H. C. OF A. 1954. SACHTER v. ATTORNEY-GENERAL FOR THE COMMONWEALTH. Dixon C.J.

With respect to the charge made under s. 209 (*g*), it has been made perfectly clear by the argument before us that the books which were in fact kept were not true accounts in certain respects in the period from 30th June 1952 to December 1952, and that they were kept in a way which would not enable anybody to see the true picture with respect to specific items. The motive for doing this may be a matter rather of speculation than of certainty but it cannot have been honest. Motive, however, is of no great materiality except for the purpose of punishment.

We shall not go into the figures which have been discussed before us, but the items through which we have been taken are quite convincing as showing that there was a definite course adopted to conceal from those who merely inspected the books the exact financial state of the business as it stood at that time.

We think that the conviction on the charge under s. 209 (*g*) must stand. The sentence imposed was one of four months' imprisonment. The maximum sentence which the judge of the Bankruptcy Court could impose was six months' imprisonment. He took into consideration the circumstances and the admissions made by the bankrupt, which he could not but think were not ill-advisedly made, and he fixed the sentence at four months. This court could not, unless it were clearly of opinion that the learned judge erred in the exercise of his discretion, interfere with the sentence. The sentence must stand.

The charge which was made under s. 210 (2) (*c*), namely that the bankrupt had made omissions in books affecting or relating to his property or affairs, etc., seems clearly enough to have been made out and that conviction must stand. A concurrent sentence of one month's imprisonment was imposed upon the bankrupt in respect of that conviction and there is no reason for interfering with it.

The result is that an order will be made quashing the conviction and the sentence on the charge under s. 210 (1) (*d*) and confirming the convictions and sentences on the other two charges. Subject to quashing of the conviction under s. 210 (1) (*d*) the appeal will be dismissed with costs.

Conviction under s. 210 (1) (*d*) *of the Bankruptcy Act* 1924-1950 *quashed, otherwise appeal dismissed with costs.*

Solicitors for the appellant, *Abram Landa & Co.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

[HIGH COURT OF AUSTRALIA.]

STEELE . . . . . APPELLANT;

AND

DEFENCE FORCES RETIREMENT BENEFITS BOARD AND ANOTHER . . } RESPONDENTS.

[No. 2]

H. C. OF A. 1955-1956.

MELBOURNE, 1955, *Oct.* 21; 1956, *Feb.* 23.

Taylor J.

High Court—Appeal—Defence Forces Retirement Benefits Board—Questions open on appeal—Determination by board of "percentage of total incapacity of the member in relation to civil employment"—Meaning—Reclassification—Board satisfied "that the percentage of incapacity of a pensioner . . . because of the nature of his employment should be varied"—Considerations governing—Defence Forces Retirement Benefits Act 1948-1952 (*No.* 31 *of* 1948—*No.* 93 *of* 1952), *ss.* 51, 53 (1), 83.

Section 51 of the *Defence Forces Retirement Benefits Act* 1948-1952, which provides for the determination by the board set up under the Act of "the percentage of total incapacity of the member in relation to civil employment", is not concerned simply with the capacity of the pensioner, in some special or highly selective occupation, to earn as much as he did previously, but with the extent to which his physical capacity enables him to engage generally in a range of occupations for which he is otherwise suited.

The conclusion that there should be a reclassification under s. 53 (1) of the Act which provides that "the Board may from time to time, if it is satisfied that the percentage of incapacity of a pensioner classified under section fifty-one of this Act . . . because of the nature of his employment, should be varied, reclassify him in accordance with the altered percentage of incapacity" can proceed only from a broad consideration of the extent of the pensioner's capacity as shown by the nature and circumstances of his employment and not merely from the fact that he is able, satisfactorily, to perform the duties of some particular occupation.

Quaere, whether on an appeal to the High Court under s. 83 of the Act from a determination of the board the issue is not confined to the question whether the board has proceeded on wrong principles.

H. C. OF A. 1955-1956.

STEELE v. DEFENCE FORCES RETIREMENT BENEFITS BOARD [No. 2].

APPEAL under the *Defence Forces Retirement Benefits Act* 1948-1952.

William Kayle Steele appealed to the High Court from a decision of the Defence Forces Retirement Benefits Board. The facts are set out in the report of the decision of the Full Court: *Steele* v. *Defence Forces Retirement Benefits Board* (1) on a case stated in the appeal, which was heard before *Taylor* J.

C. W. Harris, for the appellant.

W. H. Tredinnick, for the respondents.

Cur. adv. vult.

Feb. 23, 1956. The following written judgment was delivered :—

TAYLOR J. On 7th December 1951 the appellant, while a male member of the Permanent Air Force, sustained an injury to his right arm and wrist which resulted in permanent disability consisting of a marked limitation of the range of movement in his right elbow joint and a substantial loss of pronation in the right wrist. The fact that the appellant's disability was permanent became apparent some little time after his injury and on 2nd June 1952 he was retired. In the circumstances of his retirement it became the duty of the Defence Forces Retirement Benefits Board, pursuant to s. 51 of the *Defence Forces Retirement Benefits Act* 1948-1952, to " determine the percentage of total incapacity of the " appellant " in relation to civil employment " and to classify him in accordance with the provisions of that section. The section is in the following terms :— " 51. Where a member who is a contributor has been, or is about to be, retired, prior to attaining the retiring age for the rank held by him, on the ground of invalidity or of physical or mental incapacity to perform his duties, not, in the opinion of the Board, due to wilful action on his part for the purpose of obtaining pension or benefit, the Board shall determine the percentage of total incapacity of the member in relation to civil employment and shall classify the member according to the percentage of incapacity as follows :—

Percentage of Incapacity	Class
60 or over	A
30 and less than 60	B
Under 30	C ".

Section 52 of the Act prescribes rates of pensions payable to retired members in classes A and B but classification in class C does not constitute a qualification for pension rights of any kind in a member with the appellant's duration of service. Upon his

(1) (1955) 92 C.L.R. 177.

retirement the board determined the percentage of total incapacity of the appellant in relation to civil employment and, in accordance therewith, classified him as class B for the purposes of the last-mentioned section. Pursuant to that determination and classification the appellant became entitled to a pension of £117 15s. 0d. per annum as from 3rd June 1952. A pension at this rate was paid to him from that date until 25th June 1953 when it ceased in the circumstances hereinafter appearing.

Immediately after his retirement from the permanent Air Force the appellant secured employment as a technician's assistant in the Postmaster-General's Department at Melbourne and he continued in this employment for a period of two months. Being desirous, however, of obtaining appointment as a permanent officer of the Commonwealth Public Service he applied during this period to the Deputy Postmaster-General at Melbourne for reappointment as a junior postal officer, a position which he had held before entering the Air Force. His application was successful and his reappointment dated from the expiration of the period of two months previously referred to. He continued in this employment until the month of September 1954 when he resigned from the Commonwealth Public Service having obtained a position on the sales staff of a manufacturing organization in Melbourne.

On 2nd July 1953, whilst the appellant was still a permanent officer of the Commonwealth Public Service, the board purported to reclassify him pursuant to s. 53 (1) of the Act. This provision is in the following terms :—" 53. (1) The Board may, from time to time, if it is satisfied that the percentage of incapacity of a pensioner classified under section fifty-one of this Act has altered, or, because of the nature of his employment, should be varied, reclassify him in accordance with the altered percentage of incapacity ".

The appellant was notified of his reclassification by a letter as follows :—" Advice has been received of your recent application for appointment in a permanent capacity to the Commonwealth Public Service and that following examination by the Commonwealth Medical Officer, your incapacity in relation to civilian employment is now less than 30%. The board has accordingly determined that your classification is now class 'C' and your pension under the *Defence Forces Retirement Benefits Act* will be terminated under s. 53 on and from 25th June 1953, a final payment of £1 18s. 10d. being made on pension payday 2nd July 1953 ".

The proceedings in this Court are brought by way of " appeal ", pursuant to s. 83 of the Act, from the determination of the board.

H. C. OF A. 1955-1956.

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This section provides that any dispute under the Act shall be determined in the first place by the board and there follows a proviso "that any person aggrieved by a decision of the Board may appeal to the High Court constituted by a single justice of that Court". The decision of the Court is to be final and conclusive and without appeal. The "appeal" is not, of course, an appeal in the true sense; it is a proceeding in the original jurisdiction of the Court. I have been somewhat concerned whether the issue for the determination of this Court in proceedings such as this is not confined to the question whether the board has, in any particular case, proceeded on wrong principles or whether, not only that issue, but all questions of fact are open for determination. For reasons which subsequently appear, however, it is unnecessary to determine this question in these proceedings and that being so I do not feel that I should express a final view on the matter. As already appears no appeal lies from any order in these proceedings and this question should, I think, be left to be decided in proceedings in which it arises directly for decision.

Upon the evidence I was satisfied that at the time of the appeal the appellant's physical disability had in no way altered since 2nd June 1952 and, further, that the appellant had not achieved any form of manipulative dexterity enabling him to overcome his disability so far as it incapacitated him for any particular occupation. In other words I was of the opinion that since 2nd June 1952 the physical capacity of the appellant to perform the duties of particular occupations had remained the same and in this sense the percentage of his total incapacity in relation to civil employment had not altered during that period. Whether or not in these circumstances the board was entitled to reclassify the appellant was a matter of dispute. For the appellant it was said that there could not be a valid reclassification under s. 53 (1) unless it was shown that there had been some change in the degree of disability since the original assessment of his "incapacity . . . in relation to civil employment", whilst for the board, it was contended that the nature and circumstances of the appellant's employment since the original assessment constituted a factor which entitled the board to say, in the somewhat difficult language of s. 53, that his "percentage of incapacity . . . because of the nature of his employment, should be varied" and to reclassify him accordingly.

The substantial question to which these competing contentions gave rise was argued before the Full Court upon a case stated by me and has now been answered in favour of the board. "The

board ", it is said, " may make a new determination of the percentage of total incapacity of the pensioner in relation to civil employment either because it is satisfied that the percentage of incapacity has changed or because the employment of the pensioner shows that in the first instance it was not correctly assessed and that it should be varied ": *Steele* v. *Defence Forces Retirement Benefits Board* (1). The conclusion that there should be a new determination because of the " nature " of a pensioner's employment undertaken after the original assessment of the degree of his incapacity, is one which, of course, cannot proceed merely from the fact that he is able, satisfactorily, to perform the duties of some particular occupation ; it can proceed only from a broad consideration of the extent of the pensioner's capacity as shown by the nature and circumstances of his employment. The expression in s. 51—" the percentage of total incapacity of the member in relation to civil employment "—refers to a general capacity to undertake employment and the fact that a member who has been incapacitated from undertaking most or many forms of employment is able to undertake some special form of employment which for a time, at least, may secure a high rate of remuneration to him may well be of little consequence. The standard is not concerned simply with the capacity of the pensioner, in some special or highly selective occupation, to earn as much as he did previously but with the extent to which his physical capacity enables him to engage generally in a range of occupations for which he is otherwise fitted. As the reasons of the Full Court show reclassification on this ground may operate either in favour of or adversely to the pension rights of a retired member.

It follows, I think, from the decision of the Full Court that the determination of the board is not open to any legal objection and the question which presents itself is essentially one of fact. But it is a question which can be decided only by the formation of an opinion on broad lines. Broadly, as I see it, the question is whether the following circumstances justified the reassessment of the percentage of his incapacity for civil employment at less than thirty per cent. The appellant, with his disability, was acceptable as a permanent officer of the Commonwealth Public Service. He was able satisfactorily to perform the duties which he undertook as a junior postal officer and, so far as one can see from the evidence, his disability constituted no impediment to his advancement or to the performance of those duties which he might have been required to perform from time to time. After a little more than

(1) (1955) 92 C.L.R. 177, at p. 185.

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Taylor J.

two years in this employment he voluntarily relinquished his permanent position and obtained employment in which he is being trained to take a position on the sales staff of a private organization. Before his injury it was the appellant's intention to complete his training in the permanent Air Force as an engineer and to continue as a member of that Force in that capacity. His training in this field would have fitted him for employment as an engineer in various forms of industry and there is no doubt that his injury and resultant disability unfitted him for employment of this character. But his training in this field would, however, have disqualified him for the type of employment which he has now undertaken and there is nothing to suggest that avenues of employment which are now and which will in the future be open to him are or will be any less extensive or any less remunerative than those to which the engineering training which he originally intended to complete would have led him.

It is, of course, a matter of considerable difficulty to determine precisely the degree of a person's general incapacity for civil employment. The orthopaedic surgeon who gave evidence on behalf of the appellant considered that the injuries to the appellant's arm had resulted in a loss of efficiency in the use of the arm to the extent of forty-five to fifty per cent. Total loss of the use of the right arm would represent, he thought, eighty per cent of total disablement for ordinary work and the appellant's incapacity for civil employment was said by him to be somewhere between thirty-five and forty per cent. No doubt the estimation of these percentages is based on experience but they tend to reflect the degree of functional loss in the appellant's arm rather than his incapacity in relation to civil employment. Indeed the method of approach suggests that the percentage of incapacity in relation to civil employment will be constant in all persons who have suffered the same physical disability whereas it is clear that it must vary according to the aptitude and training of each injured person. But even if it is a permissible approach it can produce only a doubtful and tentative result which must be subject to review in the light of facts which shows clearly what the pensioner, in his partially disabled condition, can or cannot do. Some forms of disability may, of course, make it impossible for a person to pursue particular occupations but at the same time those disabilities may be of little consequence in occupations of other characters. Indeed, the surgeon already referred to expressed the view that for certain occupations the appellant's physical disability would be "minimum" whilst, of course, for other occupations it would constitute a substantial