

## [HIGH COURT OF AUSTRALIA.]

GRADY . . . . . APPELLANT;  
 PLAINTIFF,

AND

THE COMMISSIONER FOR RAILWAYS }  
 (NEW SOUTH WALES) . . . . . } RESPONDENT.  
 DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF  
 NEW SOUTH WALES.

*Appeal—Administrative tribunal—Reversal of decision appealed from—Railways—  
 Officer—Misconduct—Dismissal by head of branch—Reversal by appeal board—  
 Reinstatement—Intermediate salary—Government Railways Act 1912 (N.S.W.)  
 (No. 30 of 1912), secs. 82\*, 92 (3)\*.*

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SYDNEY,

June 11, 20.

An officer employed by the Commissioner for Railways of New South Wales,  
 who, under sec. 82 of the *Government Railways Act 1912* (N.S.W.), is dismissed  
 by the head of his branch for misconduct, but appeals successfully against

Rich, Starke,  
 Dixon, Evatt  
 and McTiernan  
 JJ.

\* The *Government Railways Act 1912* (N.S.W.) provides:—By sec. 82: "Whenever any officer in any branch of the railway service is guilty of misconduct . . . the officer at the head of such branch may in the prescribed manner—(a) dismiss or suspend him . . . but every such officer so dealt with may appeal in the manner hereinafter provided." By sec. 83 (2): "The board constituted in the next Division of this Part may investigate and deal with any charge brought against any officer for . . . misconduct, and may suspend such officer; or, if he has been already suspended,

may further suspend him for a period not exceeding six months, without salary or wages, or may inflict a fine to be deducted from his pay, or may dismiss him." By sec. 92 (3): "The board may confirm or modify any decision appealed against, or make any such order thereon as they think fit." By sec. 93 (1): "Every decision of the board shall be final and conclusive unless punishment is thereby imposed involving dismissal, or reduction of rank, position, grade, or pay, in which event the accused may . . . appeal therefrom to the Commissioner."



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the dismissal to the board constituted under that Act, is entitled to salary for the period between the dismissal and its reversal by the board.

*Commissioner for Railways (N.S.W.) v. Cavanough*, ante, p. 220, referred to.

Decision of the Supreme Court of New South Wales (Full Court): *Grady v. Commissioner for Railways*, (1935) 52 W.N. (N.S.W.) 103, reversed.

# APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by John Grady to recover the sum of £74 which, in a common money count, he alleged was due to him from the defendant, the Commissioner for Railways, New South Wales, as wages for the period between 21st February and 13th June 1934, during which, he alleged, he was in the service of the defendant as a signal ganger. In a second count the plaintiff alleged that he had been dismissed from the service of the defendant by a decision made under sec. 82 of the *Government Railways Act* 1912 by the officer at the head of his branch, but that on an appeal under the Act that decision was reversed and he was reinstated in his employment. Under this count he claimed the above-mentioned sum of £74 as salary for the period between the date of the decision by the head of his branch and the date of its reversal. In a second plea, the defendant, as to the whole cause of action, pleaded that the plaintiff was an officer within the meaning of the *Government Railways Act* 1912; that whilst holding office he had been found guilty, by a magistrate, on a charge of stealing, but pursuant to sec. 556A of the *Crimes Act* 1900, no conviction was recorded; that upon that finding of the magistrate the plaintiff's services were terminated and he was dismissed from the service; that an appeal subsequently made by the plaintiff against the finding of the magistrate was upheld by a Court of Quarter Sessions; that an appeal by the plaintiff in the manner prescribed by the *Government Railways Act* was then made and allowed; that the plaintiff was thereafter restored to the service; and that his claim was for salary in respect of the period between his dismissal from and his restoration to the service. To this plea the plaintiff demurred.

The Full Court of the Supreme Court gave judgment for the defendant in demurrer: *Grady v. Commissioner for Railways* (1).



From that decision the plaintiff now, by special leave, appealed to the High Court.

*Evatt* (with him *Dwyer*), for the appellant. Upon his appeal being allowed by the appeal board constituted under the *Government Railways Act* 1912, the appellant became entitled to wages for the period between the date of his dismissal and the date of his return to duty. The operation of sec. 82 of the *Government Railways Act* is limited to cases where the officer concerned is guilty of misconduct, or the breach of a departmental rule. It does not extend to cases where the officer is "considered" or is "thought" to be guilty, as in *Wallwork v. Fielding* (1), which is, therefore, distinguishable. The appellant was not guilty of misconduct. The decision of the board is "final and conclusive." The effect of that decision is that the appellant retained his office as if he had never been dismissed therefrom.

*Bradley K.C.* (with him *Chambers*), for the respondent. The appellant was found guilty of stealing, and therefore he was "guilty of misconduct" within the meaning of that expression as used in sec. 82 of the *Government Railways Act* 1912 (*Pearce v. Foster* (2)). His dismissal was, therefore, justified, and within the scope of the powers conferred by that section. Dismissal operates as a complete severance of the relationship of employer and employee, with the consequent loss of the right to wages for any period subsequent to the date of dismissal. Upon an appeal to it the board has power to make any order it thinks fit. In this case the board did not order that the appellant should be reinstated as from the date of his dismissal, or that wages for the period between that date and the date of his actual reinstatement should be paid to him. In the absence of the board's order to that effect the appellant has not any right to the wages claimed. The appellant is not entitled to wages for that period, as he was then out of the office or service (*Wallwork v. Fielding* (1)). The board has power to recommend, but not to order that a successful appellant be re-employed. The Commissioner cannot be compelled, under the Act, to re-employ him.

*Evatt*, in reply.

*Cur. adv. vult.*

(1) (1922) 2 K.B. 66.

(2) (1886) 17 Q.B.D. 536.

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The following written judgments were delivered :—

RICH, DIXON, EVATT AND McTIERNAN JJ. The question upon this appeal is whether an officer employed by the Commissioner for Railways, who is dismissed for misconduct by the head of his branch but appeals successfully to a board against the dismissal, is entitled to salary for the period between the dismissal and its reversal by the board.

Sec. 82 of the *Government Railways Act* 1912 empowers the head of a branch to dismiss any officer in the branch who is guilty of misconduct, but gives an appeal to an officer so dealt with. The appeal lies to a board of three, of whom the chairman is a stipendiary or police magistrate (sec. 87). The board may confirm or modify any decision appealed against, or make any such order therein as it sees fit (sec. 92 (3) ).

In the present case the officer's appeal was allowed.

The Supreme Court of New South Wales (*Davidson* and *Stephen* JJ. and *Markell* A.J.) took the view that the result was as if the officer had been suspended from office, so that there was an intermission of the benefits as well as of the duties annexed thereto. He accordingly was not entitled to intermediate salary.

We are unable to adopt this view of the combined effect of the provisions of sec. 82 and of sec. 92 (3). They appear to us to invest an administrative officer with an authority to dismiss which is not absolute, but is subject to review by an administrative board. The board is given a power which certainly includes complete reversal of the dismissal. If the board considers that no misconduct occurred, its conclusion would mean that the power of the officer to dismiss never arose. It would, in such a case, be right to set aside the dismissal so that it was null *ab initio*. In the judgment in *Commissioner for Railways (N.S.W.) v. Cavanough* (1) delivered to-day, we have stated our view that such a result ensues from the reversal or setting aside of a summary conviction upon appeal to Quarter Sessions. When, upon analogy to appeals in judicial proceedings, an administrative tribunal is set up to review such official acts as dismissal from office why should not its reversal of the act appealed from produce the like

(1) *Ante*, p. 220.



effect? *Davidson J.* considered that to entitle the officer to his salary in the meantime a special direction by the board is required. But he was of opinion that the power it enjoys to make such an order as it thinks fit is wide enough to enable it to give such a direction. No doubt it is. But when the board allows the appeal *simpliciter*, it completely reverses the dismissal. The provisional character of the dismissal is evident, and it is as if it had never taken place. Performance of the officer's duties is excused, not because he has been temporarily out of the service, but because under the conditions of his service he has been dispensed from carrying his duties out. If it turns out that he ought not to be dismissed and his provisional dismissal is set aside, it does not seem unreasonable that he should receive the salary attached to the office accruing in the meantime, and that he should do so simply because his dismissal is vacated or quashed.

In our opinion the appeal should be allowed with costs.

We have treated the case as falling under sec. 82, but it is to be noticed that the plea does not allege the commission of an act of misconduct.

The judgment of the Supreme Court should be discharged and in lieu thereof there should be judgment for the plaintiff in demurrer.

STARKE J. This appeal involves a consideration of some sections of the *Government Railways Act* 1912. By sec. 82 it is provided that "whenever any officer in any branch of the railway service is guilty of misconduct . . . or of breaking any rule, by-law or regulation of the railway service the officer at the head of such branch may . . . dismiss or suspend him . . . but every such officer so dealt with may appeal" to an appeal board. Authority is given to the board, by sec. 92, to confirm or modify any decision appealed against or make such order thereon as it thinks fit. The claim here is for wages in respect of the period between the dismissal of the plaintiff from the railway service and his re-employment. The pleadings allege that the plaintiff was an officer in the railway service, that by the decision of an officer at the head of the plaintiff's branch of the railway service the plaintiff was dismissed, that the plaintiff appealed from such decision pursuant to the *Government Railways Act*, and that the decision of

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the officer was reversed and the plaintiff reinstated in the service. The question is whether the order or decision of the appeal board reversing the decision of the head of a branch dismissing an officer, obliterates or abrogates it. It is analogous to the reversal of a judgment convicting an accused person of an offence, which was dealt with in *Cavanough's Case* (1). In my opinion the same result should follow, namely, that the decision dismissing the officer is annulled and held for nothing. It cannot, after the decision of the appeal board, be asserted that the officer was dismissed. *Wallwork v. Fielding* (2) is not in point, for there was in that case no order annulling the suspension.

The appeal should be allowed and judgment entered for the plaintiff in demurrer.

*Appeal allowed with costs. Judgment of the  
Supreme Court discharged and in lieu thereof  
judgment for the plaintiff in demurrer.*

Solicitors for the appellant, *Landa & Lamaro*.

Solicitor for the respondent, *F. W. Bretnall*, Solicitor for Transport.

J. B.

(1) *Ante*, p. 220.

(2) (1922) 2 K.B. 66.