[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE PUBLIC SERVICE COMMISSIONER FOR THE COMMONWEALTH OF AUSTRALIA.

Ex parte KILLEEN.

H. C. of A. 1914.

Melbourne, *Oct.* 15, 16, 19, 23.

Griffith C.J., Isaacs and Powers JJ.

Public Service of Commonwealth—Vacant office—Appointment—Promotion—Recommendation by Public Service Commissioner — Right of appeal — Officer "affected"—Commonwealth Public Service Act 1902-1911 (*No.* 5 *of* 1902—*No.* 26 *of* 1911), *secs.* 42, 44, 50—*Practice—Mandamus—Issue futile.*

Where on a vacancy occurring in an office in the Commonwealth Public Service several officers in the same Department apply for the vacant office and the Public Service Commissioner recommends for appointment one who is junior in service to another, the latter is "affected" by the recommendation within the meaning of sec. 50 of the *Commonwealth Public Service Act* 1902-1911, and may appeal under that section.

So held by *Isaacs* and *Powers* JJ., *Griffith* C.J. dissenting.

Where in such circumstances the officer so affected gave to the Commissioner notice of appeal, but the Commissioner, being of opinion that an appeal did not lie, took no proceedings on the notice, and the junior officer was appointed to the office,

Held, by the Court, that mandamus should not issue to command the Commissioner to proceed with the appeal, as it would be futile.

Order *nisi* for mandamus.

On 24th January 1914 a notification appeared in the Commonwealth *Government Gazette* of two vacancies in the Department of the Treasury, Pensions Branch, each in the office of Special Magistrate and Examiner in the Third Class. Applications for

the offices were sent in by four officers in the Fourth Class in the Department of the Treasury, namely, Patrick Henry Killeen, C. F. Day, Oswald Gordon Dutton and Herman Thege, of whom Dutton and Thege were both junior in service to Killeen. The Public Service Commissioner issued a certificate certifying that there were no senior officers available as capable of satisfactorily performing the duties as Dutton and Thege, and thereupon he recommended their appointment to the offices. Killeen then gave notice to the Commissioner of appeal against the appointments, but the Commissioner informed him that he had no ground of appeal, refused to forward the notice of appeal to an Appeal Board, and refused to hold the appointments in abeyance.

On the application of Killeen an order *nisi* was granted calling upon the Commissioner to show cause why a writ of mandamus should not issue directing him to forward the appeal to the Public Service Inspector for the State of Victoria for hearing by an Appeal Board as required by regulation 283 of the *Commonwealth Public Service Regulations* 1913 and by the *Commonwealth Public Service Act*.

On the hearing of the order *nisi* it was stated that Dutton and Thege had been appointed by the Governor in Council to the vacant offices.

The nature of the arguments sufficiently appears in the judgments hereunder.

Schutt, for the prosecutor, moved the order absolute and referred to *R.* v. *Bridgman* (1).

Mitchell K.C. (with him *Ian Macfarlan*), for the respondent, referred to *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (2).

[ISAACS J. referred to *In re Buckinghamshire County Council and Hertfordshire County Council* (3).]

Cur. adv. vult.

The following judgments were read:—

Oct. 23.

GRIFFITH C.J. Sec. 42 of the Public Service Act provides that

(1) 2 New Sess. Cas., 232; 15 L.J.M.C., 44.
(2) (1891) A.C., 531, at p. 573.
(3) 68 L.J.Q.B., 417.

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whenever a vacancy occurs in any office and it is expedient to fill such vacancy by the promotion of an officer the Governor-General may on the recommendation of the Commissioner appoint to fill such vacancy an officer of the Department in which the vacancy occurs, "regard being had to the relative efficiency, or in the event of an equality of efficiency of two or more officers to the relative seniority, of the officers of such Department"; or may "appoint to fill such vacancy any qualified officer of any other Department whom on the ground of efficiency, or in the event of an equality of efficiency of two or more officers whom on the ground of seniority, it appears desirable so to appoint, if it appears that such appointment would result in the work of such office being more efficiently performed than by selecting an officer from the Department in which such vacancy occurs."

Sec. 44 provides that before promotion of an officer from any office to a higher office the name of the officer shall be submitted by the Commissioner to the Governor-General after report from the Permanent Head of the Department, with a proviso that when a junior officer is recommended the Commissioner must first issue his certificate that there is no senior officer capable of satisfactorily performing the duties.

Sec. 50 provides that any officer affected by any report or recommendation made or action taken under the Act other than reports or recommendations taken under certain sections, of which sec. 42 is not one, may appeal to a Board, the constitution of which is prescribed, and that the Board shall hear the appeal and transmit the evidence together with their recommendation to the Commissioner, who shall thereupon determine the appeal. By regulations duly made under the Act the Commissioner is directed to forward the appeal to an Inspector, who is required to take the necessary steps for hearing it.

The applicant Killeen is an officer of the Fourth Class in the Treasury Department. In January 1914 it was proposed to fill two vacancies in the Third Class in the same Department. Killeen and three other officers of the Fourth Class, two of whom were junior to him, applied for the vacancies. The two junior officers were recommended by the Commissioner, and have

since been appointed by the Governor-General. Before the formal appointment was made Killeen, claiming to act under sec. 50, appealed against the promotion of these two officers on the ground that he was senior to them and could give proof of equal efficiency. The Commissioner, following the view of sec. 50 which had been adopted by the Department, refused to forward his appeal to the Inspector, and this is an application for a mandamus to compel him to do so.

The construction of sec. 50 adopted by the Department is that the word "affected" does not apply to such a case as the present. They concede that in one sense every officer in the service is "affected" by the promotion of an officer junior to himself, but contend that the word was not intended to have so wide a signification, which, they say, would render the system unworkable. This contention is, in my judgment, correct. The opposing contention is that where there are several applicants for a vacancy every person who is not appointed is affected by the Commissioner's recommendation of the appointment of another applicant, and is entitled to appeal from the recommendation in order to show that he is more efficient than the officer recommended, or, if of equal efficiency, is senior to him.

The object of the appeal is, of course, to effect a redress of grievances, and not to hold an abstract inquiry as to relative efficiency.

In my opinion the argument for Killeen is founded upon a misconception of the meaning of sec. 42. That section does not prescribe that the more efficient of two applicants, or the senior of two applicants of equal efficiency, shall be entitled to claim the appointment as of right, but that regard shall be had to both matters as elements to be considered in making the choice. Anyone familiar with the administration of Government Departments knows that these are not the only matters that demand consideration in making promotions, and also knows that the word "efficiency" connotes many qualifications. In my opinion the section, though rather obscurely worded, means that such regard is to be had by the Commissioner; for the Governor-General—*i.e.*, the Minister—can have no independent means of forming an opinion on the subject. If it were alleged and could

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be shown that the Commissioner had failed to take these matters into consideration it is possible that he might be ordered to do so, but no such case is suggested.

In my opinion sec. 50 is not applicable to such a case. I think that the word "affected" means directly affected, in the sense that the officer's status in the service is altered to his detriment, and does not include the case of a recommendation which leaves the officer exactly where he was before, so far as regards classification, salary and office, so that his only grievance is a disappointed hope. I do not think it necessary to occupy the public time by referring in detail to the various sections of the Act relating to recommendations of the Public Service Commissioner which lead me to this conclusion; I will only add that I think the recommendation intended is one which the officer is entitled to have communicated to him before it is acted upon.

A further argument was based on sec. 44. I assume (though I doubt it) that a certificate under that section was necessary, and was issued by the Commissioner. It is clear that the certificate is not a recommendation within sec. 50, and no appeal can be founded upon it.

For these reasons I think that the application fails.

Assuming, however, that I am wrong in this conclusion, other considerations arise. A mandamus will in general be granted to a public officer to do an act which he is by law bound to do, and which is a necessary preliminary to the exercise or enjoyment of some right by an individual. But the writ is discretionary, and will not be granted if it would be futile. A mandamus to admit to an office will not be granted if the office is already full. In the present case the office to which Killeen claims to be entitled is full, and can only be vacated by some action on the part of the Governor-General, over whom the Court has no control. The result of granting the mandamus would therefore, at best, be a possible change of mind on the part of the Commissioner as to the recommendation which he should have made. I cannot find in the Act any authority to the Commissioner to withdraw a recommendation which he has already made and which has been followed by an appointment.

For these reasons also I think that the application fails.

Isaacs J. The first question is whether the applicant Killeen was "affected" within the meaning of sec. 50 of the *Commonwealth Public Service Act* 1902-1911 by the Commissioner's recommendation to appoint Messrs. Dutton and Thege, or his certificate under sec. 44 preceding that recommendation. "Affected," of course, there means affected prejudicially. It seems to me clear that Killeen was prejudicially affected. He was senior to those gentlemen, and was an applicant for one of the positions they now fill. Vacancies existed in those offices, and it was found expedient to fill them by the promotion of officers. Sec. 42 directs that in such case in the event of an equality of efficiency of two or more officers regard is to be had to relative seniority. "Efficiency" means, as defined, special qualifications and aptitude for the discharge of the duties of the office to be filled together with merit and good and diligent conduct.

Before the Commissioner could recommend Messrs. Dutton and Thege over the head of Mr. Killeen, sec. 44 required the certificate of the Commissioner to be first issued certifying that there was no senior officer available as capable of satisfactorily performing the duties as they were. That certificate, however, being given, and a recommendation based upon it made by the Commissioner, the appointment of Mr. Killeen's juniors would naturally follow. He was thereby disqualified for the position; in other words, he lost the relative right which seniority otherwise gave him.

No doubt he had not any absolute legal right to demand the position; the discretion still rested with the Governor-General in Council to appoint him or not, whatever recommendation in his favour might be made, and the discretion still remained with the Commissioner to withhold a recommendation in favour of Killeen. But he was eligible until the certificate under sec. 44 was given, and the loss of eligibility is a real deprivation, and whatever deprives an officer of the capacity of advancement necessarily affects him prejudicially.

It was urged that as the Commissioner had complete discretion as to recommending an officer, and had exercised it adversely to Mr. Killeen, no mandamus should go. It was said the Commissioner had not neglected any duty; and whatever happened nothing could compel him to exercise his discretion any differently.

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That is all perfectly true; but the intention of sec. 50 is plain. The Commissioner no doubt exercises his discretion in the first instance with the fullest desire to do justice and after weighing carefully all the materials then at his disposal. But he may not have had all available facts brought to his notice, and sec. 50 enables an officer who has been "affected" to bring before the Commissioner, through the medium of a Board and by an appeal, further materials which may have been overlooked, and perhaps further considerations, upon examination of which the Commissioner may be convinced he has wronged the officer complaining and in his or the public interests ought to alter his recommendation.

Sec. 50 gives the officer the chance of convincing the Commissioner. It is an important right. It was argued that liberty to employ it in such a case as the present, would paralyse the service by overwhelming the Commissioner with appeals. That is unlikely, because it is not to be supposed that officers will abuse the right. But unless it is available in such a case as the present, it is hard to see any practical value in the section. In any event, the effect of the provision must be taken to have been foreseen by Parliament, and to comprehend the present case. If, therefore, the vacancies still continued, the mandamus should be granted.

The appeal was made in time, but the Commissioner, thinking it was made without any right to do so, did not take any step to stay the appointments. They have been in fact made, and the positions being full, it would be useless to start an appeal against the recommendation or certificate.

No one has ever asserted that Mr. Killeen is not capable of satisfactorily performing the duties of such an office. The certificate was that Dutton and Thege were more capable. But that is now beyond recall; and, should another vacancy occur, Killeen's capacity relative to them would be immaterial: any comparison then would be relative to other officers. Whatever personal satisfaction it might be to him to convince the Commissioner that an injustice has been done, it could not undo the appointments already made, and if not the mandamus could not benefit the applicant with regard to the position he sought. On the other

hand, it might cause unfounded uncertainty in relation to the present occupancy of the offices.

In these circumstances the Court does not grant the writ. *Eyre* J. in *R.* v. *Heathcote* (1) says of mandamus:—"It ought to be the concern of a Court of justice to take care, that whilst they are granting a remedy to one, they do not at the same time expose others to great inconveniences; and likewise, that the remedy be such as may prove effectual." See also *R.* v. *London and North Western Railway Co.* (2).

In the result, the applicant has lost a right—the right of appeal—which the Act gave him, and the possibilities attached to it; but, on the other hand, the Commissioner's view of the statutory provision was not only *bonâ fide*, but has the high support of the learned Chief Justice. No remedy now remains that a Court of law can provide whatever consolation administration can afford, and the present application must be refused.

POWERS J. The facts of this case have already been mentioned by my learned brothers, and I propose only to refer to the following facts:—Advertisements were inserted calling for applications for two positions in the Commonwealth Public Service, under the heading "Notification of Vacancies." Four officers applied for the positions, namely, the applicant, one Day, and two officers, admittedly junior officers to the applicant. The applicant in his application claimed on various grounds that he was specially qualified to fill one of the vacant positions. The Commissioner under sec. 44 issued a certificate certifying that there was no senior officer available as capable of satisfactorily performing the duties of the vacant positions as the junior officers recommended by him for appointment, and he recommended the appointment of the junior officers. The appointment of the junior officers was made under sec. 42 on the recommendation of the Commissioner.

If the applicant, the senior officer, was as efficient as the two junior officers, the Governor in Council, because of the recommendation of the Commissioner, was prevented from having regard to the relative efficiency, or, in the event of equality of

(1) 10 Mod. Rep., 48, at p. 54. (2) 6 Rail. & Can. Cas., 634.

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efficiency of two or more officers, to the relative seniority of the applicant.

The applicant gave notice of appeal under the Act, but the Commissioner, acting on advice, did not send on the appeal to the Board as provided by regulation 283. The effect of the appeal, if it had proceeded, would have been to give the applicant the opportunity to prove to the Commissioner through the Appeal Board that he was as efficient and as capable of satisfactorily performing the duties of the vacant office as the other applicants. That opportunity was denied him. He was necessarily affected by the certificate of the Commissioner and the recommendation of the Commissioner referred to. The question is whether he was "affected" within the meaning of the word as used in sec. 50.

That section does not apply to charges directly made against an officer, because the appeal against charges affecting officers are dealt with in secs. 46 to 49, and those sections are amongst the excepted sections.

Sec. 50 of the *Commonwealth Public Service Act* gives a right of appeal to any officer affected by any report or recommendation made or action taken under this Act—other than a report or recommendation made or action taken under secs. 31, 46 to 49, 65, 66 and 73. However seriously he is affected by any such report, recommendation or action taken under those sections, he has not any right of appeal. It would have been very easy for Parliament to have added secs. 42 and 44 to the excepted sections if it was not intended to allow any appeal for anything done under those sections. As Parliament has not thought fit to except them this Court cannot do so. The report, recommendation or action taken which the applicant appealed against was made or taken under secs. 42 and 44. The only questions, therefore, to be considered by this Court are whether the applicant for a mandamus in this case has been "affected" within the meaning of sec. 50 by the action complained of, namely, by the recommendation of the Commissioner under sec. 42 complained of in this case, or by the certificate issued and recommendation made by the Commissioner under sec. 44; and, if so, whether the Commissioner should be ordered to send on the notice of appeal

received from the applicant in accordance with regulation 283, so that the appeal can be heard by the Board mentioned in sec. 50, and a report sent by that Board to the Commissioner.

I hold that, as the applicant for the mandamus was one of four officers who applied for the vacant positions, and was senior to the two officers appointed, he was "affected," within the meaning of sec. 50, as an applicant for the positions by the recommendation of the Commissioner, and by the issue of the certificate of the Commissioner in effect declaring that the applicant as senior officer applying was not as efficient as the junior officers recommended for appointment, because the action taken by the Commissioner prevented the Governor in Council from considering the application of a senior officer claiming to be equally efficient for the position, and from having regard to the relative efficiency, or in the event of an equality of efficiency of two or more officers to the relative seniority, of the applicant.

The Commissioner refused to send on the notice of appeal when received by him, notwithstanding regulation 283, so that the applicant was deprived of the opportunity of proving that he was as efficient as one or both of the junior officers, and he was thereby deprived of the right preserved by the Act to senior officers to have their claim considered by the Governor in Council if as efficient as the junior officers applying for the positions.

It is said that Parliament could never have intended by sec. 50 to give a right of appeal to any officer affected by any action taken under secs. 42 and 44. All who know the history of the Public Service Acts in Australia know that one of the chief evils, if not the chief evil, those Acts were intended to remedy was the unfair way in which junior officers who were relatives or favourites of the Heads of Departments, or related to, or well known to political supporters of, Ministers of the Crown, were sometimes in former days placed over the heads of efficient senior officers. An appeal under sec. 50 was, I think, intentionally given by Parliament to officers. However fair and just the Commissioner for the time being may be (and the *bona fides* of the Commissioner is not questioned), he is not infallible, and he has necessarily to be guided by reports from chief

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officers and other officers, sometimes in remote parts of the Commonwealth, in deciding what reports or recommendations he will make under secs. 42 and 44; and if he makes an incorrect report or recommendation as to the inefficiency of a senior officer for an appointment, that officer, I think, has the right to appeal against that incorrect report or recommendation and prove his right to have his application considered, by showing to the Commissioner through the Appeal Board that he is as efficient and as capable of satisfactorily performing the duties of the office as any junior officer applying and recommended for appointment to a vacancy in the Service.

I am confirmed in this view by the fact that sec. 31 is mentioned in sec. 50 as one of the clauses under which an appeal is not allowed. The reasonable presumption is that Parliament considered that if sec. 31 was not excepted in sec. 50, there would be an appeal, if a person from outside the Service was appointed to fill a position which an officer in the Service was as capable as the outsider of filling, because he would be adversely affected by such an appointment. It appears to me that a senior officer is more directly affected by the recommendation of the Commissioner to appoint a junior officer over his head when he is "equally efficient," or as capable of satisfactorily performing the duties of the office, than he could possibly be by any action taken under sec. 31.

I cannot concur in the interpretation I understood Mr. *Mitchell* contended for, namely, that the word "affected" meant directly affected in the sense that his status in the Service *is altered to his detriment*; that it did not include the case of a recommendation which left the officer exactly where he was before, so far as regards his classification, salary and office. Under such an interpretation the most damaging and absolutely incorrect reports and recommendations affecting officers in the Department could be made by which an officer could unfairly be prevented from getting on in the Service all his life—however deserving he is—so long as he was allowed to retain the classification, salary and office he had when he first entered the Service. The only right of appeal he would have if that inter-

pretation is accepted would be when the effect of a recommendation or report or action taken would be to degrade the officer.

As to the effect of the interpretation now placed on the word "affected," so far as it relates to secs. 42 and 44, on the working of the Act, that should not prevent us from deciding in favour of the officer. If it makes the Act unworkable it can be amended; but as the final decision as to efficiency after appeal is left with the Commissioner, officers are not likely to press appeals they have no chance whatever of succeeding in. The appeal should have been dealt with before the recommendation was acted upon, but as the Commissioner refused under advice to recognize the right of appeal and the appointments were lawfully made by the Governor in Council on the recommendation of the Commissioner, the grant of a mandamus would be futile in this case for the reasons already stated by my learned brothers, and I agree that no order should be made.

Order nisi discharged, the respondent by his counsel consenting to pay the costs of the application.

Solicitors, for the prosecutor, *Loughrey & Douglas.*

Solicitor, for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.