

[HIGH COURT OF AUSTRALIA.]

WATSON PLAINTIFF ;

AND

COLLINGS AND OTHERS DEFENDANTS.

Railways (Cth.)—Appointment of officer by Commissioner with approval of Governor-General—Effect of withdrawal of approval after appointment—Formalities of contracts made by Commissioner—Commonwealth Railways Act 1917-1936 (No. 31 of 1917—No. 87 of 1936), ss. 24, 46, 51.

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Section 24 (2) of the *Commonwealth Railways Act 1917-1936* provides that any contract which, if made between private persons, would by law require to be in writing and signed by the parties to be charged therewith may be made by the Commonwealth Railways Commissioner in writing in his corporate name and may be varied or discharged in the same manner. Section 46 provides that the Commissioner shall appoint persons to assist in the execution of the Act, and every person so appointed shall hold office during pleasure only. Section 51 provides, *inter alia*, that the Commissioner shall not, without the sanction of the Governor-General, appoint any person to an office the salary of which is more than £500 per annum.

Held :—

- (1) that s. 24 indicates an intention that the Commissioner, though a corporation sole, is to be capable of contracting as if he were a private person ;
- (2) that, once the Governor-General has given his sanction under s. 51 and an appointment has been made pursuant thereto, the Governor-General is *functus officio*, and no purported withdrawal of the sanction can remove from office a person who has once been validly appointed ;
- (3) that the appointment need not be under seal or in writing ;
- (4) that such a person holds office thenceforth during the pleasure of the Commissioner ; and
- (5) that neither the Executive Council nor the Minister as such has authority to interfere in the appointment by the Commissioner of his officers under s. 46, subject to s. 51.

Observations concerning the necessity of independent and unbiassed testimony on the part of officers of Government.

H. C. OF A. TRIAL OF ACTION.

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Henry Edward Watson sued Senator J. S. Collings (the Minister of State for the Interior), the Commonwealth Railways Commissioner (Mr. Gahan), and the Commonwealth of Australia, for a declaration that he had been duly appointed to the office of secretary of the Commonwealth Railways and for an injunction restraining the Minister and the Commissioner from appointing another person to that office.

The action was heard by *Rich J.*, in whose judgment the relevant facts and statutory provisions are sufficiently set forth.

Adams, for the plaintiff.

Sholl, for the defendants.

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RICH J. delivered the following written judgment:—

By the statement of claim in this action, which is brought against the Minister of State for the Interior, who administers the *Commonwealth Railways Act* 1917-1936, the Commonwealth Railways Commissioner, and the Commonwealth, it is alleged that one Moyes occupied the office of secretary of the Commonwealth Railways, which is a permanent office under the *Commonwealth Railways Act* 1917-1936, that he died on 4th June 1943, and on 8th July the Commissioner (with the sanction of the Governor-General since the office carried a salary of more than £500 per annum) appointed the plaintiff to the office, and that the defendant, the Minister of State for the Interior, Senator J. S. Collings, on 19th July required the Commissioner to appoint one Harding to the office, and on 29th July procured the sanction of the Governor-General and the Executive Council to the appointment of Harding, and threatens or intends to insist on the Commissioner so appointing Harding, and unless restrained will attempt to procure or force him to do so. The plaintiff claims a declaration that he has been duly appointed to the office and is entitled to hold it, an injunction against the Minister, and an injunction restraining the Commissioner from appointing Harding. No defence was filed on behalf of the defendant Commissioner. It was stated that he submitted to the judgment of the Court, but a defence has been filed by the Minister and the Commonwealth admitting that on 7th July the Governor-General sanctioned the appointment of the plaintiff, but denying that he was in fact appointed, stating that on 20th July the Minister instructed the Commissioner to appoint Harding to be secretary and the plaintiff to be acting secretary, and stating also that on 27th

July the Governor-General approved of a recommendation of the Minister that the approval given on 7th July for the appointment of the plaintiff as secretary be cancelled, and that Harding be appointed secretary. The defence also raises the following contentions: (1) that the plaintiff's appointment was invalid because defective in form: it was not under seal or in writing or in the manner required for an appointment by a corporation, (2) that the Commissioner is an instrumentality of the Crown, that railway officers hold office only during the pleasure of the Crown, and that the acts done on 20th and 27th July showed that it was the Crown's pleasure that the plaintiff should not hold office as secretary, and (3) that, assuming the plaintiff's appointment to have been duly made and sanctioned by the Governor-General, the Governor-General's subsequent withdrawal of his sanction caused the plaintiff to vacate the office.

The *Commonwealth Railways Act* 1917-1936 makes the following general provisions. There shall be a Commissioner appointed by the Governor-General, who shall be a body corporate with perpetual succession and a common seal (ss. 5 and 6). The Commissioner holds office for the term for which he is appointed, not exceeding five years, and may from time to time be re-appointed for not exceeding five years (ss. 8 and 9). Any contract which, if made between private persons, would at law require to be in writing signed by the parties to be charged therewith, may be made by the Commissioner in writing in his corporate name, and may be varied or discharged in the same manner (s. 24 (2)). For the purposes and subject to the provisions of the Act, the Commissioner may do all that is necessary or convenient for making, maintaining, altering or repairing and using the railways (s. 35). The Minister may at any time in writing request him to propose in writing a scheme for effecting an increase of income or a decrease of expenditure or for carrying out any matter of general policy specified by the Minister, and the Commissioner shall propose a scheme accordingly: if the Minister does not approve of the proposed scheme, he may transmit to the Commissioner a proposition whereupon the Commissioner shall take all necessary steps to give effect to the proposition of the Minister (s. 43). If any doubt or difference of opinion occurs respecting the provisions of s. 43, it may be finally determined by the Governor-General. The Minister may direct the Commissioner to make any alteration in any existing practice or carry out any system or matter of policy (s. 44). The Act makes the following provision with respect to the railway staff. Subject to the Act, the Commissioner is required to appoint or employ such persons to assist in the execution of the Act as he thinks necessary, and every person so appointed shall hold office

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during pleasure only : he is to pay such salaries, wages and allowances to employees as he approves (s. 46). Persons employed at the commencement of the Act are deemed to be employed in a temporary office (s. 48). The Commissioner is required, as soon as practicable, and within a period of six months after the commencement of the Act, to certify in writing to the Minister that certain offices for the working and maintenance of the railways should be deemed to be the permanent offices, and within a reasonable time thereafter he is required to make appointments to those offices (s. 49). He may from time to time similarly certify that the number of permanent offices should be increased, and may make appointments to those offices (s. 50). The Commissioner may not, without the sanction of the Governor-General, increase the salary or wage of any employee whose annual salary or wage is more than £500, or increase the salary of, or create any office carrying a salary of more than £500 per annum, or appoint any person to an office the salary of which is more than £500 per annum (s. 51). Any employee appointed to a permanent office may appeal to an appeal board against any decision of the Commissioner dismissing him or reducing his grade or rate of pay for incapacity or misconduct (s. 53).

It appears from the evidence that, upon the death of Mr. Moyes, the Commissioner consulted with the Minister, stated that the plaintiff was recommended for the position of secretary, and obtained from the Minister a statement that he approved of the appointment. On 5th July 1943, the Commissioner gave an instruction that, pending an appointment to the position of secretary, the plaintiff would carry out the duties in an acting capacity. The Minister then on 7th July recommended to the Governor-General the plaintiff's appointment at a salary of £900 a year, and on the same day this was approved by the Governor-General. The Minister, on 8th July, informed the Commissioner of this approval, and the Commissioner informed the plaintiff by telephone on the same day that he had been appointed secretary. The plaintiff thereupon proceeded to act as secretary. It was not until 19th July that the Minister informed the Commissioner that a returned soldier must be appointed as secretary. The Commissioner, on receiving this intimation, made a recommendation that a Mr. Ford be appointed. The Minister thereupon, on 20th July, gave the Commissioner a direction that Mr. Harding was to be appointed ; and, on 27th July, he procured from the Governor-General a cancellation of the approval of 7th July of the plaintiff's appointment, and an approval of Harding's appointment. The Commissioner, on 29th July, protested, taking up the attitude that under the Act the appointment of employees was

a matter for the Commissioner, not for the Minister or the Executive. In a letter dated 5th February 1944 from the Commissioner to the Minister, this sentence occurs:—"I am conscious that my refusal to appoint Harding will not, in the long run, adversely affect him. On the contrary, it will eventually please him. It was made obvious by you to me that it is intended that he shall be secretary, and it was made equally obvious that, as the result of this refusal of mine, I shall not be reappointed after November next." This action was commenced by the plaintiff on 16th March 1944. That the Commissioner had not misunderstood the Minister is made only too clear by a telegram which the Minister thought fit to send to the Commissioner on 15th October 1944, when this action was on the eve of being tried. It purports to communicate to the Commissioner a copy of a letter received by the Minister of State for the Interior (the defendant Senator Collings) from the Minister of State for the Army, and is in the following terms:—

" Priority Gahan Commissioner Commonwealth Railways
C/o Station Master Alice Springs—

Following is text of letter received from Minister for Army begins Before leaving for Western Australia the Prime Minister mentioned to me the matter of the expiry of the term of Mr. Gahan Commonwealth Railways Commissioner on sixth November 1944. The Prime Minister left appropriate action in my hands and I shall see that a meeting of Cabinet is convened to enable the matter to be discussed before that date. It is unfortunate that a High Court action is now pending seeking to set aside the decision of Cabinet that Mr. E. Harding should be appointed Secretary of the Commonwealth Railways. As mentioned in my letter to the Attorney-General, whether the procedure taken by your department to give effect to this decision of Cabinet was good or bad in law it is not fitting for the Commonwealth to be brought before the High Court as a defendant in an action instituted by an employee. I learn from the Commonwealth Crown Law authorities that the case is listed for hearing this month and that application for certain subpoenas has been taken out in the name of the plaintiff. It is understood that one will be served on Mr. Gahan. It would be unfortunate if Mr. Gahan who I understand desires his reappointment to be considered by Cabinet were to give evidence not completely in accord with the case presented by the Commonwealth. All this shows the desirability of a settlement of this litigation before it reaches the Court and I believe that if there is a right approach from both sides it can be settled. It is my desire as Minister for the Army and the desire of the Permanent Head that Mr. Harding's services which have

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been of great value to the Army should continue with this department for the duration of the war. Therefore the question of his return to the Commonwealth Railways during Mr. Gahan's term of office does not arise. As it will be necessary to act quickly, I suggest you get in touch with the Attorney-General immediately with a view to reaching a settlement before the question of the Commissioner's reappointment comes before Cabinet. Ends. Please furnish me with your opinion on this letter by Monday next sixteenth."

The questions raised by the pleadings have been the subject of much debate, and numerous authorities have been cited, but the points involved are, in my opinion, simple, and it is not necessary to travel outside the provisions of the Act to resolve them.

I think it clear that the Commissioner and he alone has power to appoint and employ persons to assist in the execution of the Act (s. 46), the only limitation on his power being that he cannot appoint a person to an office the salary of which is more than £500 per annum without the sanction of the Governor-General (s. 51). In the present case, the office carried a salary of £900 per annum, but the Governor-General's sanction had been obtained. I am satisfied upon the evidence that after it was obtained the Commissioner duly appointed the plaintiff to the office: Cf. *In re Gibbon*; *Moore v. Gibbon* (1). It is true that the appointment was not made by a contract under seal or in writing, but this is immaterial. I think that it sufficiently appears from s. 24 that the Commissioner, though a corporation sole, was intended to be capable of contracting for the purposes of his office as if he were a private individual, assuming a contract to be necessary for the appointment. Since all appointments made by him are at pleasure, there was no need for the appointment to be made by a contract in or evidenced by writing.

It has been pointed out that the by-laws made by the Commissioner pursuant to s. 88 of the Act provide in Part II., by-law 61 clauses 5 (2) and 6, that each employee appointed to a permanent office within the meaning of the Act shall be notified in writing by the head of the branch on Form CR 54, and that each employee who has not received notification of his appointment to a permanent office on Form CR 54 shall be regarded as a temporary or casual employee whose services are terminable by the head of the branch at any time; and it has been submitted that, there being no evidence that the plaintiff ever received a notification on Form CR 54, there is no evidence that he was acting as other than a temporary or casual employee when on 27th July the Governor-General purported to

(1) (1909) 1 Ch. 367, at p. 380.

revoke his sanction to the plaintiff's appointment. Hence, it is said, up to 27th July he had not been effectively appointed to the permanent office of secretary, and after 27th July there was no longer an available approval of the Governor-General authorizing his appointment. In my opinion, however, it is obvious from the language of these by-laws that they are applicable only to the appointment of officers within a branch, and to notifications to be made by the head of the branch. There is no evidence that the office of secretary is within a branch, or which would otherwise justify the conclusion that these by-laws are applicable to an appointment to the position of secretary.

As regards removal from office, there is no difference between those holding permanent offices and those holding temporary offices as to the precarious nature of the office. All offices are held at pleasure, that is, at the Commissioner's pleasure (s. 46 (1)). This is clear from s. 53, which provides that in the case of the Commissioner dismissing an employee appointed to a permanent office, the employee may appeal to the Appeal Board. By s. 4 "employee" means any person employed by the Commissioner under the Act. The secretary stands in no different position from a fettle in this respect. It would be academic to consider whether, as between the Commissioner and railway employees, he should be regarded as "the Crown," and they as servants of the Crown. The Act in express terms regulates the conditions of employment and dismissal, and leaves no room for the rules of the common law relating to the dismissal of servants of the Crown (*Gould v. Stuart* (1); *Attorney-General v. De Keyser's Royal Hotel Ltd.* (2)). Neither the Executive Council nor the Minister, either as such or as a member of the Executive Council, has any authority to interfere in the appointment by the Commissioner of Railways of officers in exercise of the power conferred on him by Parliament, subject to this, that the Executive Council, and the Minister as a member of the Council, may exercise their constitutional right of advising the Governor-General whether he should give his sanction to any proposed appointment by the Commissioner of a person to an office the salary of which is more than £500 per annum, this being a limitation imposed on the Commissioner's authority by Parliament. But if the Governor-General gives his sanction and an appointment is made pursuant to that sanction, the Governor-General is *functus officio*. No purported withdrawal by him of that sanction can undo the appointment or remove from office a person who has once been validly appointed

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(1) (1896) A.C. 575.

(2) (1920) A.C. 508, at pp. 526, 539-540, 561.

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to an office. Removal is a matter for the Commissioner alone, subject to appeal.

In these circumstances, I hold that the plaintiff was duly appointed to the office of secretary, and still holds that office since he has never been removed from it. I do not think it necessary to grant an injunction against the defendant Minister. It would not be proper to assume that he will act in any way improperly when the legal position has been made clear by the Court. I grant no injunction against the Commissioner, because he has a discretion, fettered only by the statutory right of appeal, to remove any officer, including the secretary, at his pleasure.

It would not, however, be proper for me to part with the case without making particular reference to the telegram sent by the Minister, who is a defendant in the action, to the Commissioner for Railways, who is also a party to the action, on 15th October 1944, at a time when it was apparently thought that the Commissioner would, or might be, called as a witness for the plaintiff.

As a communication from the Minister of State for the Army to the defendant Minister, who administers the *Commonwealth Railways Act* 1917-1936, and on the footing that it was intended for the perusal of the latter only, it is perhaps not impossible to regard it as having no further intention than to influence him to effect a settlement of the matter rather than to allow the case to go to trial.

But when the defendant Minister transmitted its contents to the Commissioner of Railways, Gahan, he necessarily gave it another and a very different effect. To Gahan it could only mean that it would be unfortunate for himself, seeing that his reappointment as Railways Commissioner was about to be considered, if he gave evidence prejudicial to the case the Commonwealth proposed to present.

No court can allow to pass without observation an act calculated to affect the testimony of a witness, or to embarrass him in giving evidence. Although in the result the transmission of the letter does not appear to have influenced Mr. Gahan to disregard his duty as a witness, as he gave his evidence freely, independently and candidly, it is necessary to say that it is against the law for any person who has any authority or means of influence over a witness to use it for the purpose of affecting his evidence. And it is competent for this Court, in cases where other remedies appear inadequate or unavailing, to proceed on its own motion by calling on the party concerned to show cause why he should not be dealt with for contempt. But, primarily, the responsibility of taking proceedings for the protection of the administration of justice rests upon the law

officers of the Crown, and in the present case it is not necessary to remove the matter from their consideration by adopting the exceptional method of making a rule nisi *ex mero motu*.

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Declare that the plaintiff has been duly appointed to the office of secretary of the Commonwealth Railways and is entitled to hold that office during the Commissioner's pleasure. Order that the defendants J. S. Collings and the Commonwealth of Australia pay to the plaintiff his costs of this action and the costs, if any, of the defendant Gahan as a submitting defendant.

Solicitors for the plaintiff, *Cleary, Ross & Doherty*.

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

D. G. B.