REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1930-1932.

[HIGH COURT OF AUSTRALIA.]

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA . . . . . } APPELLANT;
DEFENDANT,

AND

ROBERTS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1931.

MELBOURNE, *Oct.* 19, 20.

SYDNEY, *Dec.* 3.

Gavan Duffy C.J., Rich, Starke, Dixon and Evatt JJ.

Superannuation—State school teacher—Appointment prior to 24th December 1881—*Pupil teacher without salary—Appointment by Governor in Council—Whether necessary—Public Service Act* 1928 (*No.* 3757), *secs.* 150, 151—*Public Service Act* 1862 (*Vict.*) (*No.* 160)—*Public Service* (*Pensions Abolition*) *Act* 1881 (*Vict.*) (*No.* 710)—*Public Service Act* 1883 (*Vict.*) (*No.* 773), *sec.* 70—*Education Act* 1872 (*Vict.*) (*No.* 447), *secs.* 3, 5, 22.

The respondent claimed to be entitled to superannuation or retiring allowance computed under the provisions of Act No. 160. The claim was made under the provisions of secs. 150 and 151 of the *Public Service Act* 1928. Sec. 150 provides that no public officer shall receive a pension, superannuation or retiring allowance if he was appointed since the passing of Act No. 710, which was passed on 24th December 1881. Sec. 151 provides that all persons classified or unclassified holding offices in any department of the Public Service at the time of the passing of the *Public Service Act* 1883 except persons appointed since the passing of Act No. 710 shall be entitled to superannuation

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

or retiring allowance computed under the provisions of Act No. 160. The *Public Service Act* 1883 was passed on 1st November 1883. From these provisions it follows that in order to succeed in his claim the respondent must establish that, being an officer in the Education Department or a teacher in a State school, he held office whether classified or unclassified on 1st November 1883 and was not a person appointed since 24th December 1881. The records showed that the respondent had been appointed as an unpaid pupil teacher from 23rd June 1881; and in the classified rolls this was the date given as the date of his appointment. On 4th July 1882 his name was submitted to the Governor in Council, when he was appointed by the Minister but not by the Governor in Council as a paid pupil teacher. It was not disputed that he was a teacher holding office on 1st November 1883.

Held, by *Rich*, *Dixon* and *Evatt* JJ. (*Gavan Duffy* C.J. and *Starke* J. dissenting), that, though his appointment by the Governor in Council was not proved, he was a person appointed prior to 24th December 1881, and that in any case the possibility of such an appointment was not completely excluded, and that he was accordingly entitled to superannuation allowance.

Per Rich and *Evatt* JJ.: Even if the respondent's appointment was not formally approved by the Executive Council he would still be entitled to his pension.

Jenkin v. *Attorney-General of Victoria*, (1921) V.L.R. 79; 42 A.L.T. 141, considered.

Decision of the Supreme Court of Victoria (*Irvine* C.J.) affirmed.

APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court by the respondent, Edward Henry Roberts, against the Attorney-General for the State of Victoria, the plaintiff claimed a declaration that he was entitled to a pension or to superannuation or retiring allowance, compensation or gratuity under the provisions of Act No. 160 of the Parliament of Victoria.

The respondent, who retired from the Education Department on 31st December 1929, claimed to be a person employed in the Public Service on 24th December 1881 who held office in a department of the Public Service on 1st November 1883, and who was not a person appointed since 24th December 1881. It was not denied on the part of the Crown that he was a person holding office in a department of the Public Service on 1st November 1883, but it was said that he was a person first appointed since 24th December 1881, namely, on or about 4th July 1882. The question raised by this appeal was whether the respondent was

in fact employed in the Education Department or the Service of the Crown on 24th December 1881 and was not, in fact, first appointed after that date.

At the trial of the action before *Irvine* C.J., evidence was given to the following effect:—The personal record of the respondent, which appeared to have been opened in the Department in or soon after June 1881, entered him as having been appointed an unpaid pupil teacher from 23rd June 1881; and in the classified rolls prepared in 1885 and 1888, pursuant to Act No. 773, the date of his appointment was given as 23rd June 1881, and this date is given in all classifications and records in which his name appears. But on 4th July 1882, or thereabouts, his name was submitted to the Governor in Council for appointment as a pupil teacher at a remuneration of £20, and in the paper on which his name was so submitted, entered opposite was the remark "Unpaid P.T. (apptd. on staff)." The Crown contended that he had not before been appointed by the Governor in Council, and that Act No. 447 did not authorize any other form of employment or appointment in the Education Department, that the Regulations under that Act did not admit of his appointment as an unpaid pupil teacher, or as a pupil teacher in the school in which he was actually put in that position, and that neither in law nor in fact did he hold a recognized position in the Service until 4th July 1882. In May 1881 a vacancy for a pupil teacher occurred in the State school in which the respondent, who was then in his seventeenth year, had been a pupil and where he had been teaching as monitor for some eighteen months. The head master recommended that he should be appointed, and his father addressed a request to the Minister of Education for the favourable consideration of his son's application, but the vacancy was filled, apparently, by the appointment of another applicant. In the course of an explanation to the Secretary of the Department, the head master said, in effect, that the respondent had been teaching as a monitor in expectation of appointment to the next vacancy as a pupil teacher, the recommendation to which he as head teacher had promised, and that partly through this promise the lad had suffered a disappointment. He ended his letter by asking "if the Honourable the Minister would allow

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

him" (Roberts) "to be placed on the staff without salary so that he might proceed with the course of examinations as pupil teacher." His father visited the Minister, and as a result the respondent formally applied to him "for appointment as unpaid pupil teacher in School No. 695." The Minister indorsed the application "M. O." (i.e., Ministerial Order). "Appoint unpaid P.T. at No. 695, Pleasant Street W. C. S. 14/6/81." The order was filed in the Department, the head teacher notified, and upon his giving an assurance in conformity with the Regulations that the respondent had no physical defect likely to impair his efficiency as a teacher, the file was indorsed with the fact that the respondent was appointed a fourth class unpaid pupil teacher from 23rd June 1881, and with the departmental number allotted to him which he retained throughout the course of his service. At the end of the year, namely, on 13th December 1881, he passed his pupil teacher's examinations enabling him to proceed to the third class, and for this the head teacher received the bonus, and after some delay the respondent was recorded as a pupil teacher of the third class as from 1st January 1882 and of the second class from 1st April 1882. It appeared that the one thing lacking for the due and complete appointment of the respondent as an officer of the teaching staff was an order in Council.

Upon these facts the learned Chief Justice made a declaration that the respondent was entitled to a superannuation or retiring allowance computed under the provisions of Act No. 160.

From that decision the Attorney-General for the State of Victoria now appealed to the High Court.

C. Gavan Duffy, for the appellant. In June 1881 the respondent had been employed as an unpaid pupil teacher and subsequently he was appointed as a paid pupil teacher. If he had been appointed as a paid pupil teacher in June 1881, then he would be entitled to the pension claimed. It does not appear anywhere that the respondent was appointed by the Governor in Council. It does appear that the respondent was unpaid, and an unpaid pupil teacher was something not known to the Regulations. All that the appointment amounted to was to give him a *locus standi* in the school from which he might enter the Service. The learned Chief Justice considered

that this case was governed by *Jenkin* v. *Attorney-General of Victoria* (1).

[DIXON J. referred to *Foran* v. *The Queen* (2).]

Fullagar, for the respondent. This matter has been fully dealt with by *Jenkin* v. *Attorney-General of Victoria* (1). The fact of there being no payment can make no difference. The test is whether there was employment. The sole question is whether the relation of employer and employee did exist. That relationship and control did exist in every respect. There was no difference before and after payment in the work done by the respondent: his work was the same. He was subject to the same discipline, and that constitutes employment. The respondent was not paid before 1882. If *Jenkin's Case* is correct, the respondent was a teacher though he was not paid. There is no evidence that the respondent was not appointed by the Governor in Council, and as he acted in the office the presumption is that he was properly appointed. A person may be a teacher in a State school without appointment by the Governor in Council. *Jenkin* v. *Attorney-General of Victoria* is a case which has stood for ten years and should not now be overruled (*Pugh* v. *Golden Valley Railway Co.* (3)).

C. Gavan Duffy, in reply.

Cur. adv. vult.

Dec. 3.

The following written judgments were delivered:—

GAVAN DUFFY C.J. AND STARKE J. The determination of this case depends upon the question whether the respondent was employed as a teacher in any State school prior to 24th December 1881, when the Act No. 710 abolishing the payment of pensions and retiring and other allowances was passed. It was not denied that he was employed, and in due form appointed, as a paid pupil teacher in a State school, as from 6th July 1882; but that is after the passing

(1) (1921) V.L.R. 79; 42 A.L.T. 141. (2) (1890) 16 V.L.R. 510, at pp. 515-516.
(3) (1880) 15 Ch. D. 330, at p. 336.

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

Gavan Duffy C.J. Starke J.

of the Act No. 710. The respondent had been a scholar in a State school near Ballarat for a considerable period, and was the best pupil in the school: in fact the head master had used his services as a monitor for teaching purposes. In May of 1881 his father applied to the Minister of Public Instruction for the appointment of the respondent as a pupil teacher, but was informed that there was then no vacancy but that the application would receive special consideration on the occurrence of the next vacancy. Later in the same month, the head master requested that the Minister would allow the respondent to be placed on the staff without salary, so that he might proceed with the course of examinations as a pupil teacher. A reply was forwarded that the Department was not prepared to appoint the respondent as an unpaid pupil teacher. In June 1881 the respondent applied for appointment as an unpaid pupil teacher. The Minister minuted the letter "Appoint unpaid P.T. at No. 695, Pleasant Street." A minute also exists in the departmental files as follows:—"Edward H. Roberts 9625. 4 cl. Apptd. unpaid P.T. from 23rd June 1881." The personal record of the respondent in the Department, and the classified roll, contain corresponding entries. Subsequent events throw some light on the Minister's action. In February of 1882 the respondent applied to be placed on the paid staff of pupil teachers, and stated that he had been appointed an unpaid pupil teacher in June of the previous year, but had since been informed that the appointment of another paid pupil teacher was then unwarranted. In June of 1882 a vacancy occurred in the position of paid pupil teacher in another school, and the respondent applied for it. But a paid pupil teacher in the school where the respondent was then teaching was appointed to this vacancy, and as from 6th July 1882 the respondent was appointed a paid pupil teacher in the school in which he had been educated and had taught as a monitor and unpaid pupil teacher. The appointment of the respondent as a paid pupil teacher was submitted to the Governor in Council, and apparently confirmed.

We must now turn to the *Education Act* of 1872, which at the relevant dates controlled the appointment of officers and teachers in the Education Department. It is unnecessary to consider the provisions of sec. 21, for the respondent did not enter the Education

Department until after the passing of this Act. Under sec. 5 the appointment and removal of teachers (which included pupil teachers) and other officers was vested in the Governor in Council and not in the Minister. And sec. 17 provided for their payment. So far as this section related to the respondent, the provision was that "teachers of State schools shall be paid such salary . . . as shall be fixed by regulations." The Regulations allotted staffs (including pupil teachers) to schools according to the average attendance, and fixed the annual salaries of pupil teachers as follows:—Males: Class 1, £50; Class 2, £40; Class 3, £30; Class 4, £20. A further provision of the Regulations was that salaries should not be paid to pupil teachers until they should have passed the examination for the fourth or lowest class. If they passed at the first examination to which they were summoned, they were paid from the date of their passing. Now it is plain enough that the appointment of the respondent by the Minister in June 1881 as an unpaid pupil teacher did not conform to any of these provisions, and cannot be attributed to any lawful authority. It is clear on the facts proved that the respondent's so-called appointment and employment in June of 1881 was based upon the Ministerial Order and upon nothing else. The Court cannot infer an origin to his appointment other than that actually proved. What then was the position of the respondent in the Education Department before 6th July 1882? The respondent's desire in 1881 to obtain a footing in the Department is clear enough. But there was no vacancy for him. He desired experience as a teacher, and, if he were allowed to give his services without payment, that would provide him with such experience, and would also advance his application for a permanent and paid appointment. So he volunteered his services, and the Minister, because it cost the State nothing, allowed him, as a privilege, to enter a State school and gain the experience as a teacher that he desired. No doubt he was subject to the discipline and control of the head master, but to call the privilege granted to him an appointment or an employment by the State surely avoids realities, and places too much stress upon the form whereby the privilege was granted. The respondent was not in fact employed in the Education Department as a pupil teacher before July of

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

Gavan Duffy C.J. Starke J.

1882. But even if he was in fact so employed, but was not lawfully appointed, we are by no means satisfied that he is entitled to the retiring allowance which he claims. The relevant provisions of sec. 22 of the Act of 1872 are: "Any . . . teacher who shall be *employed* in any State school upon having served fifteen years under this Act, or partly under this Act and partly under any law previously in force, shall be entitled to a retiring allowance on the same basis as may hereafter be provided for members of the Public Service." The phrase "any teacher who shall be employed" necessarily imports some authority to employ, and, in our opinion, means the authority found within the terms of the Act itself, and, so far as this case is concerned, that provided by sec. 5, namely, the Governor in Council. Sec. 22 does not contemplate the granting of pensions or retiring allowances to persons in fact doing work or rendering services in the Department, but persons employed under and pursuant to the authority of the Act itself. The later Acts—the *Public Service Act* of 1883, No. 773 (sec. 70), the *Public Service Act* of 1890 (sec. 107), the *Public Service Act* of 1915 (sec. 151), and the *Public Service Act* of 1928 (sec. 151)—merely preserve and make effective the inchoate right given by sec. 22 of the *Education Act* 1872, and in no way alter or affect it or extend its area.

The appeal should, in our opinion, be allowed.

RICH J. The respondent retired from the Education Department on 31st December 1929, having attained the age of sixty-five. He claimed to be entitled to superannuation or retiring allowance computed under the provisions of Act No. 160. The provisions upon which this claim is based are contained in secs. 150 and 151 of the *Public Service Act* 1928. Sec. 150 provides that no public officer shall receive a pension, superannuation or retiring allowance if he was appointed since the passing of Act No. 710. This Act was passed on 24th December 1881. Sec. 151 provides that all persons classified or unclassified holding offices in any department of the Public Service at the time of the passing of the *Public Service Act* 1883 except persons appointed since the passing of Act No. 710 shall be entitled to superannuation or retiring allowance computed under the provisions of Act No. 160. It is provided that the section shall

extend and apply to all officers in the Education Department and teachers in any State school in the same way and to the same extent but not further or otherwise than it applies to officers in any other department of the Public Service. The *Public Service Act* 1883 was passed on 1st November 1883. From these provisions it follows that in order to succeed in his claim the respondent must establish that, being an officer in the Education Department or a teacher in a State school, he held office whether classified or unclassified on 1st November 1883 and was not a person appointed since 24th December 1881. It is not disputed that he was a teacher in a State school holding an office unclassified on 1st November 1883. To establish that he was not a person appointed since 24th December 1881 he relied upon the classified roll of State teachers compiled under the provisions of the *Public Service Act* 1883 (No. 773) and under the corresponding subsequent legislation. The rolls put in evidence, as examples, were published in the *Gazette* of 1st January 1885, 30th June 1888 and 10th October 1927. In each of these documents the date of the respondent's appointment to the Service was stated to be 23rd June 1881. It seems unfortunate, to say the least of it, that, although throughout the period of his service he was classified and recorded on the footing that he was appointed on this date, doubts should have occurred to the advisers of the Crown, presumably at the Treasury, upon the correctness of the fact which had been accepted and reiterated for more than forty years only when it became apparent that it afforded a title to a pension. However, after an examination of the files of 1881 on the part of the Crown, these doubts appear to have ripened, if not into certainty, at any rate into a litigious confidence which has brought the Crown into this Court. But it can be no cause for surprise that a Court should demand the clearest and most explicit proof that no such appointment was made, in order to overthrow the effect of deliberate and exact statements in public documents compiled under the provisions of the statute for the very purpose of stating and recording the facts relating to the respondent's position in the Service. The leading document of those disinterred and put in evidence does little to weaken the presumption in the respondent's favour, although the Crown says, as perhaps it must, that that little is enough. That

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

Rich J.

document consists of an application dated 13th June 1881 to the then Minister of Education indorsed with a ministerial order directing that the respondent should be appointed unpaid pupil teacher at State School No. 695, Pleasant Street, Ballarat. Thereupon the Secretary of the Department, after receiving an assurance from the head teacher, which seems to have been required under the Regulations dealing with pupil teachers, that the respondent was free from any physical defect likely to impair his efficiency as a teacher, minuted the file with the respondent's name, the departmental number then allotted to him and the statement that he was appointed unpaid pupil teacher from 23rd June 1881. A personal record was thereupon opened in the Department's files under the respondent's name and the number so assigned. The date of the respondent's birth was entered and the fact that he was appointed an unpaid pupil teacher from 23rd June 1881 together with the file number of the Secretary's minute as the authority for the appointment. On what this record discloses or does not disclose the Crown makes three points. It is said, first, that it does not appear that he was appointed by the Governor in Council; next, that it does appear that he was unpaid, and that an unpaid pupil teacher was a thing not known to the Regulations, and, third, that all the appointment amounted to was to give him a *locus standi* in the school from which he might enter the Service. In support of the third point the correspondence between the head teacher and the Secretary of the Department and the respondent's father and the Minister was relied upon. From this it appears that a vacancy for a pupil teacher had occurred in the school; that the head teacher had held out expectations to the respondent, who had been teaching as a monitor, that he would be appointed; that an appointment of some other person had been made; that thereupon the head teacher had sought from the Minister an appointment for his protégé on the staff without salary so that he might pursue the course of examinations as a pupil teacher; that the Minister had been interviewed by the father, and the respondent had made a formal application for appointment as unpaid pupil teacher. The Regulations then in force show clearly that a pupil teacher, at least a paid one, was part of the teaching staff of a school. In order to obtain a licence to

teach, a course of training was prescribed for pupil teachers and they were required to pass annual examinations. There could be no doubt that if the respondent had been appointed a paid pupil teacher by the proper authority he would have been a person holding office in a department of the Public Service at the critical date. I am not impressed by the weight of the second and third points of the Crown. They seem to confuse the question whether the respondent ought to have been appointed, with the question whether he was. It may have been very wrong of the Minister who advised the Crown in 1881 to listen to the respondent's father or to desire to confer upon the respondent all the rights, powers, privileges and authority of the not very exalted office of pupil teacher, and withhold the slender emoluments. It may have been wrong of him to mollify an applicant for a vacancy who had failed by appointing him as an addition to the establishment. But all these considerations lend support to the view that the Minister did it rather than that he failed in his design. His whole object was to put the youth in the Service as a pupil teacher standing upon the lowest rung of the ladder, and, therefore, on the ladder. The matter must, I think, come back to the point, not of most merit but of most technical cogency, that the approval of the Governor in Council was required and was not obtained. In *Jenkin* v. *Attorney-General* (1) *McArthur* J. held that a teacher might at that time be employed in a State school and thus hold an office in a department of the Public Service without appointment by the Governor in Council. The question depends upon the meaning of sec. 5 of Act No. 447 interpreted by the light of the language used in sec. 22. However this may be, it appears that the names of pupil teachers were submitted at the time with which we are concerned to the Governor in Council, and probably the ministerial order contemplated inclusion of the respondent's name in the next list of persons whose appointments were submitted for approval. No evidence was called to prove that the records of the Executive Council had been searched. The inference we are invited to draw that in fact the name was not so submitted depends upon the fact that the present Chief Clerk of the Education Department swore that he had made a search from

(1) (1921) V.L.R. 79; 42 A.L.T. 141.

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

Rich J.

1881 to 1883 in connection with the respondent's appointments and the only records are those which he produced. It is true that the records of the Education Department so produced include no schedule or list prepared for submission to the Executive Council containing the respondent's appointment as an unpaid pupil teacher, but they contain nothing whatsoever inconsistent with his name having been submitted and approved by the Executive Council. *Holroyd* J. in *Foran* v. *The Queen* (1) states the practice by which the Executive approval is given. It might easily happen that the Department in which a schedule of names was prepared for the Minister to take to the Executive meeting either did not retain a copy or at least after the lapse of fifty years failed to exhume the particular paper in which the respondent's name was embedded. At any rate I am not prepared to say that the Crown has excluded by its proofs all probability of an appointment having been made. Having regard to the Minister's direction to appoint the respondent and the assignment of 23rd June 1881 in all statutory and other records as the date of the respondent's appointment, I am prepared to give effect to the presumption and, as *Griffith* C.J. said in *Williams* v. *Macharg* (2), " if necessary, I am prepared to infer the existence of some formal act of the Executive Council which has been lost, or not produced." It seems just as likely that the officers who compiled the records of 1885 correctly attributed a lawful appointment to the respondent, as that those who in 1929 searched to show an error had been made in these records were able to find every document which in 1881 contained the respondent's name, and unless they did so it is impossible to say that the negative has been established. Indeed, it is not pretended that they went outside the Education Department. After all the essential records are those of the Executive Council. But let it be assumed that the appointment was not passed by the Governor in Council, does it follow that for the purposes of superannuation the respondent is to be regarded as if he were not an officer at all ? From the Minister of the Department downward, the officers of the Crown treated the respondent as part of the staff of the school and as a pupil teacher of the Department. Unless the rights conferred by the provisions

(1) (1890) 16 V.L.R., at p. 517. (2) (1908) 7 C.L.R. 213, at p. 220.

of sec. 70 of the Act of 1883, rights which now depend upon the provisions of secs. 150 and 151 of the *Public Service Act* 1928, were intended to be contingent upon the regularity or lawfulness of the officer's appointment as distinguished from his presence in the Service, it is difficult to see why the informality, if it be one, in an appointment by the Minister unconfirmed by the Governor in Council should affect the respondent's rights to a retiring allowance. As appears from the judgments delivered in this Court in *Victorian Railways Commissioners* v. *Brown* (1) the regularity of very many appointments in the Victorian Public Service was open to question in 1883. Pension rights were conferred for the first time on many divisions of the Service as at 24th December 1881, including teachers. Surely in such a state of affairs the Legislature was dealing with the Service as it in fact existed and the persons who in fact comprised it, and was not concerning itself with the niceties of the statute and the general law relating to the correct mode of appointment.

In my opinion the appeal should be dismissed with costs.

DIXON J. Sec. 150 of the *Public Service Act* 1928, which provides against the payment of pensions to persons appointed to public offices after the passing of *Ramsay's Act* (No. 710), namely, 24th December 1881, contains an exception in favour of "any person employed in the Public Service at the time of the passing of the Act No. 710." Sec. 151 provides that all persons classified or unclassified holding offices in any department of the Public Service at the time of the passing of the *Public Service Act* 1883, namely, 1st November 1883, "except persons appointed since the passing of the Act No. 710" shall be entitled to superannuation or retiring allowance. It also provides that "This section shall extend and apply to all officers in the Education Department and teachers in any State school in the same way and to the same extent as but not further or otherwise than it applies to officers in any other department of the Public Service." The respondent, who retired from the Education Department on 31st December 1929, claims to be a person employed in the Public Service on 24th December 1881, who held office in a department of the Public Service on 1st November 1883,

(1) (1905) 3 C.L.R. 316.

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

Dixon J.

and who was not a person appointed since 24th December 1881. It is not denied on behalf of the Crown that he is a person holding office in a department of the Public Service on 1st November 1883, but it is said that he was a person (first) appointed since 24th December 1881, namely, on or about 4th July 1882.

The irregular manner in which the various Services of the Crown in Victoria were organized before 1883, and the reorganization effected by the three statutes of that year, Nos. 767, 773 and 777, and the manner in which pension rights were then established, are explained in *Victorian Railways Commissioners* v. *Brown* (1), and the history of the Education Department, including the grant of pensions to persons employed in it in 1883, is given in *Mills* v. *The Queen* (2) and in *Foran* v. *The Queen* (3). It is enough for present purposes to say that in 1883 the Services of the Crown included departments the officers in which had not been appointed under the *Civil Service Act* 1862; that no one not so appointed was entitled to a pension, although by sec. 22 of Act No. 447 a statutory promise of pensions had been given to teachers employed in the Education Department; and that doubts existed as to the regularity or legality of the appointment of large sections of the Services, particularly in connection with the railways and in the case of teachers paid under Act No. 149 before the passing of Act No. 447, save in so far, if at all, as they were appointed by the Governor in Council after the passing of that Act. Sec. 70 of Act No. 773 conferred pension rights upon every officer employed in the Education Department or teacher in any State school who, at the time of the Act No. 710 coming into operation held the respective positions of officer or teacher in such Department. The Acts of 1883 are to be construed together (*Brown's Case*), and sec. 72 of Act No. 767, which dealt with the railways, provided that every officer and employee holding office in the Railway Department at the time of the passing of that Act should be entitled to compensation or retiring allowance. Upon this provision *Williams* J. said, in

(1) (1905) 3 C.L.R. 316, particularly per *O'Connor* J. at pp. 337-339 and per *Griffith* C.J. at pp. 322 and 326-327.

(2) (1888) 14 V.L.R. 940, particularly at pp. 941-942, 944-945; 10 A.L.T. 148, at pp. 148 *et seqq.*

(3) (1890) 16 V.L.R., at pp. 515-516 and 519-520; 12 A.L.T., at pp. 54-55.

Reynolds v. *Victorian Railways Commissioner* (1) :—" To entitle him " (the plaintiff) " to any rights under that section, he must first establish that he was an officer or employee holding office in the Railways Department at the time of the passing of the Act No. 767, on the 1st of November, 1883. I have had considerable argument on this point, and if ' holding office ' means a strictly legal original appointment, then, as plaintiff was not appointed by the Governor in Council, as provided by sec. 22 of the *Public Works Act* (No. 289) (now sec. 18 of Act 1134), I should be constrained to hold that plaintiff did not come within the provisions of sec. 72 of Act No. 767, and that consequently he had no rights such as he claims in this action. But I do not think that the words ' holding office,' in sec. 72, have that limited and technical meaning." Even if this interpretation of the legislation were doubtful, lapse of time and the accruing and maturing of many rights to pensions raise a strong presumption in its favour, but in any case it appears to be correct. It follows that sec. 70 of Act No. 773 should be understood as referring to the fact of employment in the Education Department rather than the validity of appointment, and in any case that the exceptions contained in secs. 150 and 151 respectively of the *Public Service Act* 1928 which apply to the Service generally as at 24th December 1881 relate to employment in and appointment to the Service in fact, and are not concerned with the legality or regularity of the appointment or employment. Accordingly the question in this appeal is whether the respondent was in fact employed in the Education Department or the Service of the Crown on 24th December 1881 and was not in fact first appointed after that date.

The personal record of the respondent which appears to have been opened in the Department in or soon after June 1881 enters him as having been appointed an unpaid pupil teacher from 23rd June 1881, and in the classified rolls prepared in 1885 and 1888, pursuant to Act No. 775, the date of his appointment is given as 23rd June 1881, and this date is given in all classifications and records in which his name appears. But on 4th July 1882, or thereabouts, his name was submitted to the Governor in Council for appointment as a pupil teacher at a remuneration of £20, and in the paper in which

(1) (1903) 24 A.L.T. 169, at p. 170; S.C., on app., 25 A.L.T. 72.

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

Dixon J.

his name was so submitted, entered opposite is the remark " Unpaid P.T. (apptd. on staff)." The Crown contends that he had not before been appointed by the Governor in Council, and that Act No. 447 did not authorize any other form of employment or appointment in the Education Department, that the Regulations under that Act did not admit of his appointment as an unpaid pupil teacher, or as a pupil teacher in the school in which he was actually put in that position, and that neither in law nor in fact did he hold a recognized position in the Service until 4th July 1882.

Under Act No. 447, Regulations were made on 25th June 1875 (*Government Gazette* 1875, p. 1262) which appear to have been in force at the material time. They include provisions dealing with pupil teachers. These require that pupil teachers should go through a prescribed course in order to obtain licences to teach. They received a small annual salary varying from £20 in the fourth to £50 in the first class. The number " generally allotted " to each school is stated in the Regulations, and the number varied with the number of assistants and, perhaps, average attendance of scholars. Unpaid assistants are mentioned, but unpaid pupil teachers are not. The head teacher of a school was entitled to a bonus for every pupil teacher who passed the annual examination for the next class. In May 1881 a vacancy for a pupil teacher occurred in the State school in which the respondent, who was then in his seventeenth year, had been a pupil and where he had been teaching as monitor for some eighteen months. The head master recommended that he should be appointed, and his father addressed a request to the Minister of Education for the favourable consideration of his son's application. But the vacancy was filled apparently by the appointment of another applicant. In the course of an explanation to the Secretary of the Department, the head master said, in effect, that the respondent had been teaching as a monitor in expectation of appointment to the next vacancy as a pupil teacher, the recommendation to which he as head teacher had promised, and that partly through this promise the lad had suffered a disappointment. He ended his letter by asking " if the Honourable the Minister would allow him to be placed on the staff without salary so that he might proceed with the course of examinations as pupil teacher." His father visited the Minister,

and as a result the respondent formally applied to him "for appointment as unpaid pupil teacher in School No. 695." The Minister indorsed the application "M.O." (*sc.*, Ministerial Order) "Appoint unpaid P.T at No. 695, Pleasant Street, W.C.S. 14/6/81." The order was filed in the Department, the head teacher notified, and upon his giving an assurance in conformity with the Regulations that the respondent had no physical defect likely to impair his efficiency as a teacher, the file was indorsed with the fact that the respondent was appointed a fourth class unpaid pupil teacher from 23rd June 1881 and with the departmental number allotted to him which he has retained throughout the course of his service. At the end of the year, namely, on 13th December 1881, he passed his pupil teachers' examinations enabling him to proceed to the third class, and for this the head teacher received the bonus; and after some delay the respondent was recorded as a pupil teacher of the third class as from 1st January 1882 and of the second class as from 1st April 1882.

These facts appear to me to show that the Minister did *quatenus in illo* place the respondent in the position of pupil teacher without salary. His purpose was to give him the status which belonged to pupil teachers in order that he might take his place amongst the lowest ranks of the Service. Observations reflecting upon the course taken by the Minister tend rather to support than to weaken the conclusion that in all respects, other than salary, the respondent was put in the position of a pupil teacher, so that he would become a member of the Service. The Regulations did not prescribe a fixed relation between the number of pupil teachers and the average attendance but only the number generally allotted, and I do not think receipt of the prescribed or any salary was made an essential condition of accepting the post of pupil teacher.

McArthur J., in *Jenkin* v. *Attorney-General of Victoria* (1), expressed the view that appointment by the Governor in Council was not the method exclusively prescribed under Act No. 447 for the employment of teachers; but I doubt the correctness of this interpretation. But, whether the appointment of the respondent was regularly accomplished or not, I think it was effected in fact, and that for all

(1) (1921) V.L.R. 79; 42 A.L.T. 141.

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

Dixon J.

purposes he occupied the position of pupil teacher although possibly, if he was not in fact appointed by the Governor in Council, he might have been removed from his position without the intervention of the Governor in Council. By the official order of the responsible Minister of the Crown administering the Department, he had been assigned a recognized office, position, or place upon the staff of a State school in which he was bound to obey the directions of the head teacher, or the head teachers, superiors in the departmental hierarchy. In accepting the office, he undertook and was bound to perform the services of a pupil teacher while he retained that position. Lowly as was his station, it amounted to a status. It enabled him to proceed in regular order through the stages to full qualification and a licence to teach. His position in the Department was ascertained and acknowledged by its records, and, just as he assumed to serve the Crown, the proper officers of the Crown assumed to control him in its Service. It is true, no doubt, that the Minister and his officers considered that to make him a pupil teacher could do no harm so long as he was unpaid, but this only means that they lacked the foresight needed to anticipate the provision of sec. 70 of Act No. 773 and the arbitrary date it selected for distinguishing the prospectively pensioned from the unpensioned.

The one thing lacking, so far as appears, for the due and complete appointment of the respondent as an officer of the teaching staff was an order in Council. I am prepared to assume that his name was not submitted to and approved by the Executive Council. But, for the reasons already given, I do not think the regularity of the appointment is a criterion of his rights under the special provisions which began in the three statutes of 1883 and are now contained in secs. 150 and 151 of the *Public Service Act* 1928. I think, however, that the burden of disproving a regular appointment was heavily upon the Crown in view of the constant repetition in classification after classification of the date 23rd June 1881 as the time of the respondent's first appointment to the Service, and, although I do not doubt that no document has been found tending to show that the respondent's name was included amongst those submitted to the Executive Council for approval, yet I think a real possibility of it having been done remains which the evidence fails to exclude.

For these reasons I think that the appeal should be dismissed.

Evatt J. Sec. 151 of the *Public Service Act* 1928 (Act No. 3757) gives to certain officers in the Public Service of Victoria the right to be paid a superannuation allowance upon retirement. By sec. 151 (2) a right exactly coextensive is conferred upon teachers in State schools. The officers in the general Public Service to whom the grant is made are those "holding offices in any department of the Public Service at the time of the passing of the *Public Service Act* 1883 except persons appointed since the passing of the Act No. 710."

When the *Public Service Act* 1883 was passed the present respondent, E. H. Roberts, was a teacher in a State school. He is entitled to be paid a superannuation allowance computed in the prescribed way unless it be shown that he comes within the excepted class as a "person appointed" as a teacher in a State school "since the passing of the Act No. 710." The Act No. 710 was passed on December 24th, 1881, for the purpose of abolishing the payment of pensions to persons appointed after such date "either permanently or temporarily to any public office whatsoever."

It was some six months earlier, in June 1881, that Mr. Roberts commenced to work as a pupil teacher in a State school. The Act No. 447 (*Education Act* 1872) was then in force. In sec. 22 of that Act was written the promise of the Victorian Legislature that any teacher "who shall be employed in any State school upon having served fifteen years under this Act," should be "entitled to a retiring allowance on the same basis as may hereafter be provided for members of the Public Service."

If the respondent was a "person appointed" to the position of pupil teacher in June 1881, he is not excepted from the class to whom, under the Act of 1928, pensions must be paid. And if, in and after June 1881, he was "employed in any State school" within the meaning of sec. 22 of the Act of 1872, he was one of the persons to whom the promise of that section was addressed.

The Victorian Government's case against the respondent is reducible to two contentions.

(1) Sec. 5 of the *Education Act* 1872 provided that "For the better carrying out of the provisions of this Act an Education

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

Evatt J.

Department shall be formed, to consist of a Minister of Public Instruction, who shall be a responsible Minister of the Crown, a Secretary, an Inspector-General, inspectors, teachers, and such other officers as may be deemed necessary, and such Secretary, Inspector-General, inspectors, teachers, and other officers shall be appointed and removed by the Governor in Council." It is said that Mr. Roberts was not " appointed by the Governor in Council," and that as a consequence he was not a " teacher " within the meaning of sec. 22. In the definition section, the phrase " teacher " includes " pupil teacher." (sec. 3). It would seem at first glance that sec. 22 applies to anyone answering the description of a " pupil teacher . . . employed in any State school." But it is answered that it does not so apply unless the pupil teacher has been formally appointed by the Executive Council under sec. 5.

(2) It is also said that the respondent was not " employed in any State school " until after December 24th, 1881, because he was not paid for his services during the year 1881.

His appointment was as " unpaid pupil teacher." But this only means that it was intended to engage Mr. Roberts as a pupil teacher upon the condition that he was not to be paid for his services. During 1881 he was as much an employee in fact of the Department of Education as any other pupil teacher in Victoria. He was under its general control and supervision, and the special condition of his employment did not and could not alter the fact of his actual employment in a State school. The official description of " unpaid pupil teacher " merely indicates that the special term was attached to his engagement.

I return to the first and main point. It seems to be very curious that the Crown in right of the State of Victoria should be contending before the King's Courts that the official act of a responsible Minister of the Crown—long since dead—by which the Government secured the respondent's services upon the special footing mentioned, and accepted the full benefit of such services, was unlawful. The only possible element of unlawfulness is that there was no formal appointment of the respondent by the Governor in Council. This is the class of case where the Courts should be very loath to infer that an

appointment was irregularly made. Unless the facts exclude the reasonable possibility of a regular or formal appointment, its existence should be assumed.

For this there is ample authority (*Josephson* v. *Young* (1); *State of New South Wales* v. *Commonwealth* (2); cf. *Attorney-General for New South Wales* v. *Williams* (3)).

In my opinion the facts do not exclude the application of the doctrine *omnia præsumuntur rite esse acta*. The minute of the responsible Minister in charge of the Education Department was dated June 14th, 1881. Its terms were "Appoint unpaid P.T. at No. 695, Pleasant Street." But no letter was sent from the Department to the head teacher at School No. 695 until June 22nd, eight days later. No copy of such letter has been found, but on June 23rd the head teacher wrote to the Secretary of the Department, "I have the honour to acknowledge the receipt of your letter of 22nd June informing me that Edward Henry Roberts has been appointed an unpaid pupil teacher in this school subject to my giving an assurance of his being free from any physical defect likely to impair his efficiency as a teacher. I now give that assurance."

Why should it be inferred from the fact that the Minister himself authorized or directed the appointment, that the Governor in Council did not approve of his act or recommendation on some occasion between June 14th and June 22nd?

If the Executive Council did authorize or approve or ratify Mr. Roberts's appointment, the case against him fails. Even if his appointment was not formally approved by the Executive Council I think that he would still be entitled to his pension. The object of sec. 5 of the 1872 Act was not to prevent the application of the doctrine of ministerial responsibility for departmental appointments, but to ensure it. Mr. Roberts was placed in actual employment at the school with the full knowledge and approval of the Department of Education. To him, amongst others, the promise embodied in sec. 22 was made. The later Acts make it clear that the promise

(1) (1900) 21 N.S.W.L.R. 188, at p. 192, per *Darley* C.J.; at p. 195, per *Owen* J.

(2) (1908) 6 C.L.R. 214, at p. 221, per *Griffith* C.J.

(3) (1915) A.C. 573, at p. 581, per Lord *Sumner*.

H. C. OF A. 1931.

ATTORNEY-GENERAL (VICT.) v. ROBERTS.

was kept. I am of opinion that he was a person actually appointed to the staff of a State school before and not after December 1st, 1881. The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Frank G. Menzies*, Crown Solicitor for Victoria.

Solicitor for the respondent, *H. S. W. Lawson & Co.*

Cons *A N I Corporation Ltd* v *Hatzimanolis* (1991) 23 NSWLR 125 | Cons *Hatzimanolis* v *A N I Corporation Ltd* (1992) 173 CLR 473 | Expl *Commonwealth* v *Oliver* (1962) 107 CLR 353 | Cons *Buckfield & Repatriation Commission, Re* (1993) 29 ALD 884 | Refd to *Peet* v *Workers Rehabilitation & Comp Corp (York Civil Pty Ltd)* (1996) 66 SASR 474

H. D. W.

[HIGH COURT OF AUSTRALIA.]

WHITTINGHAM . . . . . APPELLANT; CLAIMANT,

AND

THE COMMISSIONER OF RAILWAYS (W.A.) RESPONDENT. RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1931.

MELBOURNE, *Oct.* 14.

SYDNEY, *Dec.* 10.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Workers' Compensation—Injury sustained during lunch hour—Accident to eye by cricket ball hit by other employee—Whether accident arose "out of or in the course of" the employment—Workers' Compensation Act 1912-1924 (*W.A.*) (*No.* 69 *of* 1912—*No.* 40 *of* 1924), *sec.* 6.*

During the luncheon interval the appellant was strolling on a recreation ground attached to the workshops at which he was employed, and owned by the respondent, when he was struck in the eye with a cricket ball, hit probably by one of his fellow-workers who were playing cricket there. As a result of the accident the appellant lost his right eye.

Held, by *Rich*, *Starke* and *Dixon* JJ. (*Evatt* and *McTiernan* JJ. dissenting), that the appellant was not entitled to compensation under sec. 6 of the *Workers'*

* The *Workers' Compensation Act* 1912-1924 (W.A.), by sec. 6 (1), provides that "If in any employment personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions, is caused to a worker, his employer shall . . . be liable to pay compensation" &c.