

[HIGH COURT OF AUSTRALIA.]

COSWAY PLAINTIFF ;

AND

THE COMMONWEALTH DEFENDANT.

H. C. OF A. *Public Service—State undertaking—Acquisition by Commonwealth—Agreement—*
1942. *State employee—Employment by Commonwealth—Undertaking subsequently*
MELBOURNE, *transferred to the State—Employee retained by Commonwealth—Reduction in*
status and remuneration—Rights—The Constitution (63 & 64 Vict. c. 12), sec. 84
Mar. 10-12 ; —Commonwealth Public Service Act 1902-1918 (No. 5 of 1902—No. 46 of 1918),
May 29. secs. 34A (1), 60, 61—Commonwealth Public Service Act 1922-1939 (No. 21 of
McTiernan J. *1922—No. 72 of 1939), sec. 45.*

In 1913 the plaintiff was appointed to the Public Service of Victoria as a blacksmith foreman at the Williamstown dockyard, and he continued in that position at a salary of £204 per annum until the dockyard was acquired by purchase by the Commonwealth in 1918. As the result of negotiations between the State Government and the Commonwealth Government the plaintiff, by arrangement, and without any interruption of his work, resigned from the State Public Service and was thereupon appointed as a blacksmith foreman in the Commonwealth Public Service at a salary of £240 per annum. In 1920 his position, which continued to be that of blacksmith foreman, was raised to a higher grade and his salary was increased to a minimum of £252 and a maximum of £276 per annum. In December 1923 the rate of pay in Victoria for blacksmith foremen was fixed at £6 13s. 6d. per week. About September 1923 the Commonwealth Government decided to transfer the dockyard to the State and proposals were made for the retirement and compensation of such employees as were not taken over by the State. The plaintiff made known his desire to remain in the Commonwealth Public Service and he continued at his work at the dockyard. Efforts were made to find him a suitable position at his then rate of remuneration, and in March 1924, despite a strong protest on his part, he was appointed to another Commonwealth department as a blacksmith with, apparently, a reduction in salary, and the position formerly occupied by him was later abolished. Pursuant to an order made in September 1924 under sec. 20 of the *Commonwealth Public Service*

Act 1922, the plaintiff was transferred to another branch of the Commonwealth Public Service as a blacksmith at the remuneration of £5 9s. 6d. per week and he held this position continuously at that rate of salary, subject to variations made according to the rise and fall in the cost of living, until he commenced this action against the Commonwealth wherein he claimed that his existing and accruing rights as an officer of the State Service at the time he was appointed to the Commonwealth Service were impaired by the reduction of the salary to which he had advanced in the Commonwealth Service and by his reduction in status from blacksmith foreman to blacksmith.

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Held that the plaintiff had no right of action under sec. 84 of the Constitution or under sec. 60 of the *Commonwealth Public Service Act* 1902-1918 or sec. 45 of the *Commonwealth Public Service Act* 1922-1939 and that there was no evidence that the Commonwealth had departed from any representation properly made on its behalf to the plaintiff.

ACTION.

The plaintiff, Thomas Mark Cosway, brought an action against the Commonwealth of Australia to enforce rights which he claimed to have under sec. 84 of the Constitution, sec. 60 of the *Commonwealth Public Service Act* 1902-1918, and sec. 45 of the *Commonwealth Public Service Act* 1922-1939, respectively, and under a condition which he alleged existed in the agreement whereby the Commonwealth acquired the Williamstown dockyard from the State of Victoria.

The action came on for hearing before *McTiernan J.*, in whose judgment the facts are fully stated.

H. I. Cohen K.C. (with him *D. M. Little*), for the plaintiff.

T. W. Smith, for the defendant.

Cur. adv. vult.

McTiernan J. delivered the following written judgment:—

May 29.

The plaintiff brings this action to enforce rights which he claims to have under sec. 84 of the Commonwealth Constitution and under sec. 60 of the *Commonwealth Public Service Act* 1902-1918 and sec. 45 of the *Commonwealth Public Service Act* 1922-1939 respectively and under a condition which he alleges existed in the agreement whereby the Commonwealth acquired the Williamstown dockyard from the State of Victoria.

The evidence proves that on 1st June 1913 the plaintiff was appointed to the General Division of the Public Service of Victoria under secs. 32 and 46 of the *Public Service Act* 1890 of that State. He was appointed on probation for six months to the position of

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blacksmith foreman in the Ports and Harbours Branch of the Department of Public Works. It is to be inferred that his appointment was confirmed. He occupied that position when the Commonwealth acquired the dockyard early in 1918. At that time he was receiving a salary of £204 per annum, the maximum salary fixed for the position he was occupying by regulation made by the Public Service Commissioner pursuant to the *Public Service Act* 1915 of Victoria and published in the *Victoria Government Gazette* on 19th November 1915. The evidence relating to the taking over of the dockyard as distinct from the staff does not appear to give a complete account of the transaction, but it is not suggested that all the evidence which was available was not adduced. The action taken by the Commonwealth and State as regards the staff clearly appears from the documentary evidence. The first letter in evidence, written on 18th February 1918 on behalf of the Prime Minister to the Premier of Victoria, in connection with the taking over of the Williamstown dockyard, asks the Premier to furnish a list of all the permanent employees engaged there and particulars of their status and rights under the State Government. The letter adds: "This information is desired so that the Commonwealth Government may consider the question of how many of the present staff it is prepared to employ and under what conditions." The Prime Minister's letter dated 3rd April 1918 to the Premier shows that a list was forwarded on 4th March 1918. In this letter the Prime Minister tells the Premier that "under the Commonwealth Government's scheme for carrying out the work it will not be practicable to retain as permanent officers all the men mentioned in the list." The memorandum dated 6th May 1918 of the conference between the Commonwealth Treasurer and State Ministers shows that the Commonwealth would pay the State the sum of £180,000 "for the property known as Williamstown Shipbuilding Yards with all improvements, plant, machinery, &c., except stock, which is to be taken by the Commonwealth at cost price as originally offered." The Prime Minister's letter dated 17th May 1918 to the Premier states that the question of the transfer of the staff and employees should await representations from the Government of Victoria concerning the employees whom the Premier was informed the Commonwealth did not desire to take over. The action which the Commonwealth was taking in respect of the staff at the dockyard is described in the Prime Minister's letter dated 24th October 1918 to the Premier. It arranges the staff into three groups. The first group is stated to be eligible for appointment to the Commonwealth Public Service under sec. 33 of the *Commonwealth Public Service Act*

1902-1918. The letter says that they may be transferred from the State Service to the Commonwealth Service under sec. 84 of the Commonwealth Constitution and that they are being asked whether they desire to be so transferred and that when they have signified their acquiescence it was desired that steps be taken by the Premier to effect the transfer by Order in Council. The plaintiff is not among the persons in this group. His name is found in the second group. The Prime Minister writes of these officers in these terms: "The remaining officers, who are being appointed under sec. 34A of the *Commonwealth Public Service Act* 1902-1918 as from 1st July 1918, have been requested to resign from the State Public Service as from 30th June 1918, in order that their State and Commonwealth service may be regarded as continuous." The third group was a list of officers with whom, the letter says, no communication had taken place as they were absent either on active service or at munition work. The letter of the secretary to the Prime Minister's Department, dated 22nd October, to the plaintiff was written to carry out the Commonwealth's proposal regarding the plaintiff. The letter says that it is desired to obtain an Order in Council (a Commonwealth Order in Council) appointing him to the position of blacksmith foreman, Grade VIII., General Division, in the Commonwealth Ship Construction Branch, with salary at the rate of £240 per annum to take effect from 1st July 1918. The letter also requests him to tender his resignation to the State Public Service authorities as from 30th June 1918 so that his State and Commonwealth service will be regarded as continuous. The letter adds that action will not be taken to complete his appointment by Order in Council until he has submitted evidence of the acceptance of his resignation as an officer of the State Public Service. The plaintiff complied with these requirements. On 28th October 1918 he wrote to the Public Service Commissioner of the State of Victoria informing him that he was advised by the secretary to the Prime Minister's Department that, subject to his resigning from the State Service, he would be appointed by an Order in Council to the Commonwealth Service. The plaintiff by his letter informed the Public Service Commissioner that he therefore tendered his resignation of the position of foreman blacksmith at the Williamstown shipbuilding yard as at 30th June 1918. The *Victoria Gazette* of 4th December 1918 shows that the plaintiff's resignation of that position was accepted as at 30th June 1918 by an Order in Council made on 25th November 1918. This *Gazette* shows also that Orders in Council were made accepting the resignations of other persons (whom the Prime Minister put in

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the same group as the plaintiff) of their several positions at the dockyard. The *Victoria Gazette* of the same date also shows that on 25th November 1918 the Governor in Council made an order pursuant to sec. 84 of the Constitution consenting to the transfer of a number of officers working at the shipyard (whom the Prime Minister's letter declared to be eligible for such transfer) from the Ports and Harbours Branch of the Department of Public Works of the Public Service of Victoria to the Public Service of the Commonwealth. In the *Commonwealth Gazette* of 13th February 1919 it is notified that new offices have been created in the Ship Construction Branch of the Prime Minister's Department. These include blacksmith foreman, Grade VIII., in the General Division of the Commonwealth Public Service. It is further notified that the plaintiff was appointed to that position at a salary of £240 per annum, as from 1st July 1918.

Notwithstanding the acquisition of the shipyard by the Commonwealth, the plaintiff carried on his work as blacksmith foreman without any interruption, and he continued to receive salary at the rate of £204 until February 1919. The date of the acquisition is not clearly fixed. It would appear to be 7th February 1918, because by Order in Council dated 6th May 1919 the plaintiff and other officers employed at the shipyard under the State Government were granted leave of absence from the Public Service of the State for the period from 8th February to 30th June 1918. This Order was made pursuant to sec. 183 of the *Public Service Act* 1915. It covers, so it would seem, the period before the resignations of these officers took effect during which they were employed at the dockyard by the Commonwealth. In February 1919 the plaintiff received payment at the rate of £240 per annum and arrears of payment at that rate from 1st July 1918, which was the date of his appointment to the Commonwealth Public Service. It will be observed that his Commonwealth salary exceeded his State salary by £36 per annum. On 20th June 1919 he applied to the Commonwealth Public Service Commissioner for an increase in salary, on the ground that the salary assigned to his position was inadequate. The application was refused. But in the *Commonwealth Gazette* of 11th March 1920 it is notified that his position, which continued to be that of blacksmith foreman, Ship Construction Branch, was raised from Grade VIII. to Grade IX., and the salary for the position was fixed at one ranging from £252 per annum minimum to £276 per annum maximum. By a Statutory Rule, dated 27th December 1923, which was made under the *Commonwealth Public Service Act* 1922 and came into operation as from 27th September 1923, the weekly rate of pay in Victoria for a blacksmith foreman (shipbuilding) was

fixed at £6 13s. 6d. per week. In September 1923, or before that month, it would appear that the Commonwealth had decided to transfer the dockyard to the Victorian Harbour Trust, and the question arose as to what should be done with the members of the staff who might not be taken over by the Government of Victoria. Proposals were made by the Prime Minister's Department for the retirement and compensation of such employees. These proposals apparently came to the knowledge of the staff, and the plaintiff said he was alarmed by these proposals. He was anxious to remain in the Commonwealth Public Service. His view was apparently made known, and on 29th September 1923 he was instructed by the Public Service Inspector to interview the engineer at the General Post Office, with a view to finding another position for him. This interview had no result, and the plaintiff continued at his work in the dockyard. On 2nd January 1924 the Prime Minister informed the Public Service Board that the manager of the Ship Construction Branch had reported that there was very little work being done at the Williamstown dockyard, and that a number of officers, who included the plaintiff, could be spared for transfer if positions were available. On 25th January 1924 the secretary of the Ship Construction Branch informed the Prime Minister with reference to inquiries made respecting the plaintiff and other officers at the dockyard that the Public Service Board was endeavouring to find places for them. The secretary added that these men were specially selected by the State Government when staffing the Williamstown dockyard and given an assurance of permanent employment, and that for these reasons they were entitled to every consideration. He suggested that, in the circumstances, every possible effort be made to find them suitable positions at their present rates of remuneration rather than dispense with their services on the basis of compensation set out in the memorandum dated 24th November 1923, which was prepared by the secretary of the Prime Minister's Department. This memorandum is not in evidence. The suggestions of the secretary of the Ship Construction Branch were referred to the Public Service Board. On 27th February 1924 the Board asked the secretary of the Prime Minister's Department to arrange for the services of the plaintiff and some other officers of the Ship Construction Branch to be placed immediately at the disposal of the Postmaster-General's Department for one month, in order that it might be seen whether they were suitable for absorption in that Department. On 11th January 1924 the manager of the Ship Construction Branch had, in accordance with instructions received from the Public Service Inspector, directed the plaintiff to call on the foreman

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of one of the workshops in the Postmaster-General's Department for the purpose of being tested for his suitability for work in that Department. Instead of complying with the direction the plaintiff went to the Public Service Inspector and made an objection to the direction on the ground that it was not reasonable. He then returned to the dockyard. On 4th March 1924 the plaintiff received written instructions from the manager of the dockyard to report at the General Post Office in order to comply with the instructions sent by the Public Service Commissioners through the Prime Minister's Department. The instructions were to arrange for certain officers, including the plaintiff, to be placed immediately at the disposal of the Postmaster-General's Department for one month to ascertain if they were suitable for absorption in this department. He met the engineer, who offered him a blacksmith's job in that department. The plaintiff told the engineer that it was very unfair to ask him to take this job. He said that he joined the Commonwealth Service as a foreman blacksmith and had given satisfactory service, and that he objected to working under a foreman linesman and his senior blacksmith as he was senior to them both. The plaintiff undoubtedly made a strong protest, but he went to work at the job in order to avoid the consequences of refusing duty. It appears from a letter of 26th May 1924, written by the secretary of the Commonwealth Public Service Board to the secretary of the Prime Minister's Department, that "the disposition of the staff rendered 'excess' by the disposal of the Williamstown dockyard is now receiving the earnest attention of the Board." The Board stated that it was guiding its action in the case by sec. 20 of the *Commonwealth Public Service Act*; that as regards officers whom it might be necessary to retire, the Cabinet had approved of the conditions which are set out in the letter; and that an endeavour was being made to place certain officers in other departments. The Board added: "Under sec. 20 if positions equivalent in status to those held in the dockyard are not available positions of lower classification and salary must be resorted to: but no avoidable reduction will be made." It appears from the letter of the Deputy Postmaster-General of 11th June 1924 that the Commonwealth Public Service Inspector had written to him on the question of finding positions for certain permanent officers of the dockyard, including the plaintiff. The Public Service Inspector apparently inquired whether the plaintiff could be transferred to a vacancy in the Electrical Engineers' Branch caused by the resignation of a blacksmith. The Deputy-Postmaster-General replied that the plaintiff, whom he describes as a blacksmith foreman, was reported to be a capable tradesman, but that, as he is not a farrier, he was not qualified to fill the vacant position. It is to be remembered that

the plaintiff began work in the Postmaster-General's department about 4th March 1924. On 13th June 1924 the secretary of the Public Service Board of Commissioners wrote to the secretary of the Prime Minister's Department that, in consequence of the transfer of the Cockatoo Island shipyard to the control of the Australian Shipping Board and the proposed sale of the Williamstown dockyard to the Melbourne Harbour Trust, the Board was of opinion that immediate action should be taken for the abolition of a list of classified positions in the Ship Construction Branch. The list included the position of blacksmith foreman, of which the plaintiff is described as the occupant. With an immaterial variation, the secretary of the Prime Minister's Department concurred in the Board's proposal to abolish these positions. On 5th July 1924 the Public Service Board recommended for the approval of the Governor-General that these positions in the Ship Construction Branch be abolished, and on 10th July the Federal Executive Council approved of this recommendation. The result was that as from 10th July 1924 the position of blacksmith foreman in the Ship Construction Branch of the Prime Minister's Department, which the plaintiff had occupied since 1st July 1918, was abolished. The abolition of these offices is notified in the *Commonwealth Gazette* of 17th July 1924. On 5th July 1924 the plaintiff was still employed as a blacksmith in the Postmaster-General's Department. On 11th September 1924 the secretary of the Public Service Board referred the Deputy Postmaster-General to his letter of 11th June 1924 and informed him that the Board was of opinion that the opportunity offered for placing the plaintiff by the resignation of the blacksmith should be availed of, and the Board's approval was given under sec. 20 of the *Commonwealth Public Service Act* to the transfer of the plaintiff to that vacant position with remuneration at the rate of £5 9s. 6d. per week. The transfer of the plaintiff was to take effect from 15th September 1924. The transfer is not in evidence. It was explained that it was probably amongst papers that were destroyed when the Board's offices were removed to Canberra. In a letter dated 26th September 1924 the secretary of the Prime Minister's Department notified the plaintiff of the Board's decision. On this day he was given a new direction about the place where he was to receive his pay, and on attending at Sturt Street, in compliance with this direction, he received pay at the rate of £5 9s. 6d. per week. He also received two notices dated respectively 16th September 1924 and 27th September 1924 from the Deputy Postmaster-General informing him that he had been transferred to the position of blacksmith at the Electrical Engineers' Branch at the above salary, the transfer to take effect from 15th September 1924. He has held the position

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of blacksmith, to which he was transferred, continuously up to the date of this action. By amending regulations, which came into operation as from 1st July 1924, made under the *Commonwealth Public Service Acts*, the minimum and the maximum salary for the position of blacksmith were fixed at £280 and £296 per annum. These rates were applicable to the plaintiff since his transfer on 15th September 1924 to the Postmaster-General's Department. The plaintiff did not give evidence proving the actual amount of salary which he received since 27th April 1925. His evidence was that he was paid at the rate of £5 9s. 6d. per week, subject to variations made according to the rise or fall in the cost of living. The results of the order of the Public Service Board, made on 11th September 1924, under sec. 20 of the *Commonwealth Public Service Act*, were:—

1. The plaintiff was retained as a permanent officer of the Public Service.
2. He was transferred to a permanent position in the Postmaster-General's Department.
3. His salary was reduced below that which he was receiving as an officer of the Ship Construction Branch.
4. He was reduced in rank from blacksmith foreman to blacksmith.

The rate of salary fixed for his position as blacksmith was higher than that which the State Government had fixed for his position as blacksmith foreman in the State Public Service.

The plaintiff claims that his existing and accruing rights as an officer of the State Service at the time he was appointed to the Commonwealth Service were impaired by the reduction of the salary to which he had advanced in the Commonwealth Service and by his reduction in rank from blacksmith foreman to blacksmith. It is contended on his behalf that under the *Public Service Act* of Victoria, in force at the time of his appointment to the Commonwealth Public Service, he would have been entitled to receive in any department of the State Public Service to which he might have been transferred, a salary not less than that which he received in the department from which he was transferred at the time of transfer and to retain rank not less than that of blacksmith foreman in whatever department he was employed.

It is first necessary to decide whether the plaintiff is entitled to sue under sec. 84 of the Constitution or sec. 60 of the *Commonwealth Public Service Act* 1902-1918 or sec. 45 of the *Commonwealth Public Service Act* 1922-1939. If he is not so entitled it is really unnecessary to inquire what the plaintiff's rights were under the relevant law of Victoria.

Sec. 84 provides for the protection of the State rights of officers of a department of the Public Service of a State who as a body pass under the control of the Commonwealth when the department becomes transferred to the Commonwealth, and of individual officers who were

in the Public Service of a State at the establishment of the Commonwealth and are, by consent of the State, transferred to the Commonwealth. In *Trower v. The Commonwealth* (1), Isaacs J. referred to the provisions of sec. 84 relating to the rights of officers of State departments which became transferred to the Commonwealth, in these words: "The previous portion" (of sec. 84) "deals with the transfer of departments which are by the Constitution destined to be transferred to the Commonwealth as soon as they conveniently can be." It is contended on behalf of the plaintiff that the provisions of sec. 84 relating to the officers of transferred departments have a wider application than the departments mentioned in sec. 69 of the Constitution. But if that contention were correct, the plaintiff's case would not be helped by it for the Williamstown dockyard was not a department which became transferred to the Commonwealth but an aggregation of State property which passed to the Commonwealth by purchase: See *The King v. Brislan*; *Ex parte Williams* (2). The Commonwealth and State Governments rightly took the view that action other than the purchase of the property was necessary to place in the Public Service of the Commonwealth the members of the staff whom the Commonwealth required. Further, as the plaintiff was not in the Service of the State of Victoria at the establishment of the Commonwealth, he was not eligible for transfer to the Commonwealth under the provisions of sec. 84 relating to the rights of officers transferred individually to the Commonwealth. For these reasons sec. 84 does not apply to the present case. It follows also that sec. 60 (a) of the *Commonwealth Public Service Act* 1902-1918 does not apply.

The next question is whether the plaintiff is within sec. 60 (b) of that Act. In form these provisions are more general than the last paragraph of sec. 84 of the Constitution. But the *Commonwealth Public Service Act* 1902-1918 makes no provision for effecting the transfer as such of an officer from the Public Service of a State to the Public Service of the Commonwealth. The Act renders eligible for appointment to the Public Service of the Commonwealth certain persons of the following descriptions:—(a) Those who at the establishment of the Commonwealth were engaged in the Public, Railway, or other Service of any State (sec. 33); (b) Those who had at any time retired from a salaried office in the Public Service of the Commonwealth or of any State (sec. 34). And by sec. 34A (1), which was introduced by sec. 2 of Act No. 17 of 1913, it is provided that any officer of the Public, Railway, or other Service of a State, whether appointed thereto before or after the commencement of this Act, shall be eligible for appointment to a position in the corresponding

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(1) (1923) 32 C.L.R. 585, at p. 589.

(2) (1935) 54 C.L.R. 262, at p. 274.

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division of the Public Service of the Commonwealth. Sec. 34A (2) applies the provisions of sec. 61 to a person appointed under sec. 34A (1) and, in certain circumstances, to a person appointed under sec. 33 or sec. 34. This section is one of three sections headed "Transfer of Officer from State Service." Sec. 61 provides that, for the purpose of the Act, service in the Public, Railway, or other Service of a State by any person who becomes an officer in the Public Service of the Commonwealth shall be reckoned as service in the Public Service of the Commonwealth. The appointment of the plaintiff was managed in such a way as to give him the benefit of sec. 61. But the appointment of a State officer under sec. 34A (1) is not a transfer of the officer from the State to the Commonwealth Service. The plaintiff resigned from the Public Service of the State: his resignation was accepted by the State: thereupon he was appointed to the Commonwealth Public Service. It is impossible to form the conclusion that the result of these steps was that the plaintiff was transferred to the Commonwealth Public Service.

The remaining section on which the plaintiff relies is sec. 45 of the *Commonwealth Public Service Act* 1922-1939. As the plaintiff was not transferred to the Commonwealth Public Service, this section does not apply to him.

As regards the alleged breach of a condition in the agreement whereby the Commonwealth acquired the Williamstown dockyard, the evidence utterly fails to establish any such cause of action. There is no evidence that the Commonwealth departed from any representation made to the plaintiff by any person having any semblance of authority to bind it.

At the trial the plaintiff alleged that the transfer of the plaintiff to the Postmaster-General's Department was not authorized under sec. 20 of the *Commonwealth Public Service Act*. This allegation is wholly unsubstantiated.

It is not to be taken that I should agree that any existing or accruing rights of the plaintiff under the State *Public Service Acts* were impaired by the transfer of the plaintiff to the Postmaster-General's Department, if I should have held that he had a *locus standi* under sec. 84 of the Constitution or under sec. 60 of the *Commonwealth Public Service Act* 1902-1918 and sec. 45 of the *Commonwealth Public Service Act* 1922-1939.

The action is dismissed with costs.

Action dismissed with costs.

Solicitor for the plaintiff, *P. Goldenberg*.

Solicitor for the defendant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.