

[HIGH COURT OF AUSTRALIA.]

MONCKTON . . . . .

PLAINTIFF ;

AGAINST

THE COMMONWEALTH . . . . .

DEFENDANT.

Public Service of Commonwealth—Vacancy—Appointment—Examination—Register  
of persons qualified for appointment—Action against Commonwealth—Cause of  
action—Bar to action—Appeal to Board—Commonwealth Public Service Act  
1902-1918 (No. 5 of 1902—No. 46 of 1918), sec. 50—Commonwealth Public  
Service Regulations 1913-1914 (Statutory Rules 1913, No. 341—Statutory Rules  
1914, No. 157), regs. 205, 219, 226, 227, 229.

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Isaacs,  
Gavan Duffy,  
Rich and  
Starke JJ.

Reg. 205 *et seqq.* of the *Commonwealth Public Service Regulations* provide for the holding of competitive examinations for the purpose of determining the persons from among whom appointments will be made to vacancies which may occur in the Public Service. Reg. 227 provides that “The Commissioner will cause the names of all candidates up to twice the estimated number of new appointments, who have qualified for appointment by passing the required standard of examination for the advertised positions, to be entered in their order of merit in a book, to be called the ‘Register of persons qualified for appointment.’” Reg. 229 provides that “New appointments in the Professional and Clerical Divisions shall be made from among those persons whose names are registered in the ‘Register of persons qualified for appointment,’ according to the order of their registration, and in the General Division according to their registration for vacant offices, combined with fitness in each case for the particular office to be filled.”

The plaintiff, who was a member of the Commonwealth Public Service, brought an action against the Commonwealth, alleging that, it having been notified in the *Commonwealth Gazette* that an examination open to members of the Service would be held for the purpose of filling vacancies arising during the ensuing eighteen months in offices of a certain class, and that appointments would be made from among the successful candidates in order of merit, the plaintiff passed the examination; that two vacancies which occurred during the period of eighteen months were filled by the appointment of successful



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candidates who were placed lower in order of merit than the plaintiff; and that the plaintiff was not appointed during the period to an office of the particular class. The plaintiff claimed an order that the Commonwealth should pay to him a sum of money equivalent to the difference between the salary he had received and that which he would have been entitled to receive if he had been appointed to one of the offices.

*Held*, that no cause of action was disclosed:

By *Knox C.J.*, *Gavan Duffy* and *Starke JJ.*, on the ground that to support such an action, if it would lie, it was necessary for the plaintiff to allege and prove that his name had been placed on the Register referred to in the regulations above mentioned;

By *Isaacs* and *Rich JJ.*, on the ground that, the plaintiff's rights being only those conferred by the *Commonwealth Public Service Act* and the regulations thereunder, the action, which was essentially one for damages, was inconsistent with the provisions of that Act.

*Semble*, per *Isaacs* and *Rich JJ.*, that sec. 50 of that Act, which provides that an officer affected by any action taken under the Act may appeal to a Board, was a bar to the plaintiff's action.

QUESTIONS of law directed to be argued before the Full Court of the High Court.

An action was brought in the High Court by Thomas John Monckton against the Commonwealth wherein the pleadings, so far as material, were as follows:—

By the statement of claim the plaintiff said:—

1. The plaintiff is and at all times material was an officer of the permanent staff of the Commonwealth Public Service.

2. By notice published in the *Commonwealth of Australia Gazette* on 31st May and 7th June 1913 and on other days in the year 1913 the Commonwealth Public Service Commissioner gave public notice that on 4th and 5th August 1913, at Melbourne, a competitive examination of candidates for appointment as Assistant Engineer (Professional Division, Class E), Electrical Engineer's Branch, Postmaster-General's Department, would be held.

3. The said notice contained a statement that the said examination would be open to (*inter alios*) officers of the permanent staff of the Commonwealth Public Service who had attained the age of twenty-one years.

4. The said notice contained a further statement that candidates at the said examination must undergo examination in the section



of general engineering knowledge as applied to telegraph and telephone practice and in at least one of three other sections, amongst which was the section of telegraph and telephone line construction (including surveys and development studies).

5. The said notice contained a further statement in the following words:—"Appointments.—The examination is arranged to fill vacancies arising during the ensuing period of eighteen months, and appointments will be made from the list of successful candidates in their order of merit, subject to their having passed in the sections of the examination which apply to the duties of the vacant positions."

6. By notice published in the *Commonwealth of Australia Gazette* the date of the examination aforesaid was altered from 4th and 5th August 1913 to 18th and 19th August 1913.

7. The examination was held at Melbourne on 18th and 19th August 1913.

8. The plaintiff was a candidate at such an examination in the sections of general engineering knowledge as applied to telegraph and telephone practice and of telegraph and telephone line construction (including surveys and development studies).

9. The plaintiff passed at such examination in the said sections, and was placed fifth of the candidates examined in such sections at such examination.

10. One Harry Philip Fletcher also passed at such examination in such sections, and was placed sixth of the candidates examined in such sections at such examination.

11. One Leighton William Semple also passed at such examination in such sections, and was placed seventh of the candidates examined in such sections at such examination.

12. The period of eighteen months referred to in par. 5 hereof ended on 30th April 1915.

13. The plaintiff was at all times during the said period ready and willing to be appointed to the position referred to in the said notice and in par. 2 hereof, but has not been so appointed.

14. In or about the month of August 1914 a vacancy arose in the position referred to in the said notice and in par. 2 hereof.

15. The sections of the examination referred to in par. 8 hereof applied to the duties of such vacancy or vacant position.

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16. On or about 1st September 1914 the said Harry Philip Fletcher was appointed to such vacancy or vacant position.

17. In or about the month of October 1914 a vacancy arose in the position referred to in the said notice and in par. 2 hereof.

18. The sections of the examination referred to in par. 8 hereof applied to the duties of such vacancy or vacant position.

19. On or about 1st November 1914 the said Leighton William Semple was appointed to such vacancy or vacant position.

And the plaintiff claims :—(1) A declaration that the plaintiff was entitled to be appointed to the position of Assistant Engineer (Professional Division, Class E), Electrical Engineer's Branch, Postmaster-General's Department, (a) on or before 1st September 1914 or other the date of the appointment to such position of the said Harry Philip Fletcher, (b) on or before 1st November 1914 or other the date of the appointment of the said Leighton William Semple to such position, or (c) on or before 30th April 1915. (2) An order that the defendant pay to the plaintiff a sum of money equivalent to the difference between the salary which the plaintiff has received and the salary which he would have been entitled to receive had he been appointed to such position (such difference being computed as from the date on which the plaintiff was first entitled so to be appointed) with interest thereon.

By its defence the Commonwealth said (*inter alia*) :—

7. It will contend that the plaintiff's allegations (even if all true) did not entitle the plaintiff as of right to either of the said positions.

8. It will contend that appointment or promotion to the said positions and each of them was subject to the provisions of the *Commonwealth Public Service Act* 1902-1916 and the regulations thereunder.

9. The appointment of the plaintiff to the said positions or either of them would have been a promotion to a higher office within the meaning of sec. 44 of the said Act. The plaintiff was not recommended for promotion to either of such positions by the Public Service Commissioner after report from the Permanent Head of the Department in which the plaintiff was employed or at all, and his name was not submitted to the Governor-General for such promotion; and before the appointment of the said Harry Philip



Fletcher and Leighton William Semple to the said vacant positions respectively the said Commissioner duly certified in each case that there was no senior officer available as capable as the said Fletcher and Semple respectively of satisfactorily performing the duties of such position.

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10. The plaintiff was not relatively as efficient, as capable or as fit as the said Fletcher or the said Semple for the said positions or either of them either in regard to special qualifications and aptitude for the discharge of the duties of such positions or either of them or in respect of merit and good and diligent conduct within the meaning of the said Act and regulations.

11. It will contend that the plaintiff's remedy (if any) for non-appointment to the said positions or either of them was by appeal under the provisions of the said Act and regulations.

By his reply the plaintiff said (*inter alia*):—

3. The matters alleged in pars. 8, 9 and 10 of the defence (even if all true) are no answer to the plaintiff's claim in this action.

On a summons for directions, *Powers J.* directed the issues of law raised by the pleadings to be disposed of before the issues of fact and to be argued before the Full Court, and they now came on for argument.

*Blackburn*, for the plaintiff. The plaintiff, having qualified by examination for appointment, is entitled to maintain this action, and he has alleged all the facts necessary to establish his cause of action (*Commonwealth Public Service Regulations*, regs. 205, 219, 226, 227, 229).

[GAVAN DUFFY J. Should not the plaintiff allege that his name has been placed upon the "Register of persons qualified by appointment" in accordance with reg. 229 ?]

No; it is unnecessary to do so. The placing of the plaintiff's name upon the Register is not a condition of appointment, but is a direction to the Commissioner as to the manner of recording the order in which candidates have passed the examination. The book is not open to inspection. The plaintiff has done everything required to be done by him. The plaintiff's right is contractual, being based on the offer made in the *Gazette* notice and the passing



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 by the plaintiff of the examination in a certain order of merit in accordance with the regulations. Reg. 115 indicates a definite right to appointment in persons who have qualified by examination.  
 [ISAACS J. Is not sec. 50 of the *Commonwealth Public Service Act* a bar to the action?]

No. Whatever may be its effect in respect of appointments open only to members of the Service, it does not apply to appointments open to other persons. Sec. 50 only gives an alternative remedy.

[ISAACS J. The remedy given by sec. 50 would seem to be exclusive (*Pasmore v. Oswaldtwistle Urban District Council* (1)).

[RICH J. That case is followed in *Bull v. Attorney-General for New South Wales* (2).]

Sec. 50 does not deprive a person of his contractual rights. It only applies to cases of persons who wish to review official recommendations.

[KNOX C.J. The Court is against you on the first question, so that it is no use arguing the other questions.]

*H. I. Cohen*, for the defendant, was not called upon.

KNOX C.J. This is an action against the Commonwealth brought for breach of an alleged contract by the Commonwealth to appoint the plaintiff to a certain position in the Public Service conditionally upon his qualifying himself by obtaining a particular place in order of merit at an examination about to be held. In effect the allegation is that the plaintiff sat for the examination, that he obtained a place on the list of candidates which, in the events which have since happened and having regard to the vacancies which have since occurred, entitled him to appointment to one of those vacancies, that those vacancies have been filled by the appointment of other persons, and that he, consequently, has been deprived of the remuneration which he would have received had he been appointed to one of those vacancies, and he claims to recover from the Commonwealth the amount he has lost by reason of the action of the Commonwealth in that respect. Whatever might be the case as between private individuals in the case of a contract alleged to have been

(1) (1898) A.C., 387.

(2) (1916) 2 A.C., 564.



made by such an advertisement as is said to have been published, and such performance on the part of the plaintiff, we have to consider what the rights are where the Commonwealth is a party and the advertisement is one connected with an appointment to the Commonwealth Public Service. It is not disputed that the advertisement and the plaintiff's action consequent thereon could give rise to no rights in the plaintiff except such as are in accord with the *Commonwealth Public Service Act* and the regulations thereunder. That being so, we find, from the regulations to which we have been referred by Mr. *Blackburn*, that the right given to the successful candidates at an examination is a right to have their names entered upon the Register in order of merit, which I take to mean according to the number of marks obtained in the examination. The regulations then go on to provide that from persons whose names are upon that Register appointments shall be made in order of registration, and neither the Commissioner nor the Commonwealth nor any other person has any right to dispense with the condition of that regulation. In my opinion it is necessary for the plaintiff in order to maintain this action to allege and prove that his name has been entered upon the Register in such a position as to entitle him to an appointment which has become vacant. It seems to me that registration is made a condition precedent to appointment, because the mandatory provisions of that regulation compel the appointment of the different candidates in the order in which they are registered. Whether there is or is not a remedy if the Commissioner has not discharged his duty is a matter with which we have no concern in this action.

For the reasons I have stated, I am of opinion that the allegations in the statement of claim disclose no cause of action, and that the action ought to be dismissed.

I desire also to say that I express no opinion with regard to the provisions of sec. 50 of the Act. It is not necessary to do so. It may be that sec. 50 would, in any event, preclude a person in the position of the present plaintiff from bringing an action of this kind. It may be that it would not. In the present case it is unnecessary to decide whether it does or does not, because in the reasons which

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H. C. OF A. 1920. I have given I assume that there is no obstacle in the nature of a question of procedure to the action which the plaintiff has instituted.

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Isaacs J.

ISAACS J. I agree that the action should be dismissed; and my view of the matter is this:—The plaintiff sues as an officer of the Public Service, and he says that he has not obtained the rights to which the *Commonwealth Public Service Act*, including the regulations made under it, entitled him. In my opinion, whatever rights he has must be rights created by that Act, and you have to look to the Act for the ascertainment of these rights, and, either expressly or by implication, for any remedy that is given for a violation of these rights.

On the merits as they have been argued, I can see no substantiation of the alleged right. The claim, it is said, ultimately resolves itself into this: that the appointment of the plaintiff's competitors, as I may call them, is not challenged, but the plaintiff is asking for money from the Consolidated Revenue to which he says he would have been entitled had he been appointed and they not appointed. To my mind such a claim, which is one essentially for damages, is utterly inconsistent with the provisions of the Act for regulating the Public Service.

I also think, without finally expressing any opinion upon the matter, that sec. 50 of the Act is a bar to the plaintiff proceeding in this fashion. It is quite easy to see what extraordinary results would follow if such an action were permissible. It would be open to every officer who said that he was improperly passed over, either by an appointment or by a promotion, to allow that section to lie in abeyance and then come to the Court to decide to what he would, according to his view of the law, have been entitled pecuniarily, and to ask for an order that the money should, as salary or as damages, be paid out of the Consolidated Revenue. To my mind, as at present advised at all events, that is quite contrary to the provisions of the Act. It may be that sec. 50, besides being an exclusive remedy for officers on the principle of *Pasmore v. Oswaldtwistle Urban District Council* (1) and *Bull v. Attorney-General for New South Wales* (2), mentioned during the argument by my brother

(1) (1898) A.C., 387.

(2) (1916) 2 A.C., 564.



*Rich*, gives a greater right to an officer than an outsider who seeks to enter the Public Service would have. I give no opinion about that. It may be that the right of an outsider is even less than that of an officer. However that may be, it is, according to my present impression, exclusive in the case of an officer.

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Isaacs J.

I agree with what has been said by the Chief Justice—that, assuming we have jurisdiction to decide this case, the plaintiff fails.

GAVAN DUFFY J. I agree with what has been said by the Chief Justice.

RICH J. I agree that the plaintiff has failed to show any violation of a right under the Act and regulations to be appointed.

My present impression is that the view of my brother *Isaacs* is right as to the effect of sec. 50. As the question has not been argued, I reserve my definite opinion on this point.

STARKE J. The question is whether the plaintiff has alleged in his statement of claim facts entitling him, as of right, to appointment to the position of Assistant Engineer (Professional Division, Class E), Electrical Engineer's Branch, Postmaster-General's Department. It is not alleged, and apparently cannot be alleged, that he was ever entered upon the "Register of persons qualified for appointment." The appointment, so far as this case is concerned, can only be made from persons on that Register. Therefore the statement of claim discloses no right to appointment.

I express no opinion as to the effect of sec. 50 upon this case, and I also reserve my opinion as to the plaintiff's position even if his name had been entered on the Register.

*Action dismissed with costs.*

Solicitor for the plaintiff, *Blackburn*.

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

B.L.