is no general rule of the common law that reasons should be given for administrative decisions is accepted by the text writers: see Wade, *Administrative Law*, 5th ed. (1982), at p. 486; de Smith, *Judicial Review of Administrative Action*, 4th ed. (1980), p. 148, and Flick, *Natural Justice*, 2nd ed. (1984), p. 130. The same view has been taken by judges of the High Court of New Zealand (*Reg. v. Awatere* (41); *Potter v. New Zealand Milk Board* (42); *Baker v. Public Service Board* (43) and cf. *T. Flexman Ltd. v. Franklin County Council* (44)) and by courts in Canada (*Pure Spring Co. Ltd. v. Minister of National Revenue* (45); *Reg. v. British Columbia Turkey Marketing Board; Ex parte Rosenberg* (46)). In New South Wales, the Court of Appeal in *Taylor v. Public Service Board* (47), rejected the contention that a decision of the Board on the hearing of a charge against an officer for a breach of discipline should be quashed because the Board failed to give reasons for its decision. Samuels J.A., with whom the other members of the court concurred, distinguished *Giris Pty. Ltd. v. Federal Commissioner of Taxation* (48), which had been cited in support of the contention, and added (49): "No other authority in support of the submission was offered, and *R. v. Gaming Board for Great Britain; Ex parte Benaim and Khaida* (50) is against it. So the submission fails." This Court dismissed an appeal from that decision of the Court of Appeal, but did not consider the present question (51). Priestley J.A. in the present case said that the decision was distinguishable because in *Taylor v. Public Service Board* the officer was entitled to appeal by way of rehearing whereas in the present case the respondent had no right to appeal from the decision of the Board. We are not now concerned to decide whether on a proper approach to precedent, the Court of Appeal ought to have followed its previous decision in *Taylor v. Public Service Board* (which had already been followed and applied in the unreported case of *Jet 60*

(41) [1982] 1 N.Z.L.R. 644, at p. 646.
(42) [1983] N.Z.L.R. 620, at p. 625.
(43) [1982] 2 N.Z.L.R. 437, at p. 444.
(44) [1979] 2 N.Z.L.R. 690, at p. 698.
(45) [1947] 1 D.L.R. 501.
(46) (1967) 61 D.L.R. (2d) 447, at p. 450.
(47) [1975] 2 N.S.W.L.R. 278, at p. 291.
(48) (1969) 119 C.L.R. 365, at pp. 373, 384.
(49) [1975] 2 N.S.W.L.R., at p. 291.
(50) [1970] 2 K.B. 417.
(51) (1976) 137 C.L.R. 208.

H. C. OF A. 1985-1986.

PUBLIC SERVICE BOARD OF N.S.W. v. OSMOND.

Gibbs C.J.

Minutes Cleaners Pty. Ltd. v. Brownette (52)) but whether the law which it enunciated was correct.

Before passing from this discussion of the authorities it is necessary to refer very briefly to four further groups of decisions mentioned by Kirby P. in the course of his judgment. First, there are a number of Canadian decisions which, as the learned President says, have examined the entitlement to a notice of reasons: *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* (53); *Proctor v. Sarnia Board of Commissioners of Police* (54); *Re Campbell and Stephenson* (55); *Re Evershed and The Queen* (56). Upon examination it will be seen that all of these cases decide, not that reasons must be given for a decision finally reached, but that a person or body which is considering making a decision which will adversely affect another should generally give notice to that other of the reasons why the proposed action is intended to be taken so that the person affected will have a fair opportunity to answer the case against him. I have already pointed out that that is an entirely different question from that now under consideration. Secondly, Kirby P. discussed a number of cases in Canada and New Zealand in which the courts have considered the principle enunciated by the Court of Appeal of New South Wales in *Pettitt v. Dunkley* (57), that "an obligation, concerning the giving of reasons, lies upon any court, including an intermediate court of appeal, so far as it is necessary to enable the case properly and sufficiently to be laid before the higher appellate court". The decision in that case that the failure to give reasons was an error in law may have broken new ground, but there was nothing new in saying that judges are under an obligation to give reasons where that is necessary to enable the matter to be properly considered on appeal. It has long been the traditional practice of judges to express the reasons for their conclusions by finding the facts and expounding the law (see *Deakin v. Webb* (58) and *Jacobs v. London County Council* (59)) and there have been many cases (some of which are collected in *De Iacovo v. Lacanale* (60)) in which it has been held that it is the duty of a judge or magistrate to state his reasons. That does not mean that a judicial officer must give his reasons in every case; it is clear, to use some of the words of Woodhouse P. in *Reg. v. Awatere* (61), that there is no

(52) Unreported; 8 June 1982; Supreme Court of N.S.W. (Court of Appeal).
(53) [1979] 1 S.C.R. 311, at p. 328.
(54) [1980] 2 S.C.R. 727, at p. 732.
(55) (1984) 5 D.L.R. (4th) 676, at p. 680.
(56) (1984) 5 D.L.R. (4th) 340, at p. 344.
(57) [1971] 1 N.S.W.L.R. 376, at p. 388.
(58) (1904) 1 C.L.R. 585, at pp. 604-605.
(59) [1950] A.C. 361, at p. 369.
(60) [1957] V.R. 553, at pp. 558-559.
(61) [1982] 1 N.Z.L.R., at p. 649.

"inflexible rule of universal application" that reasons should be given for judicial decisions. Nevertheless, it is no doubt right to describe the requirement to give reasons, as Mahoney J.A. did in *Housing Commission (N.S.W.) v. Tatmar Pastoral Co.* (62), as "an incident of the judicial process", subject to the qualification that it is a normal but not a universal incident. That does not mean that the requirement is an incident of a process which is not judicial but administrative; there is no justification for regarding rules which govern the exercise of judicial functions as necessarily applicable to administrative functions, which are different in kind. Moreover, the principle that judges and magistrates ought to give reasons in any case in which an appeal lies from the decision provides a quite inadequate basis for the suggested further principle that a body exercising discretionary administrative powers must give reasons to enable persons affected by the exercise of the power to bring proceedings for judicial review. That suggested principle would undermine the rule, well established at common law (see *R. v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw* (63)) that reasons do not form part of the record, for the purposes of certiorari, unless the tribunal chooses to incorporate them.

Thirdly, Kirby P. referred to three decisions of this Court given under the *Income Tax Assessment Act* 1936 (Cth), as amended. In *Giris Pty. Ltd. v. Federal Commissioner of Taxation*, Barwick C.J. (64) and Windeyer J. (65) held that the Commissioner was under a duty, if requested, to inform the taxpayer of the reasons for the opinion which he had formed under s. 99A of that Act. These remarks by Barwick C.J. were cited with approval by Owen J. in *Federal Commissioner of Taxation v. Brian Hatch Timber Co. (Sales) Pty. Ltd.* (66), and held to be applicable in cases arising under s. 80A of the *Income Tax Assessment Act*: see also *Kolotex Hosiery (Australia) Pty. Ltd. v. Federal Commissioner of Taxation* (67). It is unnecessary for present purposes to consider whether the observations in those cases were intended to indicate what the Commissioner should do as a matter of fairness rather than what he was required to do as a matter of legal obligation: cf. *Robinson v. Deputy Commissioner of Taxation* (68). If it was intended to suggest that the Commissioner was under a legal obligation, that conclusion

(62) [1983] 3 N.S.W.L.R. 378, at p. 386.
(63) [1952] 1 K.B. 338, at p. 352.
(64) (1969) 119 C.L.R., at p. 373.
(65) (1969) 119 C.L.R., at p. 384.
(66) (1972) 128 C.L.R. 28, at p. 60.
(67) (1975) 132 C.L.R. 535, at p. 541.
(68) (1984) 1 F.C.R. 328, at pp. 332-334.

H. C. OF A. 1985-1986. PUBLIC SERVICE BOARD OF N.S.W. v. OSMOND. Gibbs C.J.

must have depended upon the view which the Court took of the effect of the particular provisions of the *Income Tax Assessment Act*: cf. *Taylor v. Public Service Board* (69). Certainly those decisions do not establish any new general principle of the common law.

Fourthly, Kirby P. referred to a line of Indian decisions in which it has been held to be "settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes": *Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India* (70). This, it was there said, is "a basic principle of natural justice". These decisions appear to state the common law of India, although without a detailed knowledge of the course of decisions in that country it would be hazardous to assume that they have not been influenced by the provisions of the Constitution of India or by Indian statutes. A similar remark may be made regarding American authorities, such as *Dunlop v. Bachowski* (71). When the rules of the common law of Australia are unclear or uncertain assistance may be gained from a consideration of the decisions of other jurisdictions, but when the rules are clear and settled they ought not to be disturbed because the common law of other countries may have developed differently in a different context. If the common law of India or that of the United States requires reasons to be given for administrative decisions, it is different from that of Australia.

Finally, the learned President adverted to considerations of policy. Most people would agree that it is desirable that bodies exercising discretionary powers of the kind now under consideration should as a general rule give reasons for their decisions. As Professor Wade said, op. cit., at p. 486: "The giving of reasons is required by the ordinary man's sense of justice and is also a healthy discipline for all who exercise power over others." However, considerations may be advanced in opposition to the suggestion that there should be a general rule requiring the giving of reasons for administrative decisions. These include the possibility that an additional burden will be cast on administrative officers and that increased cost and delay may be entailed and the further possibility that a reform of this kind might in some cases induce a lack of candour on the part of the administrative officers concerned. Kirby P. recognized that any general principle requiring the giving of reasons would need to be subject to exceptions and said that in any case the exercise by the

(69) [1975] 2 N.S.W.L.R., at p. 291.
(63) (1976) 63 A.I.R. (S.C.) 1785, at p. 1789.
(71) (1975) 421 U.S. 560.

courts of their discretion to refuse relief would prevent any such principle from having an oppressive operation. However, even if it be agreed that a change such as he suggests would be beneficial, it is a change which the courts ought not to make, because it involves a departure from a settled rule on grounds of policy which should be decided by the legislature and not by the courts. Legislatures elsewhere than in New South Wales have introduced statutory reforms of administrative law and have imposed an express requirement that reasons shall, if requested, be given for certain administrative decisions: see s. 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s. 8 of the *Administrative Law Act* 1978 (Vict.) and s. 12 of the *Tribunals and Inquiries Act* 1971 (U.K.). Where these reforms have been introduced they have usually been preceded by an extensive review of the policy considerations involved, and the requirement to give reasons has often been limited so that it does not apply to decisions to which its application is thought, as a matter of policy, to be inappropriate. Section 13 of the *Administrative Decisions (Judicial Review) Act* is an example of a carefully qualified provision. New South Wales has not introduced similar legislation. Kirby P., in his judgment, said that (72): "where a number of relevant Parliaments have enacted laws elaborating modern conceptions of administrative justice and fairness, it is appropriate for the judiciary in development of the common law in those fields left to it, to take reflection from the legislative changes and to proceed upon a parallel course". He found support in remarks made by Lord Diplock in *Warnink v. Townend & Sons (Hull) Ltd.* (73):

> "Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course."

With the greatest respect, Lord Diplock did not intend to say that because there has been a trend of legislation in one jurisdiction, the courts of a different and independent jurisdiction should develop the common law of that jurisdiction on a parallel course. Such a proposition would be as impossible to sustain as it would be to put into practice when different States had taken different legislative courses. The common law of New South Wales cannot be judicially modified to make it accord with the statute law of, say, Victoria. The present case in my opinion is one to which the words of Lord

(72) [1984] 3 N.S.W.L.R., at p. 465. (73) [1979] A.C. 731, at p. 743.

H. C. OF A. 1985-1986.

PUBLIC SERVICE BOARD OF N.S.W. v. OSMOND.

Gibbs C.J.

must have depended upon the view which the Court took of the effect of the particular provisions of the *Income Tax Assessment Act*: cf. *Taylor v. Public Service Board* (69). Certainly those decisions do not establish any new general principle of the common law.

Fourthly, Kirby P. referred to a line of Indian decisions in which it has been held to be "settled law that where an authority makes an order in exercise of a quasi-judicial function, it must record its reasons in support of the order it makes": *Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India* (70). This, it was there said, is "a basic principle of natural justice". These decisions appear to state the common law of India, although without a detailed knowledge of the course of decisions in that country it would be hazardous to assume that they have not been influenced by the provisions of the Constitution of India or by Indian statutes. A similar remark may be made regarding American authorities, such as *Dunlop v. Bachowski* (71). When the rules of the common law of Australia are unclear or uncertain assistance may be gained from a consideration of the decisions of other jurisdictions, but when the rules are clear and settled they ought not to be disturbed because the common law of other countries may have developed differently in a different context. If the common law of India or that of the United States requires reasons to be given for administrative decisions, it is different from that of Australia.

Finally, the learned President adverted to considerations of policy. Most people would agree that it is desirable that bodies exercising discretionary powers of the kind now under consideration should as a general rule give reasons for their decisions. As Professor Wade said, op. cit., at p. 486: "The giving of reasons is required by the ordinary man's sense of justice and is also a healthy discipline for all who exercise power over others." However, considerations may be advanced in opposition to the suggestion that there should be a general rule requiring the giving of reasons for administrative decisions. These include the possibility that an additional burden will be cast on administrative officers and that increased cost and delay may be entailed and the further possibility that a reform of this kind might in some cases induce a lack of candour on the part of the administrative officers concerned. Kirby P. recognized that any general principle requiring the giving of reasons would need to be subject to exceptions and said that in any case the exercise by the

(69) [1975] 2 N.S.W.L.R., at p. 291.
(63) (1976) 63 A.I.R. (S.C.) 1785, at p. 1789.
(71) (1975) 421 U.S. 560.

courts of their discretion to refuse relief would prevent any such principle from having an oppressive operation. However, even if it be agreed that a change such as he suggests would be beneficial, it is a change which the courts ought not to make, because it involves a departure from a settled rule on grounds of policy which should be decided by the legislature and not by the courts. Legislatures elsewhere than in New South Wales have introduced statutory reforms of administrative law and have imposed an express requirement that reasons shall, if requested, be given for certain administrative decisions: see s. 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s. 8 of the *Administrative Law Act* 1978 (Vict.) and s. 12 of the *Tribunals and Inquiries Act* 1971 (U.K.). Where these reforms have been introduced they have usually been preceded by an extensive review of the policy considerations involved, and the requirement to give reasons has often been limited so that it does not apply to decisions to which its application is thought, as a matter of policy, to be inappropriate. Section 13 of the *Administrative Decisions (Judicial Review) Act* is an example of a carefully qualified provision. New South Wales has not introduced similar legislation. Kirby P., in his judgment, said that (72): "where a number of relevant Parliaments have enacted laws elaborating modern conceptions of administrative justice and fairness, it is appropriate for the judiciary in development of the common law in those fields left to it, to take reflection from the legislative changes and to proceed upon a parallel course". He found support in remarks made by Lord Diplock in *Warnink v. Townend & Sons (Hull) Ltd.* (73):

> "Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course."

With the greatest respect, Lord Diplock did not intend to say that because there has been a trend of legislation in one jurisdiction, the courts of a different and independent jurisdiction should develop the common law of that jurisdiction on a parallel course. Such a proposition would be as impossible to sustain as it would be to put into practice when different States had taken different legislative courses. The common law of New South Wales cannot be judicially modified to make it accord with the statute law of, say, Victoria. The present case in my opinion is one to which the words of Lord

(72) [1984] 3 N.S.W.L.R., at p. 465. (73) [1979] A.C. 731, at p. 743.

Simon of Glaisdale in *Miliangos v. Frank (Textiles) Ltd.* (74) can aptly be applied:

> "I do not think that this is a 'law reform' which should or can properly be imposed by judges; it is on the contrary essentially a decision which demands a far wider range of review than is available to courts following our traditional and valuable adversary system — the sort of review compassed by an interdepartmental committee."

I respectfully agree too with the comment made by Glass J.A. in the present case (75):

> "The proposal [i.e. the submission by counsel for Mr. Osmond] would subject New South Wales administrative tribunals to control by the courts in a blunt undiscriminating way as compared with the finely tuned system operating federally. I believe that judicial innovation under these circumstances is not justified."

It remains to consider whether, notwithstanding that there is no general obligation to give reasons for an administrative decision, the circumstances make this a special case in which natural justice required reasons to be given. The rules of natural justice are designed to ensure fairness in the making of a decision and it is difficult to see how the fairness of an administrative decision can be affected by what is done after the decision has been made. However, assuming that in special circumstances natural justice may require reasons to be given, the present is not such a case. The issues before the Board were simple and well defined: which of the two officers had the greater efficiency, and if neither of them had greater efficiency than the other, which was the senior? The respondent had the means of knowing what issues were canvassed on the appeal, and could readily infer whether the Board's conclusion rested on par. (a) or on par. (b) of s. 62(2) of the Act. Neither the provisions of the Act nor the circumstances of the case justified the conclusion that the rules of natural justice required the Board to communicate the reasons for its decision.

I have dealt with this question at what may be regarded as tedious length in deference to the judgments of the majority of the Court of Appeal. In truth, however, I regard the law as clear. There was no rule of common law, and no principle of natural justice, requiring the Board to give reasons for its decision, however desirable it might be thought that it should have done so.

I would allow the appeal. Conformably to the condition imposed when special leave was granted, the Board should pay the costs of the appeal.

(74) [1976] A.C. 443, at p. 480.

(75) [1984] 3 N.S.W.L.R., at p. 474.

Wilson J. I have had the advantage of reading the reasons for judgment prepared by the Chief Justice. I agree entirely with those reasons and with his Honour's conclusion that the appeal should be allowed.

The common law as expounded by the Chief Justice applies with special force in the case of decisions touching the employment of persons in the service of the Crown. Under the common law, it is an implied term in the engagement of every person in the public service that the office is held during pleasure: *Ryder v. Foley* (76). The consequence for one who holds an office at pleasure was stated by Lord Reid in *Ridge v. Baldwin* (77):

> "It has always been held, I think rightly, that such an officer has no right to be heard before he is dismissed, and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason."

Of course, employment in the service of the Crown is no longer regulated solely by the common law. Lord Wilberforce recognized the need to have regard to any modifications introduced by statute when, in *Malloch v. Aberdeen Corporation* (78), after referring to a portion of the passage that I have cited from Lord Reid's speech in *Ridge v. Baldwin* (77), he said (79):

> "As a general principle, I respectfully agree: and I think it important not to weaken a principle which, for reasons of public policy, applies, at least as a starting point, to so wide a range of the public service. The difficulty arises when, as here, there are other incidents of the employment laid down by statute, or regulations, or code of employment, or agreement. The rigour of the principle is often, in modern practice, mitigated for it has come to be perceived that the very possibility of dismissal without reason being given — action which may vitally affect a man's career or his pension — makes it all the more important for him, in suitable circumstances, to be able to state his case and, if denied the right to do so, to be able to have his dismissal declared void. So, while the courts will necessarily respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not, in my opinion, prevent them from examining the framework and context of the employment to see whether elementary rights are conferred on him expressly or by necessary implication, and how far these extend . . . ."

But Mr. Osmond can derive no comfort from an examination of the statute which provides the framework and context of his

(76) (1906) 4 C.L.R. 422.
(77) [1964] A.C. 40, at pp. 65-66.
(78) [1971] 1 W.L.R. 1578; [1971] 2 All E.R. 1278.
(79) [1971] 1 W.L.R., at p. 1597; [1971] 2 All E.R., at pp. 1295-1296.

employment, namely, the *Public Service Act* 1979 (N.S.W.), as amended ("the *Public Service Act*" or "the Act"). For the Act does not confer on him the right that he claims. On the contrary, in my opinion its proper construction plainly denies him that right. Despite the absence of express words, the Act reveals the intention of the legislature that the Public Service Board be under no obligation to give reasons for its decision on an appeal brought to it in accordance with s. 116.

The material provisions of s. 116 are the following:

> "(2) The Board shall consider the appeal and the grounds thereof, and any further evidence in relation thereto which the Board may deem necessary for the proper determination of the appeal, and may allow or disallow the appeal.
>
> (3) The decision of the Board on the appeal shall be final and, if the appeal relates to a decision or determination of a Department Head, shall be deemed to be the decision or determination of the Department Head . . . ."

This avenue of appeal in promotion cases is reserved to applicants for those senior offices in the Public Service that are excluded from the jurisdiction of the Government and Related Employees Appeal Tribunal ("the Tribunal") constituted in accordance with the provisions of the *Government and Related Employees Appeal Tribunal Act* 1980 (N.S.W.), as amended ("the G.R.E.A.T. Act") by reason of s. 21(1)(d) of that Act. The G.R.E.A.T. Act provides an avenue of appeal with respect to promotion decisions touching the great majority of offices in the Public Service, being substantially those that attract a maximum salary not exceeding the maximum salary applicable to a Grade 11 office in the Administrative and Clerical Division. The office for which Mr. Osmond applied was a senior office with respect to which the Tribunal had no jurisdiction to entertain an appeal.

The G.R.E.A.T. Act provides that for the purpose of hearing an appeal the Tribunal is constituted by a Chairman, an employer's representative and an employee's representative (s. 13(1)). Detailed provision is made for the hearing of the appeal at either an informal sitting (s. 37) or a formal sitting (s. 38); whether the sitting is to be informal or formal is determined in accordance with s. 35. In every case the decision must be in writing and must include the reasons for the decision (s. 48(4)). The decision is final save for an appeal to the Supreme Court on a question of law (s. 48(3), s. 54).

On the other hand, the statutory provisions governing an appeal to the Board under s. 116 of the *Public Service Act* are markedly different. First, the Board may delegate its function under that section to a member of the Board, a Department Head or an officer

employed in the Administrative Office of the Board (s. 35(2)(a)). Secondly, the appeal is to be considered and either allowed or disallowed (s. 116(2)). Thirdly, the decision is final (s. 116(3)). Fourthly, there is no mention of reasons being given for the decision. The appellant also argues for a further point of distinction, based on s. 65A(6) of the *Public Service Act*, which provides that, without affecting the G.R.E.A.T. Act, no proceedings, whether for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, shall lie in respect of the appointment or failure to appoint a person to a position in the Public Service or the entitlement of a person to be so appointed.

This description of the legislative scheme may be completed by reference to the officers in the Special Division of the Public Service. This Division includes the Department Heads whose offices are created by s. 45 of the *Public Service Act* (s. 40). Appointments, whether by way of transfer or promotion or otherwise, including temporary appointments, to Special Division positions are made by the Governor (s. 50). There is no provision for an appeal of any kind with respect to a promotion to the Special Division.

In my opinion this consideration of the relevant legislation (leaving aside for the moment the question concerning s. 65A(6)) makes it clear that the legislature deliberately refrained from imposing any obligation on the Board to give reasons for a decision on an appeal under s. 116 of the *Public Service Act*. It is not a matter that could have escaped consideration. The G.R.E.A.T. Act expressly imposed such an obligation on the Tribunal, yet s. 116 of the *Public Service Act* remains silent, notwithstanding that the section was itself amended during the legislative session in which the G.R.E.A.T. Act was enacted in order to take account of the enactment of the latter Act.

Furthermore, some significance must attach to the time when these statutes were enacted, coming at the end of a decade of extraordinary executive and legislative activity in Australia directed to the improvement of efficiency and procedural fairness in public administration: see, e.g., the 1971 Report of the Commonwealth Administrative Review Committee (the Kerr Committee); *Directions for Change*, an Interim Report by Professor Peter Wilenski, Commissioner, Review of N.S.W. Government Administration, published in 1977; the Further Report of the same Commissioner, *Unfinished Agenda*, published in 1982; *Administrative Appeals Tribunal Act* 1975 (Cth); *Ombudsman Act* 1976 (Cth); *Administrative Decisions (Judicial Review) Act* 1977 (Cth); *Ombudsman Act* 1973 (Vict.); *Administrative Law Act* 1978 (Vict.); *Ombudsman Act* 1974 (N.S.W.). In his report, *Unfinished Agenda*, at p. 68, Professor

Wilenski refers to the fact that the *Public Service Act* emerged after five months of intensive work, including extensive consultations by him with departments, authorities, unions and other interested bodies. While views may differ as to the dictates of public policy touching appointments to senior government offices, the legislature has clearly taken the view that it is not in the public interest that senior officers should have their respective merits or demerits with respect to efficiency, including aptitude, diligence and good conduct, canvassed publicly in a reasoned decision. It must have concluded that efficiency and harmony in the higher echelons of the Public Service would be enhanced by having the Board or its delegate keep its reasons to itself and thereby protect the reputations of the protagonists in the sensitive areas of character that a dispute as to relative efficiency might well encompass: cf. *Hurt v. Rossall* (80). The scheme is plain. For the great majority of offices, the G.R.E.A.T. Act provides a representative tribunal for the determination of promotion appeals in a manner accepted as being conducive to good industrial relations. For the senior, more sensitive positions, a more limited provision is made for the review of promotional decisions with the overall control remaining firmly in the hands of the Board. For Special Division officers, there is no avenue of review at all.

It is unnecessary to consider at length the conflicting submissions of counsel with respect to par. (c) of s. 65A(6) of the *Public Service Act* but I should say, with the utmost respect for those who think differently, that in my opinion the sub-section does include within its scope decisions which are made under s. 116. Sub-section (3) of s. 116 effectively incorporates the decision of the Board into Div. 2 of Pt IV of the Act, in which division s. 65A appears, by deeming that decision to be the decision of the Department Head. The effect of that sub-section is to characterize the decision of the Board on the appeal as the recommendation of the successful officer for appointment by way of promotion to the vacant position. It is on that recommendation that the Governor makes the appointment in accordance with s. 61 of the Act. This being so, the present proceedings are in respect of the appointment or the entitlement of a person to be appointed to a position in the Public Service. Furthermore, although of no relevance to the present case, it would seem that s. 65A(6) is a most unusual privative clause which excludes judicial review even for jurisdictional error. I draw this

(80) (1982) 64 F.L.R. 102, at p. 111; 43 A.L.R. 252, at p. 260.

latter conclusion from the fact that s. 65A(6) refers not to a "decision", which might then be construed to mean only a decision made within jurisdiction, but to "proceedings". In effect, it provides that, without affecting the G.R.E.A.T. Act, no proceedings by way of judicial review shall lie in respect of the filling of a vacancy in the Public Service.

I would allow the appeal.

BRENNAN J. I agree with the judgment of the Chief Justice. Accordingly I would allow the appeal.

DEANE J. There was a time when the ordinary prescript of prudence for an administrative decision-maker who was anxious to avoid litigation was to decline to give reasons for the discretionary exercise of a statutory power in a manner which would adversely affect the property or rights of another. To identify the legal foundation of that approach, one need go no further than the judgment of Taunton J. in *R. v. Mayor and Aldermen of London* (81):

> "But then it is said that they ought to have set forth the grounds upon which they arrived at that conclusion. I think that this is one of those cases in which it is probably much better that the grounds not be disclosed ... but if the corporation are so candid as to state their reasons, and allege bad ones, this Court will in such cases interfere."

(See also the dissenting judgment of Ferguson J. in *Ex parte Finlayson* (82), whose opinion was upheld on the appeal to this Court, sub nom. *Metropolitan Meat Industry Board v. Finlayson* (83).) The recent statutory provisions referred to in the judgments of Kirby P. and Priestley J.A. indicate that that approach is no longer, if it ever was, acceptable as a general prescript to be observed by all administrative decision-makers. That is a good thing since the exercise of a decision-making power in a way which adversely affects others is less likely to be, or to appear to be, arbitrary if the decision-maker formulates and provides reasons for his decision. Nonetheless, the stage has not been reached in this country where it is a general prima facie requirement of the common law rules of natural justice or procedural fair play that the administrative decision-maker, having extended to persons who might be adversely affected by a decision an adequate opportunity

(81) (1832) 3 B. & Ad. 255, at pp. 273-274 [110 E.R. 96, at pp. 102-103].

(82) (1916) 16 S.R. (N.S.W.) 591, at pp. 607-609.

(83) (1916) 22 C.L.R. 340, esp. at pp. 345, 351.

of being heard, is bound to furnish reasons for the exercise of a statutory decision-making power. To the contrary, the ordinary common law position remains that established by the authorities referred to by the Chief Justice in his judgment, namely, that where, as a matter of ordinary construction, the relevant statutory provisions do not impose an obligation to give reasons, the rules of natural justice will not remedy the omission. I would add to those authorities a reference to the judgment of Stephen J. in *Salemi v. MacKellar* [No. 2] (84) and to the statement in the third edition (1973) of Professor S.A. de Smith's *Judicial Review of Administrative Actions*, p. 128 (repeated in the fourth edition (1980), p. 148), to which Stephen J. referred with approval, that "[t]here is no general rule of English law that reasons must be given for administrative . . . decisions".

On the other hand, it is trite law that the common law rules of natural justice or procedural fair play are neither standardized nor immutable. The procedural consequences of their application depend upon the particular statutory framework within which they apply and upon the exigencies of the particular case. Their content may vary with changes in contemporary practice and standards. That being so, the statutory developments referred to in the judgments of Kirby P. and Priestley J.A. in the Court of Appeal in the present case are conducive to an environment within which the courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision-maker should be under a duty to give reasons or to accept that special circumstances might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision-maker provide reasons for a decision to a person whose property, rights or legitimate expectations are adversely affected by it. Where such circumstances exist, statutory provisions conferring the relevant decision-making power should, in the absence of a clear intent to the contrary, be construed so as to impose upon the decision-maker an implied statutory duty to provide such reasons. As has been said however, the circumstances in which natural justice or procedural fair play requires that an administrative decision-maker give reasons for his decision are special, that is to say, exceptional.

Subject only to the foregoing comments and to one further matter, I agree with the analysis of the law contained in the judgment of the Chief Justice and with his conclusion that, for the

(84) (1977) 137 C.L.R. 396, at p. 443.

reasons which he gives, the circumstances of the present case were not such as to give rise to a duty on the part of the respondent Public Service Board to provide reasons for its decision to dismiss Mr. Osmond's appeal against the appointment of another applicant to the position of Chairman of Local Lands Boards. The further matter is that I do not read the judgment of Lord Denning M.R. in *Breen v. Amalgamated Engineering Union* (85) as enunciating any general principle inconsistent with what I have written above. It appears to me that the statements in his Lordship's judgment (86) that the obligation to give reasons will arise but "sometimes" and that it "all depends on what is fair in the circumstances" should be read as not differing, as a matter of principle, from the statement of Kitto J. in *Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation* (87) which has frequently been referred to, with approval, in other judgments in this Court:

> "What the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances."

As Lord Denning's earlier judgment in *Reg. v. Gaming Board for Great Britain; Ex parte Benaim* (88) and his subsequent judgment in *Payne v. Lord Harris* (89) make clear, his reference to "sometimes" in *Breen* should not be read as intended to imply that there is a general or prima facie rule of natural justice or procedural fair play requiring an administrative decision-maker to give reasons for a decision to a person adversely affected by it. So far as the present case is concerned, it is relevant to note that Lord Denning in *Breen* (90) identified the case of a person who is disappointed by the decision of a "body, statutory or domestic" in relation to an application for "an appointment to some post or other" as an obvious example of circumstances in which there would be no obligation to give reasons for its decision.

I agree with the orders proposed by the Chief Justice. It is unnecessary for me to consider whether, as the appellant Board maintains, the proceedings in the Supreme Court were, in any event, barred by s. 65A(6) and/or s. 116(3) of the *Public Service Act* 1979 (N.S.W.).

(85) [1971] 2 Q.B. 175.
(86) [1971] 2 Q.B., at pp. 190-191.
(87) (1963) 113 C.L.R. 475, at p. 504.
(88) [1970] 2 Q.B. 417, at pp. 431-432.
(89) [1981] 1 W.L.R. 754, at pp. 757-758; [1981] 2 All E.R. 842, at p. 845.
(90) [1971] 2 Q.B., at pp. 190-191.

H. C. OF A.
1985-1986.

PUBLIC SERVICE BOARD OF N.S.W. v. OSMOND.

DAWSON J. I agree with the reasons for judgment of the Chief Justice and have nothing to add.

Appeal allowed. In accordance with the condition imposed on the grant of special leave, order that the costs of proceedings in this Court be paid by the appellant.

Order that the judgment and order of the Court of Appeal of New South Wales be set aside and in lieu thereof order that the appeal to that Court be dismissed with costs.

Solicitor for the appellant, *H. K. Roberts*, Crown Solicitor for the State of New South Wales.

Solicitors for the respondent, *W. C. Taylor & Scott.*

J.M.B.