[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE ACTING PUBLIC SERVICE COMMISSIONER FOR THE COMMONWEALTH.

Ex parte KENNEY.

H. C. of A. 1922.

MELBOURNE, *May* 19, 22, 31.

Knox C.J., Higgins and Gavan Duffy JJ.

Public Service (Commonwealth)—Vacant office—Appointment—Promotion—Recommendation by Public Service Commissioner—Office filled by transfer from same class—Right of appeal—Officer "affected"—Mandamus—Commonwealth Public Service Act 1902-1918 (*No.* 5 *of* 1902—*No.* 46 *of* 1918), *secs.* 8, 41, 42, 50, 80—*Commonwealth Public Service Regulations* 1913-1921 (*Statutory Rules* 1913, *No.* 341—*Statutory Rules* 1921, *No.* 233), *reg.* 148.

Sec. 50 of the *Commonwealth Public Service Act* 1902-1918 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."

Held, by *Knox* C.J. and *Gavan Duffy* J., that an officer is not "affected" within the meaning of the section by any report or recommendation made or action taken under the Act unless such report, recommendation or action refers to or operates upon him.

The prosecutor, a fifth class officer in a certain Department, had been recommended by the Acting Public Service Commissioner for appointment to a vacancy in a fourth class office in the same Department, but that vacant office was filled by the Commissioner, notwithstanding the recommendation, by the transfer to it of an officer who was already in the fourth class whose office in another branch of the same Department had been abolished.

Held, by *Knox* C.J. and *Gavan Duffy* J. (*Higgins* J. dissenting), that the prosecutor was not entitled under sec. 50 to appeal against the transfer of the fourth class officer to the vacant office.

H. C. OF A. 1922.

THE KING v. ACTING COMMONWEALTH PUBLIC SERVICE COMMISSIONER; EX PARTE KENNEY.

Per Higgins J. :—Where an officer, A, has duly applied for appointment to a vacant position in his Department, and the Commissioner has purported to appoint another officer, B, to the position, A is "affected by the action" of the Commissioner. Where an officer, A, being in the fifth class of the Service, has been actually recommended by the Commissioner for promotion to an office in the fourth class, and the Commissioner nevertheless purports to transfer officer B, being in the fourth class, to the position, A is "affected by the action taken" by the Commissioner.

R. v. *Commonwealth Public Service Commissioner*; *Ex parte Killeen*, (1914) 18 C.L.R., 586, and *R.* v. *Commonwealth Public Service Commissioner*; *Ex parte O'Brien*, (1919) 26 C.L.R., 380, distinguished.

ORDER *nisi* for mandamus.

An order *nisi* was obtained by Isaac Harold Kenney, an officer in the fifth class of the clerical division in the Electoral Branch of the Home and Territories Department of the Commonwealth Public Service, calling upon the Acting Public Service Commissioner of the Commonwealth to show cause why a writ of mandamus should not issue directing the said Acting Public Service Commissioner to hear an appeal instituted by Kenney on 12th December 1921 against the transfer of one Leo Little to a certain vacant office in the fourth class of the clerical division in the same Branch, and, if not prepared without evidence to decide the appeal, to forward the appeal to the Public Service Inspector of the Commonwealth for the State of Victoria for hearing by an Appeal Board pursuant to reg. 283 of the *Commonwealth Public Service Regulations* and the *Commonwealth Public Service Act*.

The material facts are stated in the judgments hereunder.

The order *nisi* now came on for argument before the Full Court of the High Court.

Gregory, for the prosecutor. The prosecutor is an officer affected by a report or recommendation made or an action taken under the *Commonwealth Public Service Act* within the meaning of sec. 50 of that Act, and is therefore entitled to appeal. The fact that another person has been appointed to an office for appointment to which the prosecutor has been recommended affects him within the meaning of that section (*R.* v. *Commonwealth Public Service Commissioner*;

Ex parte Killeen (1); *R.* v. *Commonwealth Public Service Commissioner*; *Ex parte O'Brien* (2)). On the appeal the prosecutor might show that it was of more advantage to the Public Service that he should be appointed to the vacant office rather than that Little should be appointed. There are no facts disclosed which show that if the appeal were heard the result must be futile. [Counsel referred also to secs. 8 (4), 41, 42, 44 (1).]

C. Gavan Duffy (*Ham* with him), for the respondent. The prosecutor is not "affected" within the meaning of sec. 50. An officer is not "affected" unless he has rights which have been infringed. An officer has a right, as against another officer in the same class, to be promoted to a higher class (*R.* v. *Commonwealth Public Service Commissioner*; *Ex parte O'Brien* (2)); but he has no right as against an officer in a higher class whom it is proposed to transfer to another office in the higher class. The right to be appointed to an office only exists where that office is vacant. Here it was at first thought that there was a vacant office, but on consideration it was found that there was not. Sec. 50 gives a right of appeal only for acts done under the Act; what was done here was done under the *Commonwealth Public Service Regulations*, reg. 148 (1) (*e*). It was not intended to give an appeal in respect of numbers of small matters which are referred to in the Regulations. Even if a right of the prosecutor has been infringed mandamus should not go, because the office has been and is now properly filled (see reg. 148 (1) (*e*)).

Gregory, in reply. The word "affected" in sec. 50 includes an act which operates prejudicially to an officer.

Cur. adv. vult.

May 31.

The following written judgments were delivered:—

KNOX C.J. AND GAVAN DUFFY J. This is an application to make absolute an order *nisi* for a mandamus directing the respondent to hear an appeal of the prosecutor against the transfer of one Leo Little to a position in the Electoral Branch of the Home and Territories Department and, if not prepared without evidence to decide

(1) (1914) 18 C.L.R., 586. (2) (1919) 26 C.L.R., 380.

H. C. OF A. 1922.

THE KING v. ACTING COMMONWEALTH PUBLIC SERVICE COMMISSIONER; EX PARTE KENNEY.

Knox C.J. Gavan Duffy J.

the appeal in his favour, to forward the appeal to the Commonwealth Public Service Inspector for hearing by an Appeal Board.

In June 1921 applications were invited by advertisement in the Commonwealth *Government Gazette* to fill a fourth class clerical vacancy in the Electoral Branch of the Home and Territories Department. The prosecutor, who is a fifth class clerk in the Department, sent in an application for the position, but one McClelland, also a fifth class clerk, was recommended for promotion to the vacancy. The prosecutor thereupon appealed under sec. 50 of the *Commonwealth Public Service Act* 1902-1918 against McClelland's promotion, and his appeal was in due course allowed by the Commissioner, who then recommended that the prosecutor should be promoted to the said vacancy. In November 1921, appeals against this recommendation were lodged by two other officers of the Department. These appeals were referred to a Board of Appeal, which heard evidence and on 21st November adjourned the further hearing of the appeals. On 23rd November Deputy Inspector William James Clemens reported to the respondent (*inter alia*) as follows: "(1) That the Permanent Head of the Home and Territories Department be advised that after further inquiry it is considered the position of clerk, class IV., clerical division, occupied by the said Leo Little in the said Lands and Surveys Branch is in excess of requirements and should be abolished, and that the said Permanent Head be asked to furnish a report as required by sec. 41 of the said Act relative to the proposed abolition of such position; (2) that the services of the said Leo Little be utilized by transferring him to the position of clerk, class IV., clerical division in the said Electoral Branch caused by the promotion of the said W. L. Rush; (3) that in view of the provisions of sec. 8 (4) of the said Act it is considered no further action should be taken to fill the said vacancy *vice* W. L. Rush by promotion of an officer, and that the recommendation for the promotion of the said Isaac Harold Kenney, clerk, fifth class, clerical division, to the said position of clerk, class IV., clerical division, caused by the promotion of the said W. L. Rush be cancelled." After perusing this report the Acting Commissioner approved of the recommendations which it contained. The Permanent Head of the Department was on 26th November 1921 informed of such approval and asked to furnish a

report under sec. 41 relative to the position held by Little. On 7th December 1921 the Permanent Head of the Department reported that he concurred in the recommendation of the respondent that the position occupied by Little should be abolished and that Little should be transferred to the vacant position in the Electoral Branch. The position formerly held by Little was then abolished by the Governor-General, and Little was transferred to the vacant position in the Electoral Branch. On the resumption of the hearing of the appeals against the recommendation of the prosecutor, all parties were informed that the respondent had withdrawn his recommendation in favour of the prosecutor, and that the further hearing of the appeals was therefore unnecessary; and the Board did not proceed with the hearing of the appeals. We assume that the recommendation was in fact withdrawn and was never considered by the Governor-General.

On 12th December 1921 the prosecutor lodged an appeal against the transfer of Little to the said position, and on 4th January 1922 was informed that it was not admitted that he was affected within the meaning of sec. 50 by the transfer of Little, and that in the circumstances no appeal lay. The prosecutor then obtained an order *nisi* for mandamus.

It is admitted that all that has been done is within the law, and the prosecutor does not wish to call in question any supposed act or default of the respondent with respect to his recommendation to the Governor-General that the prosecutor should be appointed to the vacancy in the fourth class, or any action or want of action by the Governor-General in respect of such recommendation. He frankly admits, through his counsel, that he does not wish to press his own claim at present because his appointment is entirely in the discretion of the Governor-General, and that in the present circumstances the Governor-General is not in the least likely to exercise that discretion in favour of the prosecutor. But he claims that the transfer of Little is an action taken by the respondent under the *Commonwealth Public Service Act* by which he is affected within the meaning of sec. 50. In our opinion he is not so affected. The primary meaning of "to affect" is to produce an effect on, and in that sense the prosecutor is affected not by the transfer of Little but

H. C. OF A. 1922.

THE KING v. ACTING COMMONWEALTH PUBLIC SERVICE COMMISSIONER; EX PARTE KENNEY.

Knox C.J. Gavan Duffy J.

by the pretermission of the Governor-General in not appointing him on the recommendation of the respondent. It is true that if he were permitted to appeal he might ultimately persuade the respondent that he had not been well advised in transferring Little, and that the interests of the Public Service would be better served by the promotion of the prosecutor; and the result might be that the respondent would again submit to the Governor-General the recommendation that the prosecutor should be appointed to the vacancy, and that in those circumstances the Governor-General would appoint him, but that is not enough: we think that an officer is not affected within the meaning of the section by any report or recommendation made or action taken under the Act unless such report, recommendation or action refers to or operates upon him. He may be deeply interested in the result, as the prosecutor is here; but to hold that every officer so interested is also affected within the meaning of the section would be to enable an officer to lodge an appeal against any act done in the management and control of the Department if he could show that such act would be likely to affect his interest, comfort or convenience.

The meaning of the section has already been discussed in this Court in two cases. In *R.* v. *Commonwealth Public Service Commissioner*; *Ex parte Killeen* (1), it was held that where several officers were competing applicants for appointment to a vacant office and the Public Service Commissioner recommended one only, all the other applicants were "affected" by that recommendation. In *R.* v. *Commonwealth Public Service Commissioner*; *Ex parte O'Brien* (2), it was held that the prosecutor was in competition for appointment to an office to which another officer had been recommended by the Commissioner, and was therefore "affected" by the recommendation of the Commissioner. Neither of these cases is an authority on which the present prosecutor can rely.

In our opinion the order should be discharged.

HIGGINS J. Officer A has duly applied for appointment to a vacant position in his Department; the Commissioner has purported to appoint another officer, B, to that position. I confess that

(1) (1914) 18 C.L.R., 586. (2) (1919) 26 C.L.R., 380.

I cannot understand how it can be said that officer A is not "affected" by the action of the Commissioner. In this case there are even additional facts. Officer A, being in the fifth class of the Service, has been actually recommended by the Commissioner to the Governor-General for promotion to this office in the fourth class. The Commissioner has since purported to transfer officer B, who is already in the fourth class, to the position. Why is officer A not to be treated as "affected" by the action of the Commissioner?

The relevant facts are that on 9th June 1921 the Commissioner advertised inviting applications to fill the vacancy, a fourth class position in the Electoral Branch of the Home and Territories Department (sec. 42; reg. 148 (1) (*b*)). Kenney and McClelland, both fifth class officers in that Department and Branch, applied for the position. An appointment of a fifth class officer to a fourth class position involves promotion, and the Commissioner, under sec. 42, recommended McClelland to the Governor-General; but, on an appeal made by Kenney, and on the recommendation of the Board of Appeal, 7th October 1921, the Commissioner recommended Kenney for the appointment. On 8th and 9th November two other officers, Ward and Lohan, filed appeals against the recommendation of Kenney. These appeals came before the Board on 22nd November 1921, and were adjourned. On 23rd November a letter was written by a Deputy Inspector (one of the members of the Board of Appeal, but not acting, it appears, as to this letter, in pursuance of any general or particular direction of the Commissioner—see sec. 8 (1)), to the secretary of the Commissioner, recommending that the position of clerk, class IV., occupied by one Little in the Lands and Surveys Branch of the Department was in excess of requirements, and should be abolished under sec. 41; that Little be transferred to the vacancy in the Electoral Branch, and that no further action should be taken to fill the vacancy by promotion. It turns out, from the cross-examination of Mr. Earl, the secretary of the Commissioner, that, notwithstanding the words used in Earl's affidavit, there was no finding whatever of the Commissioner, under sec. 8 (4) of the Act, to the effect that there were more officers in the fourth class of the Department than necessary for the efficient working of the Department. The Commissioner did nothing but

H. C. OF A. 1922.

THE KING v. ACTING COMMONWEALTH PUBLIC SERVICE COMMISSIONER; EX PARTE KENNEY.

Higgins J.

write "approved" on the Inspector's letter. On 26th November the Permanent Head of the Department was informed by Earl of the approval of the letter, and was asked by Earl to furnish a report under sec. 41 (*b*) as to the abolition of Little's office in the Lands and Surveys Branch. Sec. 41 says that the *Governor-General* is to "obtain a report" from the Permanent Head. No "report," in the sense of the Act, was obtained by any one; but on 7th December the Permanent Head "informed" Earl that he concurred in the recommendation of the letter as to the abolition of Little's office, and the transfer of Little to the vacancy in the Electoral Branch. I should have thought that the abolition of Little's office without the Governor-General "obtaining a report" from the Permanent Head—a report that would definitely fix the Permanent Head with responsibility, as required by sec. 41—would be invalid; but the point was not taken, though it might be taken on an appeal.

On the same 7th December the same Deputy Inspector informed the appellants Ward and Lohan, as well as Kenney, at the Board of Appeal, that the Commissioner had "withdrawn his recommendation" in favour of Kenney, and that the further hearing of the appeals was unnecessary. There is no power, that I can see, in the Act to "withdraw the recommendation." The Governor-General is entitled to retain it for what it is worth; but I should think that under sec. 5 (1) the Commissioner could submit any further report to the Governor-General. There is no affidavit that the recommendation was withdrawn. On 12th December Kenney filed an appeal against the transfer of Leo Little to the said fourth class clerical position. The Commissioner on 4th January 1922 refused to entertain the appeal on the ground that Kenney was not "affected" by the transfer, within the meaning of sec. 50. On 9th February 1922 there appeared in the *Gazette* a notice that the position occupied by Little was abolished by the Governor-General on the recommendation of the Commissioner. The notice did not state that a report had been obtained from the Permanent Head.

There seems to be no doubt that under reg. 148 (1) (*e*) and (4) (*c*) of the Regulations the Commissioner has power to transfer an excess officer of the fourth class from one Branch to another fourth class

position in another Branch, without seeking the approval of the Governor-General.

The first argument put forward by counsel for the Commissioner is that an officer is not "affected by any . . . action taken" unless some right of his has been infringed. Owing to the circumstances of this case, I propose to assume (notwithstanding what I have said) that no right of Kenney has been infringed—that no illegal step has been taken. I assume even (what is doubtful) that the officer called the "Acting Public Service Commissioner" has the same powers as a Commissioner or a Deputy Commissioner. These are assumptions—not, so far as I understand, admissions. The net result is that, although the Commissioner, when he intended to make a promotion to the office, recommended Kenney for the office, he has now appointed to the office a man who is already in the fourth class, but whose own office has been abolished. I cannot conceive a clearer case of an officer being "affected" by an action taken under the Act. Kenney is affected to his prejudice by the action of the Commissioner, right or wrong. In addition to such facts as the appellant showed in *Killeen's Case* (1) and in *O'Brien's Case* (2), Kenney has shown that, by the Commissioner's action, he has been baffled in legitimate expectations aroused by the Commissioner; but this last fact is not, to my mind, essential. Sec. 50 is not confined to infringements of a right. The appeal is not provided for an officer "whose rights are infringed," but for an officer who is "affected by any . . . action taken"; and we have no right to whittle down the meaning of the words used by the Act. The section expressly excepts from appeal any action taken under secs. 31, 46-49, 65-66, 73, and excepts no other action taken; and we have no right to add to the exceptions: *Expressio unius exclusio alterius.* The scheme devised by Parliament is a valuable safety-valve for discontents. It does not exclude appeals on such delicate grounds as the relative efficiency of officers (*Killeen's Case*; *O'Brien's Case*); it does not exclude appeals on questions of discretion or expediency. The Board has large powers of brushing aside frivolous appeals; it can even exclude evidence which it deems

(1) (1914) 18 C.L.R., 586. (2) (1919) 26 C.L.R., 380.

H. C. OF A. 1922.

THE KING v. ACTING COMMONWEALTH PUBLIC SERVICE COMMISSIONER; EX PARTE KENNEY.

Higgins J.

to be irrelevant (reg. 292). The duties entrusted to the Commissioner are so numerous, so various in character, so complex, that the probability of some considerations being overlooked at times is very great, and Parliament has really provided for an appeal to the Commissioner's enlightened second thoughts—enlightened by the report of an Appeal Board; but Parliament has taken care to lodge the responsibility for the final determination in the Commissioner himself. In my opinion, this first point cannot be sustained.

The second point taken by the Commissioner's counsel is that the provision for appeal applies only to action "taken under this Act," and that action taken under reg. 148 (1) (*e*) is not taken under the Act. But it is the Act that speaks through the regulation—"when made by the Governor-General and published in the *Gazette*" it "shall have full force and effect" (last clause of sec. 80). It is by virtue of the Act, sec. 5 (1), as Mr. *Gavan Duffy* says (I think rightly), that the Commissioner has power under reg. 148 to make this appointment of Little without the approval of the Governor-General; and, as Mr. *Gavan Duffy* admits, if the words of sec. 5 (1) were that the Commissioner shall have the powers, &c., vested in or imposed on the Commissioner by regulation set forth in the Schedule to the Act, any action taken under such regulations would be action taken "under the Act." There is no real distinction—the Act operates similarly in both cases.

Finally, for a third point, it is urged for the respondent that the office is filled and the appeal would be futile, and that the Court does not issue a mandamus to do what would be futile. It is suggested that the proper remedy is a proceeding by quo warranto. Even if quo warranto lies in respect of an office such as the present—which I doubt—the writ would not be granted where the filling of the office is legally valid (as is here assumed). The only remedy, if there is any remedy, is by appeals under sec. 50. This office is filled subject to the appeal; what is done can be undone. If, for instance, it were clearly demonstrated to the Board that Little is wholly unfitted for this office, incapable of carrying out the duties, there is no ground for assuming that the Commissioner would fail in his duty to allow Kenney's appeal. The appeals of Ward and Lohan would still have to be heard. If the latter appeals fail, the Governor-General would

still have to exercise his powers under sec. 42. To say the least, it is not established that the appeal would be necessarily futile; if the office is filled, it is filled subject to the right of appeal. It was not even filled till after the appeal of Kenney was filed.

For these reasons, I am of opinion that the Commissioner ought to entertain this appeal, and that the order should be made absolute.

Order nisi discharged with costs.

Solicitors for the prosecutor, *Maddock, Jamieson & Lonie.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

WARREN . . . . . APPELLANT;
INFORMANT,

AND

VAGG . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *May* 18, 29.

Knox C.J., Higgins and Gavan Duffy JJ.

Forests—"Protected forest," meaning of—Water frontage—Licence—Forests Act 1915 (*Vict.*) (*No.* 2655), *secs.* 4, 30—*Local Government Act* 1915 (*Vict.*) (*No.* 2686), *secs.* 729, 732.

Sec. 4 of the *Forests Act* 1915 (Vict.) provides that, unless inconsistent with the context or subject matter, "'protected forest' includes all unoccupied Crown land proclaimed as a protected forest pursuant to this Act or any Act hereby repealed and every unused road and every water frontage as defined in Part XXXIX. of the *Local Government Act* 1915." Sec. 30 (1) provides that "No person shall fell girdle ring-bark injure destroy or remove any growing tree or