

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE PUBLIC SERVICE COMMISSIONER FOR THE
COMMONWEALTH OF AUSTRALIA.

EX PARTE O'BRIEN.

H. C. OF A. *Public Service of Commonwealth—Vacant office—Appointment—Promotion to*
1919. *higher class—Right of appeal to Board—Officer “affected”—Non-service in*
each subdivision of class—*Efficiency—Commonwealth Public Service Act 1902-*
MELBOURNE, 1918 (No. 5 of 1902—No. 46 of 1918), secs. 23, 42, 50—*Mandamus.*

June 5, 10,
11.

Barton, Isaacs
and Rich JJ.

Sec. 23 of the *Commonwealth Public Service Act 1902-1918* provides that “(1) No officer shall be promoted from one class to another in the Clerical Division until he has served at least one year in each subdivision of the class from which he is promoted; and he shall not be promoted in such Division except to fill a vacancy in the class next higher than the class from which he is promoted or to fill a new office”: “(3) Notwithstanding anything contained in this section, on the recommendation of the Commissioner upon a report from the Permanent Head and with the approval of the Governor-General, an officer may be promoted from any class to the next higher class, although he has not served at least one year in each subdivision of the class from which he is promoted.” Sec. 42 provides that in filling a vacancy in any office regard is to be had to the relative efficiency of the officers from among whom the appointment to the office is to be made or, in the event of an equality of efficiency, to their relative seniority. Sec. 50 provides that “Any officer . . . affected by any report or recommendation made or action taken under this Act . . . may, in such manner and within such time as may be prescribed, appeal to a Board . . . 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.”

A, an officer in one class of the Clerical Division who had not served one year in each subdivision of that class, had applied for one of several vacancies in the next higher class, but the Commissioner had recommended that certain other

officers, none of whom was junior to A, should be appointed to the vacancies. A alleged that he was the most efficient officer for the performance of the duties of the vacant office.

Held, that A was an officer affected within the meaning of sec. 50, and was entitled under that section to appeal to a Board.

ORDER *nisi* for mandamus.

On the application of Philip Alwyn Inledon O'Brien, an order *nisi* was obtained calling upon the Public Service Commissioner for the Commonwealth to show cause why a writ of mandamus should not issue, directing him to forward a certain appeal of O'Brien to the Commonwealth Public Service Inspector for the State of Victoria for hearing by an Appeal Board as required by reg. 283 of the *Commonwealth Public Service Regulations* and by the *Commonwealth Public Service Act*.

From the affidavits the following facts appeared :—O'Brien was an officer in the eighth subdivision of the Fifth Class, Clerical Division of the Commonwealth Public Service, who had not served at least one year in each subdivision of the Fifth Class, and at the material time had been acting for two years in the position of officer in charge of the Records Branch of the Federal Taxation Staff in Victoria, a Fourth Class position. On 18th October 1917 eighteen Fourth Class clerical positions in the Taxation Staff in Victoria, including two in the Records Branch, were advertised as being vacant, and applications were invited for them. O'Brien applied for one of the two positions in the Records Branch. On 8th January 1919 the Deputy Public Service Commissioner recommended for the approval of the Governor-General that certain officers, not including O'Brien, should be promoted to fill the positions so advertised. All those officers were seniors in service to O'Brien. Thereupon O'Brien on 16th January 1919, by a letter addressed to the Acting Commonwealth Public Service Commissioner, applied for a Board of Appeal under sec. 50 of the *Commonwealth Public Service Act* to hear an appeal by him against the appointment of any officer other than himself to the position of officer in charge of the Records Branch, Federal Taxation Staff, Victoria, and he stated in the letter that the ground of the appeal was that he was the most efficient officer for the performance of the

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duties of the office in question. On 8th April he was informed that no officer junior to him had been recommended for promotion to the position in question, and that no appeal lay.

The order *nisi* now came on for hearing.

H. I. Cohen and *Mann*, for the prosecutor. The prosecutor is "affected" by the recommendation of the appointment of another officer to the position for which he applied (*R. v. Commonwealth Public Service Commissioner*; *Ex parte Killeen* (1)), and so is entitled to appeal under sec. 50 of the *Commonwealth Public Service Act*. Any officer is "affected" by a recommendation which has the effect of a declaration that some other officer is more efficient than he, or of a declaration that he is no more efficient than some other officer. He is "affected" in his reputation and in his rights.

Schutt, for the respondent. The prosecutor was not "affected" within sec. 50. The word "affected" means directly affected; otherwise any person who was not appointed to a vacant office for which he applied might appeal. Not having served for at least one year in each subdivision of the Fifth Class as required by sec. 23 (1) and there being no recommendation or report as required by sec. 23 (3), he is not eligible for promotion to the Fourth Class. The fact that such a recommendation or report as is referred to in that section has not been made cannot be the subject of appeal. In order to entitle the respondent to a mandamus, it is not sufficient for him to allege that he is efficient to perform the duties of the office, but he must show that the persons proposed to be appointed are, relatively to him, inferior in capability, or at least, on the question of relative efficiency, that he has a *primâ facie* case.

H. I. Cohen, in reply.

Cur. adv. vult.

June 11.

The judgment of the COURT, which was read by ISAACS J., was as follows :—

The application is for a writ of mandamus to the Commonwealth Public Service Commissioner commanding him to forward an

appeal to the Public Service Inspector for Victoria for hearing by an Appeal Board as required by reg. 283. The material facts are these :—On 18th October 1917 certain vacancies were advertised for clerical positions in the Taxation Branch of the Treasury Department. O'Brien, who is an officer of the Fifth Class, applied for one of those positions, and stated his experience and past services ; all of which are undenied. The vacancy he applied for was in respect of an office in the Fourth Class which he had been temporarily filling for two and a half years. Learning unofficially that the Commissioner had made recommendations for filling those and other offices by appointing other officers to them, the applicant sent in an application for a Board of Appeal under sec. 50 of the Act, in which he said (*inter alia*) : “ The appeal is brought on the grounds that I am the most efficient officer for the performance of the duties of the position in question.”

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Mr. Schutt very properly assented to treating the affidavit as if it alleged the applicant's own opinion that that statement is true. If it be true, then no doubt he is “ affected ” within sec. 50 of the Act ; but, having regard to the general purpose of the section, it is not intended that the truth of the allegation shall form the subject of our decision. That is for the Appeal Board. Enough has been shown to “ affect ” the applicant for the purposes of admitting his appeal. Then, as relative efficiency is the principal test, he has shown a sufficient case for that also.

The main objection raised to his application was that as he had not served at least one year in each subdivision of the Fifth Class he is debarred by sec. 23, sub-sec. 1, from competing. In other words, he is said to be ineligible. But as sub-sec. 3 offers an alternative qualification, namely, such efficiency as will induce the Permanent Head to report and the Commissioner thereupon to recommend in his favour and the Governor-General then to approve of the recommendation, it is clear the Act does not exclude him. And if he is not to have an appeal in respect of a report or recommendation actually made, and which if acted on would shut him out, how is he to establish his efficiency so as to satisfy the third subsection ?

Sec. 50 enables the Appeal Board to hear the appeal and transmit

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the evidence, with its recommendation, to the Commissioner, who is to determine the appeal. Assuming, as we must, that up to the present moment O'Brien has not had the benefit of a report from the Permanent Head under sec. 23, sub-sec. 3, that, it must also be assumed, is because the Permanent Head, who is charged by the Act with the general working of his Department, has formed the opinion that, having regard to the relative efficiency of his officers, O'Brien should not, and that some one else should, be nominated for the position he applied for. If the Appeal Board agrees with this, they may so recommend; if, on the contrary, they agree with O'Brien, their recommendation will be to that effect, and the Commissioner will have the responsibility of considering whether he approves of it or still adheres to his former opinion. If he agrees with a recommendation in O'Brien's favour, he can, under reg. 16, call for a report from the Permanent Head, and according to that report the provisions of the Act will operate.

There being in the circumstances a statutory right to an appeal and it being denied, the writ of mandamus should issue unless the Commissioner undertakes to forward the appeal.

Unless the Public Service Commissioner undertakes to forward the appeal, order absolute for mandamus. Applicant to have his costs.

Solicitors for the prosecutor, *Loughrey & Douglas.*

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

B. L.