

HAS THE PUBLIC SERVICES COMMISSION POWER TO DISMISS?

Munusamy v. The Public Services Commission

In the recent Federal Court decision in *Munusamy's case*¹ Thomson Lord President, cast serious doubts on the competence of the Public Services Commission to dismiss members of the public service. In the course of his judgment he said:²

But it is equally true that the Public Services Commission are nowhere in terms given any power to dismiss anybody. If they have any such power it must be derived from art. 139(1) ... or art. 144(1) [of the Malaysia Constitution] ...

Art. 139(1)³ of the Constitution generally defines the jurisdiction of the Public Services Commission with regard to the services as defined by art. 132. Art. 144(1) sets out the functions and duties of the Service Commissions, including the Public Services Commission. Art. 144(1) reads:

Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this Part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the service or services to which its jurisdiction extends.

Great reliance was placed by the Lord President upon the fact that the power of dismissal by the Public Services Commission was not spelt out in the Constitution. He said:⁴

... there is not a word from beginning to end of the Constitution that gives the Public Services Commission power to effect a dismissal ...

Thomson L.P.'s comments have a far reaching significance. Is there, in fact, a real doubt as to the power of the Public Services Commission (or any other Commissions created by the Constitution) to dismiss persons within its jurisdiction? Thomson L.P. feels that the Public Services Commission are "nowhere ... given any power to dismiss anybody." Considering the important implications which are thus thrown as to the competence of these Commissions, it may be necessary to examine the learned judge's words. Although it is true that the word 'dismissal' is not used in art. 144(1), the writer wishes to state that he differs and it is proposed here to show that the Public Services Commission and the other Commissions, in fact, *have* power to dismiss.

First, by reading art. 160(1)⁵ together with the Eleventh Schedule it can be seen that the Constitution has expressly provided for such a situation. Art. 160(1) incorporates sections of the Interpretation and General Clauses Ordinance, 1948⁶

1. (1964) 30 M.L.J. 239. Federal Court (Thomson L.P., Barakbah C.J.) Thomson L.P. and Barakbah C.J. gave differing opinions, but as the third member Neal J. went on retirement without giving his judgment, by virtue of s. 16(2) of the Courts Ordinance, 1948 (No. 43 of 1948) the decision of Ong J. in the trial Court stood. Note that s. 16 has been repealed by the Courts of Judicature Act, 1964 (No. 7 of 1964) which by s. 42(2) will now give rise to a rehearing in a similar situation. The decision of Ong J. (1960) 26 M.L.J. 220 has been commented upon on more than one occasion; see (1962) 4 Malaya L.R. 305; (1963) 5 Malaya L.R. 166-170; (1964) Malaya L.R. 173. It is not the intention of the writer to join issues with any of the views expressed therein.

2. (1964) 30 M.L.J. at p. 244.

3. Art. 139(1) reads: There shall be a Public Services Commission, whose jurisdiction shall, subject to Article 144, extend to all persons who are members of the services mentioned in paragraphs (c) and (f) of Clause (1) of Article 132 ... [i.e. the general public service of the Federation and the joint public services mentioned in Article 133].

4. (1964) 30 M.L.J. 239 at p. 244.

5. Art. 160(1) reads: The Interpretation and General Clauses Ordinance, 1948, as in force immediately before Merdeka Day shall, to the extent specified in the Eleventh Schedule, apply for the interpretation of any written law within the meaning of that Ordinance ...

6. F.M.O. No. 7 of 1948.

as specified in the Eleventh Schedule for the interpretation of the Constitution. The clear meaning of section 29 of the Ordinance so specified in the Eleventh Schedule cannot be overlooked. Section 29 reads:

Where a written law confers upon any person or authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to dismiss or suspend any person appointed ...

The combined effect of art. 160(1) and the Eleventh Schedule is that the power of dismissal is to be read into art. 144(1) since no contrary intention has been shown in the grant of power to appoint. In the instant case the point could have been happily resolved if reference had been made to art. 160(1) and the Eleventh Schedule.⁷

Secondly, even without resorting to the Interpretation and General Clauses Ordinance, the Lord President could have deduced the power of dismissal of the Public Services Commission by taking into consideration art. 135. Here is the only mention of a power to dismiss public servants and the relevant part reads:

(1) No member of any of the services mentioned in paragraphs (b) to (g) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of dismissal or reduction, has power to appoint a member of that service of equal rank.

This article limits the power to dismiss to the authority that has, at the time of dismissal, the power to appoint a member of that service of equal rank. This means that only the authority that has the power to appoint, or an authority superior to it, has the power to dismiss. The Public Services Commission by art. 139(1) is the competent authority to deal with the General Public Service as defined by art. 133(1)(c). Reading art. 139(1) together with art. 144(1) the Public Services Commission is the only authority that has the power to appoint Mr. Munusamy. And being the authority that has the power to so appoint, it has by art. 135(1) the power to dismiss him.

The contention of the writer thus is that the Public Services Commission has an undoubted power to dismiss just as it has an undoubted power to appoint. Lord Denning, delivering the judgment of the Privy Council in *Surinder Singh Kanda v. The Government of the Federation of Malaya*⁸ said in no uncertain terms that the Police Service Commission has the power to dismiss:

It appears to their Lordships that, as soon as the Yang di-Pertuan Agong appointed the Police Service Commission, that Commission gained jurisdiction over all members of the police service and had the power to appoint and dismiss them.⁹

Since all Service Commissions derive their power from art. 144(1), what Lord Denning said with regard to the Police Service Commission must be equally applicable to the Public Services Commission.

If the Lord President was correct in his judgment that the Public Services Commission was not endowed with any power to dismiss a member of the public service, the question then arose as to who had the power to do so. Art. 135(1) prohibits any authority (excepting a superior authority) who could not appoint from dismissing and if, according to the Lord President, the appointing authority (in this case the Public Services Commission) could not dismiss, then the writer could not see how any

7. There is evidence that, on another occasion Thomson L.P. has been aware of s. 29 of the Interpretation and General Clauses Ordinance, 1948; see *Surinda Singh Kanda v. The Government of the Federation of Malaya* (1961) 27 M.L.J. 121 at p. 124 where he said:

The Ordinance [the Police Ordinance, 1952 (No. 14 of 1952)] is silent as regards the discharge of such officers so the question of their discharge is governed by s. 29 of the Interpretation and General Clauses Ordinance, 1948, by which, in brief, a power to appoint is to be construed as including a power to dismiss.

8. (1962) 28 M.L.J. 169.

9. *Ibid.*, at p. 171.

member of the public service in Malaysia can be dismissed (there being no other superior authority) !

That there is confusion in the mind of the Lord President with regard to this power of dismissal is evident from the following passage in his judgment:

Thus in the present case a dilemma again arises. Either the Public Services Commission had the power to dismiss Mr. Munusamy or they did not have that power. If they had that power they exercised it without complying with Article 135(2) and the exercise is therefore a nullity. On the other hand if they did not have that power again the purported exercise of a power they did not possess is equally a nullity.¹⁰

Regrettably, the Lord President did not go further to decide on whether the Public Services Commission had or had not in fact such a power to dismiss Mr. Munusamy. Such a doubt created by the Lord President has far reaching effects and goes beyond the Public Services Commission because art. 144(1) and art. 135(1) cover in general terms the powers of the other Commissions having jurisdiction over nearly all public servants in Malaysia as laid out in art. 132(1).

As a great number of persons are employed in the various public services there will necessarily be many instances of dismissals. It is fearful to imagine the state of affairs if the Service Commissions are stripped of the power of dismissal. The writer hopes that in the very near future judicial pronouncements would resolve this apparent conflict between the statements of the Lord President and Lord Denning on this vital point and with finality 'dismiss' the doubt cast by the Lord President.

10. (1964) 30 M.L.J. 239 at p. 244.