[HIGH COURT OF AUSTRALIA.]

DETTMAN . . . . . APPELLANT;

PLAINTIFF,

AND

WILLIAMS . . . . . RESPONDENT.

NOMINAL DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *Sep.* 25, 26.

Griffith C.J., Barton and O'Connor JJ.

Public Service Act (*N.S.W.*), (59 *Vict. No.* 25), *secs.* 12, 59, 60, (*consolidated* 1902, *No.* 31, *secs.* 15, 70, 71) — *Public Service* (*Superannuation*) *Act* (*N.S.W.*), (*No.* 55 *of* 1899), *sec.* 2—*Officer who elects to retire—Not a person whose services were dispensed with—Construction of Statutes.*

Sec. 59 of the *Public Service Act* 1895 provided that no person to whom the Act applied should receive any pension, superannuation, retiring allowance or gratuity, except as provided by sec. 60. The latter section provided that all allowances made to persons whose services were dispensed with under the Act for any cause other than an offence were, subject to certain conditions, to be made and calculated upon certain specified scales. Sec. 12, sub-secs. II. and V., provided, in effect, that any officer whose salary was reduced by the Public Service Board by more than one fourth, should have the option of continuing in the service at the reduced salary, or of retiring therefrom, and, if he elected to retire, should be entitled to "the payment and gratuity mentioned in sec. 60."

Held, that an officer who under such circumstances elected to retire, and received the payment and gratuity under sec. 60, did not, by reason of his becoming entitled to the payment and gratuity mentioned in sec. 60, become an officer whose services "were, for any cause other than an offence, dispensed with under the provisions of the *Public Service Act* of 1895" within the meaning of sec. 2 of the *Public Service* (*Superannuation*) *Act* 1899, which provided that officers who came within that description should in certain cases be entitled to a further allowance.

Decision of the Supreme Court: *Dettman* v. *Williams*, (1905) 5 S.R. (N.S.W.), 265, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

H. C. OF A. 1905.

DETTMAN v. WILLIAMS.

The appellant was an officer in the Public Service of New South Wales. In 1896 his salary was reduced by the Public Service Board by more than one-fourth; and he elected to retire under sec. 12, sub-secs. II. and V., of the *Public Service Act* (59 Vict. No. 25), (now sec. 15, sub-secs. II. and V., of the consolidated Act 1902, No. 31). He received the gratuities to which he was entitled upon the basis of sec. 60 of that Act, (now sec. 71 of the Act 1902, No. 31). After the passing of the *Public Service (Superannuation) Act* (No. 55 of 1899), he sued the defendant, as nominal defendant duly appointed on behalf of the Government, to recover superannuation allowance under sec. 2 of that Act, as a person whose services were dispensed with under the provisions of the Act of 1895 for a cause other than an offence.

At the trial a verdict was entered for the defendant, and the Full Court, on motion to make absolute a rule *nisi* to set aside the verdict, held that the verdict was right, and discharged the rule: *Dettman* v *Williams* (1).

From this decision the present appeal was brought by special leave.

The various sections are set out in the judgments. For the sake of clearness, the references are, in each case, to the sections of the earlier Acts, not to the consolidation Acts.

Armstrong (with him *Edwards*), for the appellant, referred to *Chitty, Prerogatives of the Crown*, p. 18.

C. B. Stephen, for the respondent, referred to *Smith* v. *Great Western Railway Co.* (2); and *Dettman* v. *Williams* (3).

Armstrong, in reply.

The arguments are fully dealt with in the judgments.

GRIFFITH C.J. The question for determination in this case is whether the plaintiff comes within the words of sec. 2 of the *Public Service (Superannuation) Act* 1899, which provides that:

(1) (1905) 5 S.R. (N.S.W.), 265.
(2) 3 App. Cas., 165, at p. 180.
(3) (1905) 5 S.R. (N.S.W.), 265, at p. 266.

—"Where the services of any officer employed in the Public Service, and a contributor to the Civil Service Superannuation account, were, for any cause other than an offence, dispensed with under the provisions of the *Public Service Act* of 1895 within twelve months from the commencement of the said Act, and after he had served for fifteen years or more," he should be deemed to be entitled to certain payments by way of pension, to which it is not necessary now to refer. The question is whether his services were "dispensed with." Now, there is no doubt that the words used in this section are used in the same sense as in sec. 60 of the *Public Service Act* of 1895, which provided that "if the services of any person permanently employed in the Public Service shall be dispensed with by the Board" under the provisions of that Act "otherwise than for an offence," then under certain conditions, which are those under which the appellant claims, he should be entitled to a gratuity.

Under the *Public Service Act* 1895, sec. 8, the Board were required to examine the conditions of the service, and, if they found too many persons employed in any department, they were to transfer some of them to some other department if they could, and if, to use the words of sec. 8, their services could not be usefully and profitably employed in any other department, their services were to be dispensed with, subject to the provisions of sec. 60. Other duties of the Board were to inquire whether the officers were capable of performing the services required of them, whether the salaries paid were adequate to the services rendered, and whether the services rendered were adequate to the salaries paid, and it was by sec. 12, sub-sec. (II.) in particular provided that "if in the opinion of the Board" an "officer is unfitted for or incapable of performing work of a class equivalent to the amount of his salary, or if such work shall not be available, the Board shall reduce the salary of such officer to the maximum determined by the Board to be appropriate to the class of work actually performed by or assigned to him, and he shall have the option of continuing in the Service at such reduced salary, or of retiring therefrom as hereinafter provided."

Another sub-section (v.) provided that, if the reduction of the salary exceeded one fourth, and was certified by the Board to be

H. C. OF A. 1905.

DETTMAN v. WILLIAMS.

Griffith C.J.

made on the ground that the officer affected was unfitted for or incapable of performing work equivalent to the amount of salary previously received by him, and certain other conditions were fulfilled, then, if the officer elected to retire from the service by reason of the reduction of his salary, he should be entitled to receive "the payment and gratuity mentioned" in sec. 60, sub-sec. (1) of the Act.

The circumstances under which the appellant left the service were these. The Board, upon examination, thought that he could not perform work equivalent to the salary which he received, and reduced his salary by more than one-fourth. Thereupon he had the option of continuing in the service at the reduced salary, or of retiring as provided by sub-sec. (v.) of sec. 12. He elected to retire, and asked for the gratuity to which he was entitled under that sub-section, and received it. After that the Act of 1899 was passed, which, he claims, confers additional rights upon him. If his services were dispensed with within the meaning of the Act, he is entitled to these additional advantages. But, *primâ facie*, a person who, having the option of continuing in the service at a reduced salary or of retiring, elects to retire, cannot be said to have had his services dispensed with. The argument which was relied upon to establish this contention was an ingenious one. It depends upon the words of sec. 59, which provides that no person to whom the Act applies shall be allowed to receive any payment by way of pension, annual superannuation, retiring allowance, or gratuity, either directly or indirectly, except as provided in sec. 60. Under the Act of 1884 some persons were entitled to a retiring allowance which that section abolished. Now sec. 60 begins: "If the services of any person permanently employed in the Public Service shall be dispensed with by the Board under the provisions of this Act otherwise than for an offence," and then certain consequences follow. The argument sought to be based on that portion of the section was this:—Under sec. 59 the only persons who are allowed to receive anything by way of pension, superannuation, retiring allowance, or gratuity, are persons who fall within the category of persons whose services were dispensed with by the Board under provisions of the Act. If, therefore, a person can be brought within the category of persons entitled to a pension, &c.,

he must necessarily fall within the other category. That is an ingenious argument, but it does not strike one as altogether convincing. There are, it appears to me, two answers to it. First, that is not what sec. 59 says. It does not say that the only persons who shall receive gratuities are persons who fall within the description in sec. 60. What it does say is that in any case where persons are entitled to any payment or allowance under the Act, it shall be calculated at the rate prescribed by sec. 60, and not on any other scale. Upon this construction the sections are quite consistent. Sec. 12 merely provides that persons who retire, although they do not fall within the description of sec. 60, shall nevertheless receive the gratuity or allowance specified in sub-sec. (II.) of sec. 60. That is one answer. There is another, arising upon the ordinary canons of construction. Every Statute is to be so construed as to give effect, if possible, to all its provisions. Now, if the construction contended for is correct, the provisions of sub-sec. (V.) of sec. 12 are entirely unnecessary, because, assuming that the appellant is a person whose services were dispensed with, he was entitled to an allowance under sec. 60; but the legislature expressly provided by sub-sec. (V.) of sec. 12 for this particular case, treating it, not as that of a person whose services were dispensed with, but as that of a person who elects to retire from the service because his salary was reduced by more than one-fourth. It is impossible therefore to accept Mr. Armstrong's construction without rejecting altogether the provisions of sub-sec. (V.), or rather holding that they have no sensible effect at all. The proper inference to draw under these circumstances is that sec. 59 should be construed so as to allow some meaning and effect to sub-sec. (V.) of sec. 12, and, if that gives rise to any repugnancy between the sections, then one must be taken as a proviso to the other. In that way the difficulty of repugnancy will be avoided, and full effect given to all the provisions of the legislature, who must not be assumed to have enacted specific provisions which have no meaning at all.

For these reasons, I think that the appellant has failed to establish that his ingenious argument is correct, and that the decision of the Supreme Court should be affirmed.

BARTON J. I am of the same opinion. Sec. 2 of the Act of 1899, it is contended, is a substitution in effect for sec. 60 of the

H. C. OF A. 1905.

DETTMAN v. WILLIAMS.

Barton J.

Act of 1895, with regard to persons who come within the last-named provision. In order to come within that section, it is rightly contended that a person making a claim must be an officer whose services have been dispensed with, because both sec. 2 of the Act of 1899 and sec. 60 of the Act of 1895 relate only to that class of persons. It became necessary, therefore, for Mr. Armstrong to urge that his client was a person whose services had been dispensed with. He called to his aid, for that purpose, the latter part of sec. 59, which is: "Nor shall any person to whom this Act applies, except as in the next succeeding section provided, receive out of the Consolidated Revenue of the Colony any payment by way of pension, annual superannuation, retiring allowance, or gratuity, either directly or indirectly." Mr. Armstrong's argument appeared at first sight to have some strength on its side, but when one examines the provisions of sec. 12, particularly the fifth sub-section, one sees that there is a fallacy in arguing that the person dealt with in sec. 12 is a person whose services have been dispensed with within the meaning of sec. 60 of the Act of 1895 or sec. 2 of the Act of 1899. Relying on the second part of sec. 59, Mr. Armstrong argued that this was restrictive to itself, and that no one could receive the benefits of sec. 60 unless, applying the last part of sec. 59, he is a person whose services are dispensed with, and that, while sub-sec. (v.) of sec. 12 gives the benefits of sec. 60 to persons who come within that sub-section, they must be intended by the Act of Parliament to be deemed persons whose services were dispensed with. I cannot agree with that contention. It appears to me that the provisions of sec. 12, sub-sec. (v.), are quite reconcilable with those of secs. 59 and 60 of the Act of 1895. Sub-sec. (v.) deals with the case of an officer electing under certain circumstances to retire from the service by reason of the reduction of his salary, and says that he shall be entitled to receive the payment and gratuity mentioned in sec. 60 of that Act. The contention on behalf of the appellant depends upon these latter words, for, unless we are to read the words of sub-sec. (v.) and the whole of the latter portion of them as bringing him within the meaning of sec. 60 as a person whose services are dispensed with, then the case remains to be dealt with simply under sub-sec. (v.) of sec. 12,

but upon the scale provided for in sec. 60. The latter seems to be the meaning which must be given to sec. 59 : that the officer shall be entitled to the payment mentioned in sec. 60, not that he shall be deemed to be a person whose services are dispensed with, but that, there being a scale provided in sec. 60, that shall apply also to persons who come under sec. 12, sub-sec. (v.).

The second portion of the argument was directed to showing that by force of sec. 12, and particularly sub-sec. (II.), "on the dictionary meaning of the words," the appellant was an officer whose services were dispensed with, because by sec. 12, sub-sec. (II.), if an officer is, in the opinion of the Board, incapable of performing work of a class equivalent to his salary, or if work is not available, his salary shall be reduced to the maximum amount appropriate to the class of work actually performed by him, and he shall have the option of continuing in the service at the reduced salary, or of retiring. It is argued that, because the Board may reduce his salary to so low a point that he may be quite unable to contemplate remaining in the service upon such a pittance, and he may therefore have to accept the provision for retirement provided for in that section, he is in effect compulsorily retired. But it seems to me that the Act is framed in such a way as to destroy that contention, because it looks not at what is virtually done, but at what is actually done. Accordingly it may be, perhaps, very well contended that a person whose salary is reduced to a painfully low point can have no option but to retire, but that is an argument founded upon effects rather than upon acts or deeds. The Act clearly distinguishes, to my mind, between persons who elect to retire and persons whose services are dispensed with. The words in sub-sec. (II.) of sec. 12—"who shall have the option of retiring"—seem to mean precisely the same as the words "who shall elect to retire" in sub-sec. (v.). However hard the alternative put to him may be, if he chooses one of them he elects, and if he elects to retire, his services are not dispensed with, as he had an opportunity of staying in the service and obtaining certain financial advantages. In either case his services are not dispensed with. Nor can it be said that, where the Act uses expressions so different as those in sec. 12, and those in sec. 60 of the Act of 1895, they are to be held to mean the same thing.

H. C. OF A. 1905.

DETTMAN v. WILLIAMS.

Barton J.

That they should mean the same thing is a construction to be struggled against unless there is something in the context to necessitate such a construction. I see nothing of that kind here. Mr. Armstrong has striven manfully to support a very difficult position. It may be that there is a hardship on the appellant, but if there is a hardship it is one created by the law. I therefore concur with the Chief Justice in the opinion which he has stated.

O'CONNOR J. I am of the same opinion.

C. B. Stephen, for the respondent, asked that the appeal should be dismissed with costs.

[GRIFFITH C.J.—If the Crown asks for costs we cannot refuse to allow them.]

Appeal dismissed with costs.

Foll *McDonogh* v *Cth* 61 LGRA 232 Foll *McDonogh* v *Commonwealth* (1985) 61 ACTR 22

Solicitor, for appellant, *A. J. McDonald.*

Solicitor, for respondent, *The Crown Solicitor of New South Wales.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MILLER . . . . . APPELLANT;

NOMINAL DEFENDANT,

AND

McKEON . . . . . RESPONDENT.

PLAINTIFF,

H. C. OF A. 1905.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Sept.* 12, 13, 14, 15.

Negligence—Construction of road—Unprotected cutting—Liability of Government—Reasonable care under circumstances—No evidence of breach of duty—Nonsuit.

Griffith C.J., Barton and O'Connor JJ.

The Government of a new country, when forming for the first time a practicable road upon waste land of the Crown which has been technically dedicated as a highway, is not bound by the rules which govern private