[HIGH COURT OF AUSTRALIA.]

COHEN . . . . . APPELLANT;
INFORMANT,

AND

ASSOCIATED DOMINIONS ASSURANCE SOCIETY PROPRIETARY LIMITED . } RESPONDENT.
DEFENDANT,

H. C. OF A. 1946.

MELBOURNE, *Oct.* 4.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

High Court—Appeal from inferior court of State exercising Federal jurisdiction—Cross-appeal—Notice—Time—"Varied"—"Set aside"—Judiciary Act 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *s.* 39 (2) (*b*)—*Justices Act* 1928 (*Vict.*) (*No.* 3708), *s.* 150—*High Court Rules, Part II., Section III., r.* 16; *Section IV., rr.* 1, 7.

Rehabilitation of service men—Application for former employment—Time—Completion of war service—Date of discharge—Evidence—Certificate of discharge—Re-establishment and Employment Act 1945 (*No.* 11 *of* 1945), *ss.* 4, 12, 16, 19.

Section IV. of Part II. of the *Rules of the High Court* (relating to appeals from inferior courts of States exercising Federal jurisdiction), by rule 7 thereof, incorporates in that section rule 16 of Section III. of Part II., so that in such an appeal a respondent who proposes to contend that the decision appealed from should be "varied" (which includes "set aside") and who complies with the requirements of rule 16 as to notice need not take any other step to institute a cross-appeal; a cross-appeal is not an appeal within the meaning of rule 1 of Section IV.

The defendant company was charged with a contravention of the *Re-establishment and Employment Act* 1945 in that it failed to make employment available to the informant, a former employee who had completed a period of war service and who had applied by letter dated 6th August 1945 for reinstatement in his employment. The informant gave evidence that "I completed my military duties on July 30th, 1945. I was on that date discharged from further service and thereafter did not report further to the military authorities, nor was I thereafter required by them to perform any military service," and he produced various documents issued under military authority which were consistent with his oral testimony; but his certificate of discharge, which was

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also produced, though dated 6th August 1945, was expressed to take effect at and from 29th August 1945. The magistrate before whom the charge was heard found that the offence had been established.

Held, by *Latham* C.J., *Starke*, *Dixon* and *Williams* JJ. (*McTiernan* J. being of opinion that on the evidence it was open to the magistrate to find as he did), that effect must be given to the certificate of discharge which showed that, within the meaning of s. 12 of the Act, the informant had not "completed a period of war service" until 29th August 1945 and, therefore, that his application, having been made more than fourteen days earlier, was not made within the time limited by the section. The information was accordingly dismissed.

APPEAL from a Court of Petty Sessions of Victoria.

The information of Cyril Cohen charged the Associated Dominions Assurance Society Pty. Ltd. in a court of petty sessions, constituted by a police magistrate, at Melbourne that between 20th August and 17th November 1945 "the defendant being a former employer of the informant within the meaning of the *Re-establishment and Employment Act* 1945 upon application being made by notice in writing dated the 6th day of August 1945 by the informant, being a person who had completed a period of war service within the meaning of the said Act, for reinstatement in employment did fail to make employment available to the informant as required by the said Act."

The information was heard on 27th May 1946. It appeared that until his enlistment in the Australian Imperial Force in August 1941 the informant had been in the employ of the defendant at a remuneration of about £7 a week plus commission as a superintendent in relation to a district consisting of certain suburbs of Melbourne. On 6th August 1945 he wrote to the defendant a letter which was in the following terms :—"I wish to inform you that I was discharged from the Army on the 30th July 1945 with permission to resume civil duties. I am therefore applying for reinstatement in my former position with your Society under the same terms and conditions that applied before my enlistment. I am available to commence my duties on Monday 20th August. I will be glad to have a reply from you within seven days." The defendant replied on 24th August, offering him a different position, one which appeared from the evidence to be inferior in status and remuneration. On 28th August the informant's solicitor wrote the defendant as follows :—"I am instructed by Mr. Cyril Cohen to demand of your company that, on his return from active service, he be immediately reinstated to his former position of Superintendent for the Essendon-Footscray district, and also to demand that the terms and conditions of pay and emoluments attaching to such position be paid to my client. In addition, despite your company having promised to make up to him

the difference between his pay with you and his pay as a soldier, it has failed to honour its agreement. Both these matters have been raised with your company direct by my client, but in your letter of the 24th inst., you have grossly miscontrued what my client seeks, and you have denied him a reply to his requests that the difference between his military and civil pay be made up by your Society. Unless by the end of this week this matter is adjusted, I am to issue proceedings in which event please nominate a solicitor in Melbourne for service." The informant gave evidence which included the following statements:—"I completed my military duties on July 30th, 1945. I was on that date discharged from further service and thereafter did not report further to the military authorities, nor was I thereafter required by them to perform any military service. I produce my Final Statement of Account—Discharged Member" (dated 8th August 1945), "Manpower Card" (dated 6th August 1945), "Soldier's Record of Service Book" (dated 27th July 1945), "Member's Personal Equipment Card" (dated 27th July 1945), "and memorandum for tobacco supplies" (dated 30th July 1945), "showing my date of discharge as at July 30th, 1945. I was discharged in Queensland on July 30th, 1945. I travelled to Melbourne in civilian clothes. When I arrived in Melbourne, I rang Mr. Lees, the Victorian manager of the company and told him that I had been discharged and wanted to resume my position with the company. He said that he did not think there would be any trouble but that I would have to communicate with Sydney and make a formal application. . . . I have not been reinstated in any capacity whatsoever. At all relevant times between August 20, 1945, and November 17, 1945, I have been ready willing and able to resume my employment with the defendant company as a superintendent. The company has not made that position available to me." Subsequently the informant's certificate of discharge from the Australian Imperial Force was put in evidence; it was dated 6th August 1945, but the discharge was expressed to take effect at and from 29th August 1945.

The court of petty sessions on 27th May 1946 convicted the defendant and made the order indicated by the following memorandum entered by the magistrate in the register:—"Convicted and fined fifty pounds with £21 costs and in addition to pay £52/10/0 compensation to informant. It is further ordered that informant receive half of the fine."

From this order the informant on 20th June 1946 appealed, by way of order to review, to the High Court on grounds relating only to the award of compensation to the informant.

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The defendant gave the following notice of intention to cross-appeal, which was dated 27th August 1946 : " Take notice that the respondent intends at the hearing of the appeal herein to contend that the order of the court of petty sessions at Melbourne made on the 27th day of May 1946 whereby the defendant was convicted fined £50 with £21 costs and directed to pay the informant £52/10/0 compensation should be set aside."

The appeal now coming on for hearing, objection was taken on behalf of the appellant to the competency of the cross-appeal.

Rapke (*Ashkanasy* K.C. with him), for the appellant. By virtue of the *High Court Rules*, Part II., Section IV., rule 1, appeals from courts of petty sessions of Victoria to the High Court must be brought in the manner and within the time prescribed by s. 150 of the *Justices Act* 1928 (Vict.). The procedure is by order nisi to review, which must be obtained within one month of the decision. Section IV. provides no procedure for a cross-appeal except in so far as it is to be regarded as an appeal within rule 1. The respondent's purported notice of cross-appeal having been given after the expiration of one month from the decision under review, the position is that no step towards the institution of a cross-appeal was taken within the time prescribed by the *Justices Act*. Even on the assumption that a cross-appeal can be instituted simply by notice, it is submitted that the time limit provided by the Act is applicable. [He referred to *Grayndler* v. *Cunich* (1) ; *Wilson* v. *Moss* (2).]

Coppel K.C. (with him *D. I. Menzies*), for the respondent. Rule 7 of Section IV. has the effect of incorporating in that section the provisions of rule 16 of Section III., or at least that part of it which dispenses with the need for a notice of cross-appeal. The other branch of rule 16 requires that, if the respondent intends to contend that the decision appealed from should be " varied," he shall give notice twenty-one days before the appeal is set down for hearing. If this branch of the rule applies where the contention is that the decision should be " set aside," the respondent has complied with it ; if it does not apply, the notice given was unnecessary.

Rapke, in reply.

PER CURIAM. The Court is against the objection taken by Mr. *Rapke* and is of opinion that it is open to the respondent to argue the point to which reference is made in the notice served. Reasons

(1) (1940) 62 C.L.R. 573. (2) (1909) 8 C.L.R. 146.

for this view will be given when the case is dealt with. The Court will now hear counsel for the respondent on the point of the cross-appeal.

Coppel K.C. When the informant applied by his letter of 6th August 1945 the *Re-establishment and Employment Act* had not come into force. At that stage the matter was governed by the *National Security* (*Reinstatement in Civil Employment*) *Regulations*; but the Act (by s. 9) applies to applications which were made under the regulations, and there is no material difference between the provisions of the Act and those of the regulations. Consequently, s. 12 of the Act may be taken as stating the conditions on which the informant's application depended. The application was not made within the time prescribed; it was made too soon. In order that the consequences stated in the Act should attach to the application, it should have been made not earlier than fourteen days prior to the completion of the informant's period of war service (s. 12 (2)). War service, in the informant's case, means service in the Australian Imperial Force (s. 4 (1), definition of " war service," par. *b*). His certificate of discharge is conclusive that he was not discharged until 29th August 1945. Although he was not required to perform any military duty after 30th July, he could have been recalled to duty at any time before his discharge took effect; his service in the Australian Imperial Force continued until the date of discharge. The informant's oral evidence, referring to 30th July as the date of his discharge, did no more than express his own erroneous conclusion from the fact that he had been relieved of duty; the other documents put in evidence are not inconsistent with the certificate of discharge, which, in any event, must prevail. It was, therefore, not open to the magistrate to find that the period of war service had been completed at any date earlier than that of discharge. The informant's solicitor's letter of 28th August to the defendant is not a sufficient application; it does not comply with the conditions stated in s. 13 of the Act. [He also referred to the *Defence Act* 1903-1941, ss. 4 (definition of " war service "), 38, 39.]

Rapke. The question is one of fact, and there is sufficient evidence to support the magistrate's finding. The Act (s. 4 (1), definitions of " member of the Forces " and " war service ") draws a distinction between membership of, and service in, the Forces. It is consistent with the certificate of discharge that the informant was a member of the Australian Imperial Force until the date of discharge, but that his period of war service had ended before that date. At the

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most the certificate was evidence which, in view of the other evidence, it was open to the magistrate to accept or reject. If the letter of 6th August was not sufficient in itself, it was incorporated by reference in the solicitor's letter of 28th August so that 20th August was, for the purposes of s. 13 of the Act, specified as the date as from which the informant was available for employment. Alternatively, the demand in the second letter that the informant be "immediately" reinstated was a sufficient specification.

The following judgments were delivered :—

LATHAM C.J. The order from which this appeal is brought is an order made by a magistrate whereby the respondent to the appeal in this court was convicted and fined £50 with £21 costs for an offence against the *Re-establishment and Employment Act* 1945, s. 16 (1), and he was ordered in addition to pay £52 10s. compensation to the informant. It was further ordered that the informant should receive one half of the fine imposed. Section 12 (1) provides that any person who has completed a period of war service may apply to his former employer for reinstatement in employment, and s. 16 (1) provides :—"Where an application has been made under this Division and is still in force, the former employer shall make employment available to the applicant in accordance with this section at the date notified to him, or last notified to him, as the date on which the applicant will be available for employment or at the first opportunity (if any) at which it is practicable and reasonable to do so thereafter.

Penalty : One hundred pounds."

The respondent was convicted of an offence under this section. Section 19 (1) (*a*) and (*b*) provides that when an employer is convicted of an offence under the Division of the Act which includes s. 16 the court may order that a portion of the fine imposed shall be paid to the employee or former employee concerned, and that, whether or not an order has been made under par. 1 (*a*) the court may order that the employer shall pay to the employee or former employee such compensation as the court thinks reasonable. The order therefore was made under s. 16 (1) and s. 19 (1) (*a*) and (*b*) of the *Re-establishment and Employment Act*.

There was only one proceeding before the magistrate, and only one order was made, though that order contained four provisions, one imposing a fine, another dealing with costs, another directing that half the fine be paid to the informant, and another provision dealing with compensation. The informant appealed by order to review to this court pursuant to the *Judiciary Act*, 1903-1940, s. 39 (2) (*b*). Section IV, rule 1, of the Appeal Rules of this Court provides

with respect to appeals from decisions of inferior courts of a State that an appeal from such a court shall be brought in the same manner and within the same times as are respectively prescribed by the law of the State for bringing appeals from the same courts to the Supreme Court of the State in like matters. This provision introduces the procedure of the *Justices Act* 1928 (Vict.), s. 150, which provides for orders to review decisions of magistrates. The order to review must be applied for within one month of the making of the order which it is sought to review. Within that time an order to review was obtained by the informant, the informant challenging only the part of the order of the magistrate which related to compensation, contending that the compensation had been assessed upon wrong principles. After this period of one month had expired, namely on 27th August 1946, the respondent company gave a notice of intention to cross-appeal. In that notice the respondent intimated that it intended on the hearing of the appeal to contend that the order of the Court of Petty Sessions whereby the defendant was convicted etc. should be set aside. It was contended for the appellant here that this is a notice of appeal and that it is out of time, not having been given within one month of the order which the respondent seeks to review.

The respondent, on the other hand, relies upon rule 16 of Section III. of the Appeal Rules of this Court which, it is contended, is made applicable to appeals from inferior courts by rule 7 of Section IV. Rule 1 of Section IV. contains the provision which I have in part read providing for appeals, and rule 7 of Section IV. provides :— "Except as herein or by law otherwise provided, the provisions of Section III. of these Rules shall apply to appeals to the High Court from decisions of inferior Courts." Rule 16 of Section III. provides in relation to appeals from Supreme Courts and other courts from which an appeal lay at the establishment of the Commonwealth to the Queen in Council as follows :—

"It shall not be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision appealed from should be varied, he shall within the time prescribed by the next following rule, or such time as is allowed by special order of a Full Court in any case, give notice of his intention to such of the parties as may be affected by the contention. The omission to give such notice shall not diminish the powers of the High Court when hearing the appeal ; but may, in the discretion of the Court, be ground for an adjournment of the appeal or for a special order as to costs. A copy of the notice shall be filed in the Registry." The next rule

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provides that notice under rule 16 shall be given, subject to any special order, twenty-one days before the day on which the appeal is set down for hearing. Notice was given by the respondent in accordance with this rule.

Rule 1 of Section III. provides that appeals to the High Court shall be instituted by notice of appeal. Rule 16 of that section provides that it shall not be necessary to give notice of motion by way of cross-appeal, but that a notice of intention to contend that the decision appealed from should be varied shall be given. Accordingly, in Section III. the general provision as to appeals contained in rule 1, is not regarded as in any way inconsistent with the specific provision as to cross-appeals contained in rule 16. That is to say that rule 16, dealing with what would ordinarily be described as cross-appeals, operates notwithstanding the general provision contained in rule 1. So also, in my opinion, rule 7 of Section IV. can operate so as to introduce from Section III. the provision as to cross-appeals (or proceedings in the nature of cross-appeals) notwithstanding the general provisions of rule 1 of that section. Accordingly, in my opinion, the respondent is entitled to contend that the order from which the appeal is brought should be varied.

It was suggested that the provision in rule 16 relating to the variation of an order was not sufficiently wide to cover the setting aside of an order. I find it difficult to draw a line at any particular point between variation and setting aside. Apart from this consideration, however, it appears to me that the word "varied" should here be read as including "set aside," because otherwise there would be no provision in the rule for either a cross-appeal or a notice of intention in lieu of a formal cross-appeal in a case where it was desired to contend that the order appealed from should be set aside. Accordingly, in my opinion, the preliminary point fails. The contention of the respondent in the nature of a cross-appeal therefore arises for consideration.

The point which is raised is this. The appellant made an application, it is said, under the Act for reinstatement in employment. He must therefore qualify under s. 12 (1): "Any person who has completed a period of war service may apply to his former employer for reinstatement in employment." It must be shown by the appellant that he has completed a period of war service. "War service" is defined as meaning service in various forms in pars. *a* to *f* contained in s. 4 (1) under the definition of "war service." The relevant provision here is this:—"'war service' means . . . (*b*) service in the Australian Imperial Force." It was proved that the applicant was a member of the Australian Imperial Force. The question is:

"When did he complete his period of war service?" The evidence shows that he served in the Australian Imperial Force. In the evidence which was before the magistrate there is included a certificate of discharge. That certificate was issued and signed by a lieutenant for the officer in charge of records, Queensland Lines of Communication Area, and contains this statement: "This discharge takes effect at and from the twenty-ninth day of August 1945." The document is dated 6th August 1945. Upon this document it is plain that, although it is dated 6th August, the period of service extended until 29th August. Effect is given to the certificate of discharge by military regulations made under the *Defence Act* 1903-1941, which provide in reg. 185 that the discharge of a soldier (with certain exceptions which are not material in this case) shall be authorized and confirmed, and in reg. 188 that a discharge of which confirmation is required by reg. 185 shall take effect on the day for which it is confirmed. This discharge is confirmed as for 29th August 1945 and takes effect from that day. Various other documents were put in evidence which show the history of the soldier in returning equipment, in finalizing accounts, in obtaining registration for civilian purposes, tobacco supply and the like. But the certificate of discharge is the formal, effective and authorized method of bringing about the discharge of a soldier from the forces, and therefore determines his period of war service under the Act. Accordingly he had not completed his war service until 29th August 1945.

Now the application which was made and upon which the appellant relied is to be found in a letter of 6th August 1945. But that application was not made within the time provided for in s. 12 (2) of the Act. That provision requires that the application shall be made not earlier than fourteen days prior to the completion of war service and not later than one month after the completion of that period. It was made at an earlier date than is permitted, and therefore was not an application made in accordance with the Act. It was suggested that a case could be made for the appellant upon a letter dated 28th August 1945. But s. 13 requires that, if a date is not specified in an application as a date upon which the applicant will be available for employment, such a date must be specified in a notice in writing within two months after the date on which the application was made or prior to the expiry of an extended period determined by a Reinstatement Committee. The requirements of this section have not been fulfilled by the appellant, and the liability of an employer under s. 16 (1) depends upon a date being duly notified to him under s. 13.

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I have dealt with the case upon the basis of the Act itself, upon which all argument was addressed to us. I should say that the provisions in the Act to which I have referred reproduce provisions in regulations which were applicable to the applicant and which were in force at the time when he applied. The Act was proclaimed on 27th August 1945. The provisions in the regulations are in substance the same as in the Act. Under s. 9 of the Act the effect of the regulations is carried into the Act.

Accordingly, on the ground that no application was made in accordance with the Act, the cross-appeal succeeds and the appeal fails. The order which in my opinion should be made is that the order of the Court of Petty Sessions should be set aside and the information should be dismissed, but there should be no order as to the costs of the proceedings in either court.

STARKE J. I would refer to s. 9 of the *Re-establishment and Employment Act* 1945, which enacts that the provisions of the Act shall apply to the *National Security* (*Reinstatement in Civil Employment*) *Regulations*. The method of enforcing the regulations is that prescribed by the Act.

A certificate of discharge appears to me to prove itself as a document or certificate of a public officer entrusted with lawful authority to make it. It is unnecessary, I should think, to refer to the *Army Act* or any other Act for the purpose of its admissibility in evidence.

Otherwise I agree that the order nisi should be discharged.

DIXON J. I agree that the cross-appeal in this case is not a proceeding that need be brought in accordance with rule 1 of Section IV. of the Appeal Rules of Court, which incorporates by reference the State law concerning orders to review. It is a matter falling within rule 7, incorporating rule 16 of Section III., which enables the giving of a notice of cross-appeal.

On the merits of the cross-appeal, I think that military regulation 188 makes it clear that the discharge took place on 29th August 1945. The document called a certificate is itself the discharge and is therefore relevant when proved to establish the date of discharge. Discharge took place as on 29th August. I think the period of service ended on that date. No sufficient application within the period allowed by the Act and the regulations on either side of that date can be spelled out of the materials before us. Attempts were made to show that such an application existed for one reason or another. Everything which might amount to an application was deficient in some necessary particular.

I agree with the order proposed. We gave consideration to the question whether we should allow the information to be withdrawn, but, on the whole, I agree that it is better that it should be dismissed.

McTIERNAN J. I agree with the reasons of the Chief Justice, except upon one point.

I do not agree that the date expressed in the certificate of discharge for the appellant's discharge necessarily or as a matter of law marks the date of the completion of the period of the appellant's war service for the purposes of the Act or the regulations. I think that it was open to the magistrate to find that the appellant's period of war service was completed on 30th July.

WILLIAMS J. I agree with the reasons of the majority of the Court and with the proposed order and have nothing to add.

Appeal dismissed. Cross-appeal allowed. Order nisi to review discharged. Order of the Court of Petty Sessions set aside, and information dismissed. No order as to costs.

Solicitor for the appellant: *J. W. Sackville.*
Solicitors for the respondent: *Cornwall, Stodart & Co.*

E. F. H.