Toafa v. Attorney-General

High Court of Tuvalu
Donne C.J.
8 June 1987

Constitutional law – public servants – powers of Governor-General to dismiss public servants at will – whether power of dismissal is fettered by rules promulgated under legislation – whether Governor-General is required to afford affected persons a hearing before acting on advice tendered to him to order dismissal of public servants – whether Public Service Commission upon the advice of which the Governor-General must act is required to afford affected persons a hearing before tendering advice to Governor-General – Constitution of Tuvalu 1978, sections 86, 87 (1) – Public Service Ordinance 1979, section 7 – General Administrative (Abnormal Hours Allowance) Amendment 1983.

Administrative law – natural justice – right to be heard – whether persons holding office as public servants and liable to be dismissed by the Crown at its pleasure are entitled to be heard before being dismissed.

The Public Service of Tuvalu was established by the Constitution of 1978. By section 87(1) the power of dismissal of public servants was vested in the Governor-General "acting in accordance with the advice of the Public Service Commission". The Public Service Commission was established by section 86 with the function (inter alia) of tendering advice to the Governor-General. In 1979 the Public Service Ordinance 1979 was enacted. Section 7 provided for the Minister to promulgate General Administrative Orders relating to the Public Service. In 1983 the General Administrative (Abnormal Hours Allowance Amendment) Order 1983 was promulgated. This provided (inter alia) that certain orders relating to the public service which had been issued in 1974 (prior to the independence of Tuvalu) were to remain in force with such modifications as may be required to bring them into conformity with the Constitution and the Public Service Ordinance. Amongst the provisions in the General Administrative Orders were provisions dealing with "conduct and discipline".

In January 1983 Toafa and two others were dismissed from their positions as permanent officers of the Public Service by order of the Governor-General. The applicants applied for (a) a writ of certiorari quashing the order and (b) a writ of mandamus requiring the Public Service Commission to reconsider the recommended dismissal of the applicants. The grounds were (a) that the Public Service Commission acted contrary to rules of natural justice in that it decided to recommend to the Governor-General that the applicants be dismissed without affording them a hearing; and (b) that the Governor-General acted contrary to rules of natural justice in deciding to act on that advice without affording the applicants a hearing. The applicants further contended that the General Administrative Orders promulgated under the Public Service Ordinance were binding on the Public Service

Commission and that the provisions wherein as to conduct and discipline had not been observed by the Public Service Commission in making its decision to recommend the applicants' dismissal.

HELD:

(1) The common law rule that public servants hold office at the pleasure of the Crown and may be dismissed without cause applies in Tuvalu. The rule may be modified by statute but not by contract: *l.* 170.
Council of Civil Service Unions v. *Minister for the Civil Service* [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1985] I.C.R. 14; [1984] 3 All E.R. 935; [1985] L.R.C. (Const.) 948 *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 Q.B. 641; [1956] 2 W.L.R. 919; [1956] All E.R. 807; [1956] 3 W.L.R. 643; [1956] 3 All E.R. 338 followed.

(2) Under section 87(1) of the Constitution of 1978, the Governor-General was empowered to dismiss public servants but only in accordance with advice to do so tendered by the Public Service Commission. In its formulation of that advice, the Public Service Commission was not bound by procedures set out in General Administrative Orders since it was an independent body whose freedom from outside control was guaranteed by the Constitution: *l.* 360.

(3) Insofar as the General Administrative Orders established terms which applied to the contracts of public servants, they were not inconsistent with and did not derogate from the principle that the contracts were determinable at the pleasure of the Crown: *l.* 370.

(4) In recommending the dismissal of the applicants, the Public Service Commission was not exercising any legal power affecting the applicants since it was only the Governor-General who had power to dismiss them. Accordingly it is with the Governor-General's actions that the Court must concern itself, not the Public Service Commission's: *l.* 400.

(5) Since the Governor-General on the advice of the Public Service Commission could dismiss public servants at his pleasure, he was under no duty to afford affected persons a hearing nor to give reasons for dismissal: *l.* 420.
Ridge v. *Baldwin* [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66 followed.

(6) Accordingly the applications were dismissed.

Other cases mentioned in judgment:

Clodumar v. *Chief Secretary* [1987] L.R.C. (Const.) 979
Dean v. *Bennett* (1870) L.R. 6 Ch. 489
Dunn v. *R.* [1896] 1 Q.B. 116
Gould v. *Stewart* [1896] A.C. 575
Kodeeswaran v. *Attorney-General of Ceylon* [1970] A.C. 111
R. v. *Darlington School Governors* (1844) 6 Q.B. 682
R. v. *Stratford-on-Avon Corporation* (1809) 11 East 176
Reilly v. *R.* [1934] A.C. 176
Riordan v. *War Office* [1959] 1 W.L.R. 1046
Scott v. *Commonwealth of Australia* (1982) 41 A.C.R. 49
Shenton v. *Smith* [1895] A.C. 299
Terrell v. *Secretary of States for Colonies* [1953] 2 Q.B. 482; [1953] 3 W.L.R. 331;

[1953] 2 All E.R. 490
Willis v. *Childe* (1851) 13 Beau. 117

ED. NOTE: See also *Ibrahim Sulaiman* v. *Papua New Guinea University of Technology,* supra at p. 267, where the dismissal of a public employee was held to be not subject to judicial review, but only remedies for breach of contract.

Marsh for the applicants
Attorney-General in person

DONNE C.J.

Judgment:

The applicants apply for the issue of writs of certiorari and mandamus, the former to quash the order of the Governor-General dismissing them from the Public Service of Tuvalu and the latter to order the Public Service Commissioner "to hear and determine the matter of the recommended dismissal of the applicants". The grounds upon which the writs are sought are that:

(a) The Public Service Commission acted contrary to the rules of natural justice in making its recommendation to the Governor-General in that the applicants were not afforded the opportunity to be heard at a fair hearing before the Commission, and
(b) Their dismissal was contrary to the rules of natural justice since the Governor-General followed the advice of the Public Service Commission recommending it without the applicants having been afforded such a fair hearing.

The applicants were public servants attached to the Broadcasting and Information Office of the Government of Tuvalu. In January 1983, on various dates, they were dismissed from the Public Service by the Governor-General. The reasons for dismissal are immaterial for the purpose of these proceedings. The applicants were each notified of his or her dismissal by letter and in each letter were stated the specific grounds of the dismissal. Prior to that none of the applicants had been informed of the allegations against them nor had they been given an opportunity to be heard to answer any of them.

The Public Service of Tuvalu was established by the Constitution of 1978 and the applicants were appointed as permanent officers of the Service pursuant to Section 87 thereof. Apart from the Constitution, the only legislation relating to the Public Service is the Public Service Ordinance 1979. Pursuant to Section 7 of that Ordinance, there was made by the Prime Minister what was called "The General Administrative (Abnormal Hours Allowance Amendment) Order 1983" which provided (inter alia).

> That the General Orders 1974 Edition Sections B, C, and D are the General Administrative Orders issued for the purpose of section 7(1) of the Public Service Ordinance in respect of the matters dealt with therein: Provided that the said sections of the said General Orders 1974 must be construed with such modifications, adaptions, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution of Tuvalu and the Public Service Ordinance.

Dated this 6th day of January, 1983.

Prime Minister of Tuvalu.

The General Administrative Orders which were invoked deal with "Appointments, Promotions and Transfers" within the Public Service, "Termination of Appointments, Resignation and Retirement" and "Conduct and Discipline". They were originally promulgated before Tuvalu became independent by the Colonial Administration. I do not propose to review them in this decision other than to express the view that, although they by the 1983 Order (supra) are required to be construed "with such modifications, adaptions, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution" and the Public Service Ordinance, the administration of them must inevitably be difficult in view of certain archaic terminology therein and their inconsistency in many respects with the Constitution.

Dismissal at pleasure – the law

The first question to be decided is whether the common law rule of dismissal at pleasure applied in Tuvalu, in respect of public servants at the time of the dismissal of the applicants.

In the case of *Clodumar* v. *Chief Secretary* [1987] L.R.C. (Const.) 979, the rule was expressed as follows (p. 984):

> At common law, servants of the State were dismissible at pleasure on the principle that the public interest requires that the government should be able to disembarrass itself of any employee at any moment. The general policy of the judges was to treat Crown or State service as no concern of ordinary law.
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> However, in the process of considering this prerogative, the courts have examined to what extent the common law rule can be excluded. The decisions show that the rule will apply unless the State servant can point to a statutory provision which is inconsistent with the common law.

The question as to whether the Crown's right of dismissal at pleasure was fettered in the case where there was a contract of employment of the public servant with the Crown was considered by the Queen's Bench Division of the High Court in the case of *Council of Civil Service Unions* v. *Minister for the Civil Service* [1984] 3 W.L.R. 1174; [1984] L.R.C. (Const.) 894. Although this case finally by way of appeal reached the House of Lords, the appeal was concerned with a different point of law not relevant to this present case. Glidewell J. in the High Court reported in pp. 983-5 in L.R.C. (Const.) said:

> Mr Brown submits that there is ample authority for the proposition that the Crown can dismiss its servants at will and that any provision to the contrary, except in or under a statute, is of no effect as being a fetter on the Crown's power. . . .
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> In *IRC* v. *Hambrook* [1956] 2 Q.B. 641 Lord Goddard, C.J. whose judgment at first instance was upheld by the Court of Appeal said at p. 653:
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> > I think an established civil servant, whatever his grade, is more properly described as an officer in the civil employment of Her Majesty, and I can

see no ground on which different rules of law in respect of his employment can be applied according to the grade or position he may occupy. They apply to a junior clerical officer as they do to a Permanent Secretary; as the Judicial Committee said in the *New South Wales* (1945) H.C. 457; 489, case, the same rules of law in this respect apply in relation to the armed forces to a Field Marshal as to a private soldier. It is settled beyond controversy that the Sovereign can terminate at pleasure the employment of any person in the public service; except in special cases where it is otherwise provided by law. If authority be needed for what may now be considered as axiomatic, I need only refer to *Shenton* v. *Smith* [1895] A.C. 299 and *Dunn* v. *The Queen* [1896] 1 Q.B. 116, but it is curious that there does not appear to be a definite and clear decision as to whether there is a contract of service between the Crown and its officers in the Civil Service. Mr Stuart Robertson, in the work to which I have already referred [G.S. Robertson, *Civil Proveedings by and against the Crown* (1908)], after citing numerous cases and instances of petitions of right that have been presented, though not in all cases tried, says, at p. 359. "Even if there be a contract of service the Crown's absolute powers of dismissal must be deemed to be imported into it." Lord Atkin said in *Reilly* v. *R* [1934] A.C. 176, 180, that "a power to determine a contract at will is not inconsistent with the existence of a contract until so determined". Just previously to this passage he said: "their Lordships do not find it necessary to express a final opinion on the theory accepted in the Exchequer Court, – that is in Canada – "that the relations between the Crown and the holder of a public office are in no degree constituted by contract. They content themselves with remarking that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other." It is, I think, fair to say that the trend of their Lordships' opinion seems to be that in the absence of some special term, such as engagement for a definitely expressed period, there is not a contractual relationship.

In *Riordan* v. *War Office* [1959] 1 W.L.R. 1046, Diplock, J. (as he then was), said, at p. 1053:

> In my view the law is correctly stated by Mr George Stuart Robertson at page 359 of that book [supra], where he says: "The Crown's absolute power of dismissal can only be restricted by statute, and anything, short of "a statute, which purports to restrict it, is void as contrary to public policy". I hold, therefore, that the plaintiff can have no cause of action arising out of termination of his employment.

In *Kodeeswaran* v. *Attorney-General of Ceylon* [1970] A.C. 111, his Lordship, by then Lord Diplock, giving the judgment of the Judicial Committee of the Privy Council, said at p. 111:

> It is now well established in British constitutional theory, at any rate as it has developed since the eighteenth century, that any appointment as a Crown servant, however subordinate, is terminable at will unless it is

> expressly otherwise provided by legislation; but, as pointed out by Lord Atkin in *Reilly* v. *R* [1934] A.C. 176, 180; "a power to determine a contract at will is not inconsistent with the existence of a contract until so determined". In Reilly's case Lord Atkin, while finding it unnecessary to express a final opinion as to whether the relationship between the Crown and the holder of a public office was constituted by contract, remarked at p. 179: ... "that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other."

and at p. 1123:

> A right to terminate a contract of service at will coupled with a right to enter into a fresh contract of service may in effect enable the Crown to change the terms of employment in future if the true inference to be drawn from the communication of the intended change to the servant and his continuing to serve thereafter is that his existing contract has been terminated by the Crown and a fresh contract entered into on revised terms.

Despite some dicta apparently to the contrary in the Privy Council decisions in *Gould* v. *Stewart* (18 96) A.C. 575 and *Reilly* v. *R* [1934] A.C. 176, I agree with Mr Brown that the authorities establish that the engagement of a civil servant can be terminated by the Crown at will, unless some statutory provision prevents this.

In the Supreme Court of Western Australia, this principle was similarly expressed by Kennedy J. in *Scott* v. *Commonwealth of Australia* (1982) 41 A.C.R. 49, where at p. 503 he said:

> The insuperable obstacle which Mr Scott then faces is what I accept as the established common law rule that a Crown servant may be dismissed at pleasure, and this notwithstanding the apparent terms of the servant's contract.

See also *Terrell* v. *Secretary of State for Colonies* [1953] 2 Q.B. 482, 340; [1953] 3 W.L.R. 331, 340; [1953] 2 All E.R. 490, 495 (line H.7) - 496 (line B.1).

The Public Service of Tuvalu as at January 1983

By Section 9 of the Tuvalu Independence Order 1973, all persons holding public office immediately prior to Independence Day, 1 October 1978 became public servants under the Constitution. The Public Service of the independent State of Tuvalu was thus established by the Constitution of 1978. Following independence there was enacted the Public Service Ordinance 1979. This enactment and the Constitution govern the establishment and regulation of the public service as at January 1983. There is no other legislation that is concerned with the public service.

Chapter VIII of the Constitution deals with "The Public Service". It provides in Section 87(1) thereof how public servants, apart from special officers, are appointed removed and controlled. It reads:

> Subject to the provisions of this Constitution, power to make appointments to public offices (including power to confirm appointments) and to remove and to

exercise disciplinary control over persons holding or acting in such offices is vested in the Governor-General, acting in accordance with the advice of the Public Service Commission.

Similar powers in relation to magistrates are given to the Governor-General under Section 88 and the power of appointment and suspension of the Chief of Police is given under Section 89. It should be mentioned that the Governor-General, apart from these specific powers, has a general power under Section 44 to constitute offices for Tuvalu and to both appoint to these officers and terminate such appointments.

Section 86 creates the Public Service Commission and fixes its establishment. Its functions under Chapter VIII are concerned with the tendering of advice to the Governor-General in the exercise of his powers under Sections 87,88 and 89. It is also given appellate functions under the latter section in respect of certain decisions made by the Chief of Police under subsection 3 of the latter section.

The Commission operates under the authority of Section 110 by which it is empowered to make regulations and regulate its own procedure. (Subsections 1 and 3). It is relevant to note that no regulations have been promulgated. This section also guarantees the Commission's independence by directing that in the exercise of its functions under the Constitution, it shall not be subject to the direction or control of any other person or authority.

The Public Service Ordinance 1979 purports to "make provision additional to that of the Constitution" in relation to both the public service and the Public Service Commission. Such additional powers bestowed must be subject to those already vested in the respective bodies by the Constitution (section 3). The Ordinance is mostly concerned with what could be called "machinery' matters e.g. the Establishment Record (Section 4). Provision is made for Advisory Committees to advise "the Minister" on certain public service matters, but, their advice is not binding on the Minister, the Governor-General or the Public Service Commission (Section 6(2)). The functions of the Public Service Commission are extended to include the power of advising, if requested, the Governor-General in relation to General Administrative Orders and the Governor-General, any Members or Departmental Secretary on any matters concerning the public service (section 9).

The General Administrative Orders referred to are created by Section 7 of the Ordinance by "the Minister". The section reads (inter alia) as follows:

(1) The Minister may from time to time issue orders relating to the administration of the public service to be known as General Administrative Orders.

(2) General Administrative Orders may cover every aspect of the work and privileges of all employees of the Tuvalu Government for their guidance, assistance and control, but shall be without prejudice to the provisions of the Constitution, this Ordinance, the Public Service Commission Regulations, financial instructions and regulations and any express contractual term relating to any such employee.

(3) ...

(4) Save as provided in subsection (2), an order made under this section shall be deemed to form part of the conditions of service of all employees to whom it is expressed to relate, as from the date of its general distribution or any

other date provided by such order.

Provided that no order which has an adverse effect on the terms and conditions of service of any employee shall take effect at any earlier date than that of its general distribution.

(5) ...

(6) ...

The Prime Minister on 6 January 1983, invoked this section to promulgate The General Administrative (Abnormal Hours Allowance) Amendment 1983 (supra). Mr Marsh relies heavily on these orders. As I understand him, he argues that they are binding on the Public Service Commission governing its procedure and submits that the dismissals of the applicant cannot stand since the Commission did not act in accordance with the Orders and the applicants were not given a fair hearing to which in accordance with the principles of natural justice, they were entitled. This requires a consideration of the respective rules of the Governor-General and the Commission in the dismissal process.

The roles of the Public Service Commission and the Governor-General in dismissals

Although in legislation creating it and defining its functions, it is not expressed specifically that the main function of the Public Service Commission is the control and the management of the public service, clearly that is its implied purpose giving it the competency to advise the Governor-General on the appointment and removal as well as on his powers of disciplinary control in relation to public servants.

Its powers of management and control however, are limited by the Constitution. It does not have the power to appoint, remove or exercise disciplinary control over, public servants. Those powers are retained by the Crown. They are vested in the Governor-General (Section 7(1)). I do not accept as valid the proposition put to me that in the exercise of those powers, the Governor-General is not acting as representative of the Crown. The Governor-General's status is established by the Constitution (Section 28(1)). He may exercise on behalf of the Crown its executive authority (Section 31(2)). He, I consider, has no lesser status in the performance of any of the powers given to him in the Constitution.

As already stated, the role of the Public Service Commission in relation to these particular powers of the Governor-General is an advisory one and in the advisory process adopted by it, I am of the opinion the General Administration Orders play no part. In my view, they in effect are directed to the terms of contract which govern employment of public servants. They are expressed in Section 7(1) of the Public Service Ordinance (supra) to be made for the "guidance, assistance and control" of employees of the Tuvalu Government and by subsection 4 thereof, they are deemed to form part of the conditions of service of the employees covered by them. They are not expressed to be rules to which the Public Service Commission is subject. That Commission is an independent body whose freedom from outside control and direction is guaranteed by the Constitution (section 110). It is a statutory authority with power to regulate its own procedure. It has not adopted the General Administration Orders of "the Minister" and it thus follows that they cannot bind the Commission in the absence of statutory authority to that effect. There is no such authority.

By what process, therefore, does the Public Service Commission formulate the

advise it tenders to the Governor-General before he considers the exercise of his power of dismissal? Clearly it must act within the framework of its own procedures. It has no statutory regulations governing these, but, it is empowered to regulate its own procedure (supra). As I see it, since the General Administration Orders are not binding on it, the Commission is not obliged to act on them. It is true these Orders establish the terms of employment of the public servant, but, as Lord Atkin said in *Reilly* v. *R.* (quoted in the *Hambrook* case (supra), "a power to determine a contract at will is not inconsistent with the existence of a contract until so determined." See also *Scott's* case (supra). Put in another way, the terms of contract setting out the servant's rights cannot in any way affect the right of the Crown to determine it at pleasure. Only by statute can that right be restricted. Here the Public Service Commission tenders advise not on the contract of the public servant, but, on his dismissal. The power of dismissal is given to the Governor-General.

In the result, I conclude that the procedures of the public Service Commission are not prescribed by law; they do not in any way fetter the Governor-General's right of dismissal. I can find no legislation in the laws of Tuvalu restricting the common law right of the Crown to dismiss at pleasure and I hold that the right of dismissal given to the Governor-General under section 7 is exercised by him on behalf of the Crown and is thus exercisable at pleasure.

Natural justice – a fair hearing

The applicants in their claims allege that "the Commission failed to observe the rules of natural justice in purporting to dismiss the applicants without a fair hearing". The removal of the applicants from office was by order of the Governor-General exercising his power of removal given under Section 87(1) of the Constitution. The Public Service Commission's part in the removal was the tendering of the advise which is a mandatory prerequisite to the exercise by the Governor-General of his power. It is the Governor-General, not the Public Service Commission, whose prerogative it is to dismiss and his right of dismissal is at pleasure. It is with the exercise by him of that right that the Court must concern itself, not the manner in which the Commission arrived at its decision to advice dismissal, a process which preceded the decision making of the Governor-General. The question is whether the Governor-General should have done any more than he did before he removed the applicants from public office. Now, the power to dismiss at pleasure allows the person possessing it to dismiss without giving any reason since he need not have anything against the servant he dismisses. The power of dismissal at pleasure is unfettered unless there is statutory provision to the contrary. In the case of the Governor-General section 86 (supra) fetters his power of dismissal to the extent that he is required to act on the advice of the Commission. But having received the advice is he required to go behind it, to question it? I am satisfied there is no such obligation on him to do so. Nor is he empowered to do so. He must accept it as tendered. That, I consider, is the effect of section 39 of the Constitution which imposes a mandatory requirement that the Governor-General "shall act in accordance with the advice" when required to do so by the Constitution. Only in the case of the obligation to "consult" with as opposed to receiving advice from, any person or authority (other than Cabinet), can he use his discretion (subsection 2). Furthermore, by subsection 3 there is no right to call in question in any court of law whether, in the case of advice of or consultation with, any person or authority e.g.

the Public Service Commission, he has acted in accordance therewith.

This leads me to the firm conclusion that in deciding whether the power of dismissal has been properly exercised, the Court must be satisfied the advice of the Public Service Commission was tendered to the Governor-General before he dismissed the public servants. The Governor-General must be considered without question to have acted in accordance with that advice which is the sole prerequisite laid down for the lawful exercise of his power to dismiss. There is no obligation on him to do more. There is certainly no obligation on him to hear the servants before he dismisses them. This is well established in law and is stated by Lord Reid in the oft quoted case of *Ridge* v. *Baldwin* [1964] A.C. 40, 65-66; [1963] 2 W.L.R. 935, 941-942; [1963] 2 All E.R. 66, 71 (line H.5) - 72 (line B.3) as follows:

Then there are many cases where a man holds an office at pleasure. Apart from judges and others whose tenure of office is governed by statute, all servants and officers of the Crown hold office at pleasure, and this has been held even to apply to a colonial judge *(Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482; [1953] 3 W.L.R. 331; [1953] 2 All E.R. 490; A.C. 1964. 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. That was stated as long ago as 1670 in *Rex* v. *Stratford-on-Avon Corporation* (1809) 11 East 176, where the corporation dismissed a town clerk who held office durante bene placito. The leading case on this matter appears to be *Reg* v. *Darlington School Governors* [1844] 6 Q.B. 682, although that decision was doubted by Lord Hatherley L.C. in *Dean* v. *Bennett* (1870) L.R. 6 Ch. 489, and distinguished on narrow grounds in *Willis* v. *Childe* (1851) 13 Beav. 117, I fully accept that where an office is simply held at pleasure the person having power of dismissal cannot be bound to disclose his reasons. No doubt he would in many cases tell the officer and hear his explanation before deciding to dismiss him.

But if he is not bound to disclose his reason and does not do so, then, if the court cannot require him to do so, it cannot determine whether it would be fair to hear the officer's case before taking action.

For the reasons above stated, I am satisfied the writs as prayed cannot issue and the applications are dismissed.

Reported by: P.T.R.