IN THE HIGH COURT OFAUSTRALIA
ADELAIDE REGISTRY

No. A4 of 2011

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

AUSTRALIAN EDUCATION UNION
Appellant

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-and-

DEPARTMENT OF EDUCATION & CHILDREN'S SERVICES
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

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1. The respondent's submission at paragraph 7.6 furnishes a further contextual ground for construing the Act in the manner contended for by the appellant. The respondent's explanation of the statutory régime for long service leave shows that teachers appointed under the *Education Act 1915* (SA) and its successor Acts were excluded from the category of public servants whose entitlements were governed by the *Public Service Act 1967* (SA) and its successor Acts.[1] That makes sense in the context of teachers appointed under s.15, whose special terms and conditions of employment are governed by Part III of the *Education Act 1972* leaving the entitlements of persons appointed under s.9(4) (necessarily non-teachers on the

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[1] This dichotomy has a long history. In 1935 the following section was inserted into the *Education Act 1915* (SA):

> "s.18a - *Notwithstanding anything contained in the Acts relating to the Public Service the provisions in those Acts as to the granting of long leave by the Governor to persons in the employ of the Government of the State shall not apply to any teacher appointed under this Act."*

The *Public Service Act 1936* (SA) excluded from the public service *"any teacher appointed under the Education Act 1875, the Education Act 1915, or any Act amending or substituted for any of those Acts":* s.6(1). The *Public Service Act 1967* (SA) and its successor Acts prescribe and continue to prescribe the same exclusion to this day: Respondent's submissions: fn 11.

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appellant's case) to be governed by the *Public Service Act 1967.* On the respondent's case, however, the exclusion of teachers from the 'public service' leads to the anomalous result that persons appointed under s.9(4) are public servants with statutory entitlements under the *Public Service Act 1967* unless they happen to be teachers, in which they are excluded from *both* the 'teaching service' and the 'public service' and have no statutory entitlements.

2. There is no reason for Parliament to have intended such an arbitrary exclusion. The better view is that the exclusion of teachers from the provisions of the *Public Service Act 1967* assumes, consistently with the appellant's case, that all public school teachers will be governed by Part III.

3. The decision in *Cusack v. Parsons*[2] (relied on by the respondent at footnote 44 of its submissions) is no authority for the proposition at issue in this case, namely, the validity of teaching appointments under s.9(4) for the following reasons:

(a) There, the Department challenged the jurisdiction of the Teachers Appeal Board to entertain an appeal by a certain teacher, Ms. Robbins, for discriminatory preferment in the appointment of a less qualified teacher ahead of her. At the time of the acts complained of, Ms Robbins was a qualified teacher but held no teaching position either as a contract teacher or as an officer of the teaching service. At the time of her appeal, she was an officer in the teaching service under s.15. Nothing in the case turned on Ms. Robbins' one time status as a contract teacher purportedly appointed under s.9(4).

(b) In *Cusack v. Parsons,* the Court held (1) that the relevant time, for the purposes of jurisdiction, was the time of the acts complained of, not the time of instituting the appeal; (2) that, although the Regulations purported to give appeal rights to a *"teacher"* – a term which might include Ms. Robbins, who though not at the relevant time employed in any capacity by the Department, was *"qualified to teach"* – nevertheless the Act restricted the Board's jurisdiction to appeals brought by an officer of the teaching service, and there was no warrant to give the word *"teacher"* any wider meaning that that, even

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2 (1988) 48 SASR 364

if, incidentally, to do so meant excluding contract teachers appointed under s.9(4) from access to the Board. That is the *ratio decidendi* of the case.

(c) This Court in *Cusack v. Parsons* simply assumed the regularity of teaching appointments under s.9(4). That is unsurprising, as it was not necessary to the Court's decision to have regard to them. Certainly, the statement of Jacobs J.[3], that teachers in departmental schools are not necessarily officers in the teaching service but may be employees appointed by the Minister under s.9(4) is in no sense a judicial deliberation but a simple assertion of the then practice of the Department as reported to the Court.[4]

10 (d) The respondent relied below on the statement of Cox J. that *"the Act thus makes a clear distinction between those teachers who are officers of the teaching service and those who are not."* But that statement was not made on the issue of s.9(4). The context from which his Honour's words are extracted has nothing to do with s.9(4) but rather with the distinction between teachers as persons qualified to teach, and the officers of the teaching service, which his Honour describes as *"plainly...the government teaching service administered by the Minister of Education and, under him, the Director-General and his Department".*[5] Understood in this light, his Honour's statement is not controversial and, if anything, when read alongside the following further
20 statements, supports the appellant's argument that Part III is an exhaustive code for the appointment of teachers in public schools. Thus when turning to s.9(4), Cox J. said: [6]

> *"Plainly this envisages three categories of officers – officer of the teaching service, departmental officers, and other officers considered necessary for administration or welfare purposes.* [Note: not teaching purposes][7] *It is not obvious what functions an officer on the third category would perform – counsel were not able to offer any plausible examples – but I do not think it matters".*

In other words, his Honour confines the meaning of s.9(4) in the same way as the appellant.

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3 At 366

4 Cox J. reports the appointment of Ms Robbins under s.9(4) as simply a finding of fact by the Appeals Board: at 372. Jacobs J. notes an entire absence of evidence on their relationship to the department: At 367

5 At 374

6 At 375

7 Note supplied by the appellant.

> *"It is probably also the case that the teaching service established under Part III consists solely of officers, appointed pursuant to s.15, although the amendments that were made to Part II by the* Education Act Amendment Act 1986 *have left the position a little less clear than it might be in that respect. The may be said with respect to the status of departmental officers".* [8]

4. In other words, his Honour tends to adopt the "code" approach to Part III advocated by the appellant. In the event, it was entirely unnecessary for the Court to speculate on the scope of s.9(4) and it did not purport to do so.

10 **DATED** 8 April 2011

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