

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE BOARD OF APPEAL UNDER SEC. 50 OF THE
“COMMONWEALTH PUBLIC SERVICE ACT 1902-1915 ”
AND OTHERS.

EX PARTE KAY.

*Commonwealth Public Service—Board of Appeal—Right of appellant to be represented
by counsel—Commonwealth Public Service Act 1902-1915 (No. 5 of 1902—No.
37 of 1915), secs. 48, 50.*

H. C. OF A.
1916.

MELBOURNE,

Oct. 23.

On the hearing of an appeal by an officer of the Commonwealth Public Service to a Board appointed under sec. 50 of the *Commonwealth Public Service Act 1902-1915* the appellant is entitled to be represented by counsel.

Griffith C.J.,
Barton and
Isaacs JJ.

ORDER *nisi* for mandamus.

Edith Maud Kay, an officer in the Department of the Postmaster-General, having been informed by the Deputy Postmaster-General that the Deputy Public Service Commissioner had approved of a recommendation that certain seniority lost by her should not be restored to her and that her nominal advancement due from 1st December 1915 should be deferred for a period of three months, appealed, pursuant to sec. 50 of the *Commonwealth Public Service Act*, to a Board appointed under that section consisting of W. J. Clemens, Timothy Howard and James McCart. On the appeal coming on for hearing, the appellant was represented by counsel, but the Board refused to proceed with the hearing in his presence,

H. C. OF A. 1916. stating that they were impliedly prohibited from doing so by the Act and the regulations thereunder.

THE KING v. BOARD OF APPEAL. EX PARTE KAY. The appellant thereupon obtained an order *nisi* for a mandamus directing the Board and the members thereof to permit counsel to appear and conduct the appeal, or, in the alternative, directing the Board and the members thereof to exercise their discretion to permit or refuse to permit counsel to appear and conduct the appeal.

No counsel appeared for the Board.

Eager, for the applicant. No implication can be drawn from sec. 48 of the *Commonwealth Public Service Act* that counsel cannot be heard by the Board, for the inquiries under that section are of a different nature from those under sec. 50. Nor can such an implication be drawn from reg. 289 of the *Commonwealth Public Service Regulations*, which purports to permit an officer in a remote locality to appear by deputy. Where a Statute gives a person a right to appear before a tribunal by which his rights and interests may be affected, he has a common law right to be represented by an agent, and, therefore, by counsel: *R. v. Assessment Committee of St. Mary Abbotts, Kensington* (1). This Board are not merely a domestic tribunal. They have to investigate the acts of public servants, who have, in respect to their offices, a right in the nature of a proprietary right. Such a right is affected here. If the appellant is not entitled as of right to be represented by counsel, the Board have a discretion to permit it, and they have not exercised their discretion.

GRIFFITH C.J. I have felt considerable doubt as to the absolute right asserted by the applicant to be heard by counsel before a Board appointed under sec. 50 of the *Commonwealth Public Service Act*. There is no room for doubt as to their power to hear counsel if they think fit. From one point of view the Board may be a sort of domestic tribunal within the Public Service itself, which decides nothing, but takes evidence which it is required to remit to the Public Service Commissioner for him to deal with. It might be very inconvenient if proceedings before such a tribunal were protracted, as they might be if counsel were allowed to appear. On

(1) (1891) 1 Q.B., 378.

the other hand, the status of a person aggrieved by the recommendation appealed from might be very seriously prejudiced if he or she were not able to present his or her case satisfactorily to the Board. Sec. 50 provides that a person aggrieved may "appeal to a Board" constituted by certain officers, and that "the Board shall hear such appeal and transmit the evidence taken together with a recommendation thereon to the Commissioner who shall thereupon determine such appeal." That seems to suggest that witnesses may be called and examined and cross-examined, a function which junior members of the Service may not be well qualified to perform. On the whole, I have come to the conclusion that an appellant is entitled, not only to be heard before the Board, but to conduct his case before them in such a way as to ascertain the actual facts.

It is also urged that at common law any person in such a position is entitled to appear by an agent unless there is some law to the contrary. If I came to the conclusion that this Board was a purely domestic tribunal, I should think that the common law right would be excluded. But, on the whole, the better opinion appears to me to be that the appellant is entitled to be heard by an agent, and, if so, then she had just as much right to demand to be heard by counsel as to be heard by any other agent.

The Board seem to have thought that they were precluded by the express provisions of sec. 48, which prescribes that officers upon the hearing by a Board of Inquiry of a charge against them shall be entitled to be heard by counsel, attorney or agent, from allowing counsel to be heard—even in their discretion—on an appeal under sec. 50. Personally, having regard to the structure of that Part of the Act and the source from which it was apparently taken, I am unable to draw from the presence of those words in sec. 48 any inference as to the effect of their absence from sec. 50. I determine the case on the construction of sec. 50 alone, and, on the whole, I come to the conclusion, though with doubt, that the applicant is entitled to be represented by counsel, and therefore that a mandamus should go in the first alternative asked.

BARTON J. I agree, with the same doubt. Ordinarily, every person may at common law appoint an agent to represent his

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interests in all cases in which his personal presence to assert them is not a necessity of the case, either in its nature or by some law. I take it he has the same power at common law in respect of rights conferred on him by Statute—with the same reservation, which does not exist in this case; and therefore, under sec. 50, I think an appellant has a right to appoint such kind of agent as he chooses to represent him. There is only one source of doubt, and that is the fact that by sec. 48 a person against whom a charge is made is expressly given the right to be represented by counsel, attorney or agent, while there are no words either of prescription or limitation on the subject in sec. 50. But this distinction is scarcely sufficient to raise the implication that the assertion of the right by appeal is intended to be conditional upon personal advocacy of it before the Board. It is to be observed that the right given by sec. 50 is a right to “appeal”—not merely a right to “appear”—and the right of appeal is to be exercised “in such manner and within such time as may be prescribed.” A regulation may therefore be made defining the manner in which these appeals are to be prosecuted. But it seems to me that the ordinary right of appointing a representative can be exercised under sec. 50 as in any other case where a statutory right of appeal is given without qualification. I therefore agree that mandamus should go in the first alternative.

ISAACS J. I also originally had doubts about the first alternative, but the case of *R. v. Assessment Committee of St. Mary Abbots, Kensington* (1), cited by Mr. *Eager*, determines those doubts, because that case establishes the *primâ facie* common law right of any person who has a statutory right to appear before a non-judicial tribunal to conduct his business before the tribunal by an agent as well as personally.

Then, looking at sec. 50 by itself, there is nothing in it which, by force of the section itself, takes away the common law right. The common law right may hereafter be taken away, because by the words of the section itself the Governor-General in Council may make regulations prescribing the manner in which the appeal is to be conducted. With regard to sec. 48, in the first place the mere fact

that in relation to one matter specific provision is made for representation by counsel does not necessarily cut down the common law right as to another matter contained in another section which is silent upon that point. Then there is another reason why sec. 48 is inapplicable impliedly to cut down the right of an appellant under sec. 50 to be represented by counsel: if sub-sec. 1 of sec. 48 had that effect, then sub-sec. 2 would have a similar effect, and when sub-sec. 2 is looked at, such a result would be absurd.

Therefore I agree that the order *nisi* should be made absolute for a mandamus in the first alternative.

Order absolute in the first alternative.

Solicitors for the applicant, *Doyle & Kerr.*

B. L.

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CALDWELL APPELLANT;

AND

THE COMMISSIONER OF PATENTS . . . RESPONDENT.

*Patent—Application—Anticipation—Acceptance of application and specification—
Patents Act 1903-1909 (No. 21 of 1903—No. 17 of 1909), sec. 46.*

The Commissioner of Patents should not refuse to accept an application and specification in respect of an alleged invention that is said to solve a problem which hitherto has been thought to be insoluble, merely because the alleged invention is very similar to a contrivance intended to effect the same object which was patented in the Commonwealth many years ago.

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MELBOURNE,
Sept. 19.
Griffith C.J.,
Barton and
Rich JJ.