財務委員會會議

2002 年 6 月 14 日(星期五)

FCR(2002-03)21 號文件

暫停向再度受聘擔任公職人員支付退休金
《退休金條例》(第 89 章)及
《退休金利益條例》(第 99 章)

行政長官在根據《退休金條例》第 11 條及《退休金利益條例》第 26 條行使酌情權處理某宗個案前，公布他會如何就一特定類別領取退休金人員行使酌情權的政策，這做法是否合法，有委員希望政府就此提供意見。

法定條文

2. 《退休金條例》第 11 條有關部分規定－

> "如根據本條例已獲批予退休金的人再度受聘擔任公職...則有關的退休金可在該人的同意下，於其擔任公職期間，暫停支付。"

《退休金利益條例》第 26 條有關部分規定－

> "(1) 如具有資格領取退休金或已獲批予退休金的人員，再度受聘擔任公職...則有關的退休金可在該人員再度受聘或受聘之後的服務期間，暫停支付。"

不受約束的酌情決定權和採納政策

3. 公共主管當局事先聲明其建議依循的政策，並無不對，惟必須妥為聆聽有關申請，並須考慮該政策的可能例外情況。請參閱隨附 Wade 和 Forsyth 的文章節錄(《行政法》，第 8 版，第 330 至 333 頁)。在第 330 頁，作者表示－

"法院應審慎從事，不可抑制公共主管當局制定政策，因為一致的行政政策不但是容許的，而且極為合宜。同樣合宜的做法是，政策必須向公眾宣布，讓申請人知道可期望什麼。"

因此，只要公布的政策是基於客觀和合理的準則，則法院不會視之為非法約束酌情決定權。

總結

4. 根據《退休金條例》第 11 條，行政長官在領取退休金人員的同意下，才可暫停支付該員的退休金。在有關情況下，引起爭議的問題僅涉及《退休金利益條例》第 26 條。根據上述原則，行政長官事先公布，根據有關政策，在領取退休金人員受聘出任某主要官員的指明職位期間，他不會暫停支付該員的退休金，這並沒有不合法地制約其酌情決定權。在公布上述政策時，行政長官並沒有預先決定對其他類別的領取退休金人員行使酌情決定權的方式。

律政司

民事法律專員溫法德

2002 年 6 月 18 日

ADMINISTRATIVE LAW

BY

SIR WILLIAM WADE

QC, LL D, LITT D (Hon), FBA

An Honorary Bencher of Lincoln's Inn

Formerly Master of Gonville and Caius College, Cambridge,

Rouse Ball Professor of English Law

in the University of Cambridge and Professor of

English Law in the University of Oxford

Eighth Edition

by

SIR WILLIAM WADE

and

CHRISTOPHER FORSYTH

BSc LLB (Natal) LLB PhD (Cantab)

Assistant Director of the Centre for Public Law

of the Inner Temple, Barrister

Fellow of Robinson College, Cambridge

University Lecturer in Law

OXFORD

UNIVERSITY PRESS

irrelevant, and provided that it is ready to consider exceptional cases.[97] Where it is at liberty to make a choice between conflicting policies, it may decide to make no exceptions, as where it adopts a policy of making all schools in its area into comprehensive schools and abolishing all grammar schools.[98] But even then it is in a stronger position if it has listened fairly to the objections of parents and others concerned.

Licensing authorities

The rule has often been canvassed in liquor licensing cases where the licensing justices have adopted some restrictive policy, for example for reducing the number of licences in their area.[99] If the justices refuse renewal of a licence under some new policy without considering the application on its merits, their decision will be quashed.[1] But there can be no objection to a declared policy provided that the application is properly heard and considered in each case. Thus where the justices announced publicly that they would renew restricted licences only subject to the same restrictions, save in very exceptional cases, and subsequently decided a case saying: 'The bench carefully considered the application but is not prepared to alter the policy', the court upheld its decision.[2] The court is careful not to inhibit public authorities from laying down policies, since consistent administrative policies are not only permissible but highly desirable. And it is no less desirable that policies should be made public, so that applicants may know what to expect. But the policies must naturally be based on proper and relevant grounds. The justices erred, therefore, in refusing an occasional licence under a policy of never allowing more than two such licences a year to any one applicant.[3] Even though they considered the case and were prepared to make exceptions, they acted on a policy different from that which the Act imposed upon them, which was public convenience. Similarly where the justices had refused a licence to sell liquor to one theatre, and for the sake of consistency felt obliged to refuse one to another theatre which had enjoyed it for fifty years previously, the decision was set aside since the statutory purpose was 'for ensuring order and decency' and the justices' motive was primarily to enforce consistency.[4] These decisions are merely examples of the

[97] *Cumings v. Birkenhead Cpn.* [1972] Ch. 12, where Lord Denning MR expounds the rules as to policy.

[98] *Smith v. Inner London Education Authority* [1978] 1 All ER 411.

[99] *Boyle v. Wilson* [1907] AC 45.

[1] *R. v. Windsor Licensing Justices ex p. Hodes* [1983] 1 WLR 685.

[2] *R. v. Torquay Licensing Justices ex p. Brockman* [1951] 2 KB 784, distinguishing *R. v. Walsall Justices* (1854) 18 JP 757 (refusal to hear any application for new licences) and following *R. v. Holborn Licensing Justices* (1926) 42 TLR 778 (fixed policy but case duly considered).

[3] *R. v. Rotherham Licensing Justices ex p. Chapman* (1939) 55 TLR 718 (explained in the *Torquay* case, above). See also *Perilly v. Tower Hamlets London Borough Council* [1973] QB 9 (mistaken rule of 'first come first served').

[4] *R. v. Flintshire CC Licensing Committee ex p. Barrett* [1957] 1 QB 350.

abuse of discretionary power, discussed elsewhere.[5] None of them is in any way hostile to the adoption of a policy as such.

Bankes LJ stated the basic distinction in a frequently cited judgment. He contrasted two classes of cases: 'cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case'; and 'cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made'.[6] Accordingly the Port of London Authority, which was empowered to grant or withhold permission for the construction of docks, was allowed to enforce its policy of refusing permission, after due consideration, in cases where the new dock would come into competition with its own docks.

Ministers and national policy

Ministerial policies are subject to the same principles as the policies of other authorities. Accordingly it was unobjectionable for the Minister of Housing and Local Government, in deciding planning appeals, to follow a policy of discouraging development likely to interfere with the Jodrell Bank radio telescope provided that he judged each individual case fairly.[7] The Home Secretary was likewise entitled to pursue a policy of discrimination against foreign students of 'scientology' by refusing to renew their residence permits, subject to the same qualification;[8] and he might change his policy so as to refuse release on licence ('parole') to certain classes of prisoners in all but the most exceptional cases, so long as each case was examined individually.[9] The Home Secretary fettered his powers unduly when he announced a policy of considering the release of life sentence prisoners on certain grounds only, but he remedied the fault by a later announcement that he would take account of exceptional circumstances.[10] He committed the same fault when he fixed a rigid tariff-period of 15 years for the minimum term of imprisonment of two boy murderers instead of fixing a term which would be provisional and always reviewable.[11] The law was reviewed by the House of Lords in another case where

[5] See particularly *R. v. Birmingham Licensing Planning Committee ex p. Kennedy* [1972] 2 QB 140 (unlawful requirement that licences be purchased), below, p. 393.
[6] *R. v. Port of London Authority ex p. Kynoch Ltd.* [1919] 1 KB 176 at 182.
[7] *Stringer v. Ministry of Housing and Local Government* [1970] 1 WLR 1281.
[8] *Schmidt v. Home Secretary* [1969] 2 Ch. 149.
[9] *Re Findlay* [1985] AC 318. Opinions in the Divisional Court and the Court of Appeal were divided.
[10] *R. v. Home Secretary ex p. Hindley* [2000] 2 WLR 730.
[11] *R. v. Home Secretary ex p. Venables* [1998] AC 407. Compare *R. v. Accrington Youth Court ex p. Flood* (1997) 10 Admin. LR 17 (rigid policy of sending female young offenders to remand centres instead of to young offender institutions held unlawful).

the Board of Trade had made it a rule to refuse all applications for investment grants for items costing less than £25.[12] The claimants had invested over £4m. in oxygen cylinders, but since each cylinder cost only about £20 the Board refused a grant, after giving full consideration to the case. The Act said merely that the Board 'may make' a grant. The House of Lords upheld the Board's action. Lord Reid said: '. . . if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him'. He added the familiar proviso: 'provided that the authority is always willing to listen to anyone with something new to say—of course I do not mean to say that there need be an oral hearing'. But he sounded a caveat against taking Bankes LJ's formula literally in every case; and Lord Dilhorne carried this further, saying: 'it seems somewhat pointless and a waste of time that the Board should have to consider applications which are bound as a result of its policy decision to fail'. There may thus be room for some relaxation of the requirement of consideration of every application on its merits, at any rate in cases involving a national policy where applications are multitudinous. And there is no real difference in this context between a 'policy' and a 'rule'.

In a strongly contrasting case a minister resolved to turn a deaf ear to all pleas for a change of policy and his decision was quashed.[13] He had consulted local authorities generally before obtaining statutory power to reduce the central government's rate support grant to those whose expenditure was in his view excessive. After the Act was passed he refused to receive further representations and decided on reductions in the case of several authorities. He was held to have fettered his discretion unlawfully by settling and announcing his policy before he obtained his powers and then refusing to consider any appeals for exceptions. He had disregarded his duty 'to listen to any objector who shows that he may have something new to say'. He had also disregarded the principles of natural justice.[14]

Sometimes a minister will have power to make regulations covering the same ground as some policy which he has adopted, and it may then be argued that he should enforce his policy openly by making regulations, which may be subject to Parliamentary scrutiny, rather than covertly by exercising discretion in each case. This argument was rejected by the Court of Session in a case where the Secretary of State had refused to approve the appointment of a chief constable on the ground that he came from within the local force.[15] The Secretary of State had both a discretionary power to withhold consent and also power to prescribe the

[12] *British Oxygen Co. Ltd.* v. *Board of Trade* [1971] AC 610; cf. *Kilmarnock Magistrates* v. *Secretary of State for Scotland* (below).

[13] *R.* v. *Secretary of State for the Environment ex p. Brent LBC* [1982] QB 593 (Divisional Court).

[14] See below, p. 526.

[15] *Kilmarnock Magistrates* v. *Secretary of State for Scotland* 1961 SC 350 (Secretary of State's decision upheld). This question has been much litigated in the United States: see Schwartz and Wade, *Legal Control of Government*, 93.

qualifications of chief constables by regulation but he had made no regulation embodying his policy for rejecting internal appointments. There might perhaps be cases where a regulation-making power could be held to exclude administrative discretion; but where both powers are conferred by the same statute it is reasonable to allow the minister to choose between them; and it is, indeed, his duty to decide every case as he believes the public interest requires at the time.

Indiscriminate action

It undoubtedly remains true that the court will not accept the indiscriminate use of a power where cases ought to be considered on their own merits. If a local authority has power to refer furnished lettings to a rent tribunal, in order to obtain adjudication of the rent, it may not adopt a rule of referring all tenancies in any block of flats where two or more reductions of rent have previously been ordered, whether or not the tenants have complained.[16] For it is inherent in the power to refer that there should be some reasonable and specified ground for doing so in each particular case. If the authority has power to require owners of unfit houses to repair them, or else to repair them itself at the owner's expense, it may not give standing orders that the latter course shall always be taken without regard to individual circumstances.[17] There can be no substitute for the genuine exercise of discretion on every occasion.

RESTRICTION BY CONTRACT OR GRANT

Contractual fetters on discretion

Just as public authorities must have policies, so they must make contracts. Like policies, contracts may be inconsistent with the authorities' proper exercise of their powers. But, unlike policies, contracts are legally binding commitments, and therefore they present more difficult problems. The general principle is the same: an authority may not by contract fetter itself so as to disable itself from exercising its discretion as required by law. Its paramount duty is to preserve its own freedom to decide in every case as the public interest requires at the time.[18] But at the same

[16] *R. v. Paddington and St Marylebone Rent Tribunal ex p. Bell London & Provincial Properties Ltd.* [1941] 1 KB 666 (below, p. 394). Cf. *Wood v. Widnes Cpn.* [1898] 1 QB 463 (over-rigid policy of requiring installation of water-closets).

[17] *Elliott v. Brighton BC* (1980) 79 LGR 506.

[18] See *Denman Ltd. v. Westminster Cpn.* [1906] 1 Ch. 464 at 476.